

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

INTERNATIONAL BROTHERHOOD OF) Case No. 1476
ELECTRICAL WORKERS LOCAL 1597,)
and VALERIE KILLINGER,) FINDINGS OF FACT AND ORDER
)
Petitioners,)
v.)
)
CITY OF ST. PAUL,)
)
Respondent.)

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

NOV 13 2019

CLERK

For Petitioner: Robert E. O'Connor, Jr.
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For Respondent: Jerry L. Pigsley
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Before Commissioners Blake, Carlson and Jones.

NATURE OF THE CASE

The Petitioners, International Brotherhood of Electrical Workers Local 1597 ("IBEW") and Valerie Killinger, allege that Respondent, City of St. Paul, committed a prohibited practice in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(2)(a),(c) and (d). In the Amended Prohibited Practices Complaint filed January 4, 2019, Petitioner IBEW alleged an anti-union statement was made by City Clerk Connie Jo Beck to a union member, Deputy Clerk Valerie Killinger, and that the alleged statement damaged the Union and its members by denying the right to representation by the Union without coercion. This anti-union statement was allegedly made during a disciplinary meeting. During the Pre-Trial Conference on April 19, 2019, Petitioner was granted leave to amend its petition to add Valerie Killinger as a party. Petitioners' Second Amended Prohibited Practices Complaint was filed April 22, 2019. Respondent's Answer to Amended Prohibited Practices Complaint was filed on January 14, 2019.

Respondent asserts that its actions toward Petitioners were based on legitimate, non-discriminatory reasons and not based on any exercise of rights granted by the Act; and requests dismissal of the Complaint and reimbursement for attorney fees and costs. A trial was held before the Honorable William G. Blake on April 29, 2019. Post-hearing briefs were submitted.

FINDINGS OF FACT

Petitioner IBEW is a "labor organization" as defined in Neb. Rev. Stat. § 48-801(7). Respondent is a "public employer" as defined in Neb. Rev Stat. § 48-801(12). At all times relevant to this matter, the parties have been covered by a collective bargaining agreement between Petitioner IBEW and Respondent covering wages, hours and conditions of employment. (Exhibit 502). Petitioner and union member, Ms. Killinger, was employed by Respondent as the Deputy Clerk of the City of St. Paul. At all times relevant to this matter, Ms. Killinger's supervisor was Ms. Beck.

Various problems with Ms. Killinger's job performance had been noted on her annual performance evaluations for several years. (Exhibits 16, 17 and 18; 120:14-20, 121:6-122:11). On August 2, 2018, Ms. Killinger was given an employee performance appraisal by Ms. Beck. As part of this appraisal Ms. Killinger was asked by Ms. Beck to answer three questions in preparation of her fulfilling the duties of the City Clerk, once the City Clerk vacated the position. Ms. Killinger answered "Not at this time" to the following question: "Would you feel comfortable as Deputy Clerk in performing the duties of the City Clerk, if the City Clerk would vacate the position of City Clerk?" (Exhibit 4; 96:11-22). Ms. Killinger was also asked: "Are you willing to give up your job title as Deputy Clerk for the best interests of the City of St. Paul?" She answered, "No." (Exhibit 4; 96:23-97:8).

Also on August 2, 2018, Ms. Killinger received a notice of disciplinary warning from Ms. Beck. (Exhibit 2). Attached to the warning was a document entitled "Concerns and Issues that City Clerk Beck has with Deputy Clerk Killinger" and attachments. (Exhibit 510). Ms. Killinger was put on probation for 90 days with the possibility of termination or demotion. (Exhibit 2; 16:3-7.) On August 13, 2018, Petitioners filed a grievance regarding the August 2, 2018, disciplinary warning as allowed by Article 9 of the parties' collective bargaining agreement. (Exhibits 3 and 502, pgs.10-11). On August 21, 2018, Ms. Beck denied the grievance pursuant to Step 1 of the grievance procedure. (Exhibit 5). On September 4, 2018, Petitioners appealed the denial to Mayor

Tracy Howard pursuant to Step 2 of the grievance procedure. (Exhibit 3). On September 14, 2018, a meeting was held regarding Step 2 of the grievance. (Exhibit 6; 45:19-46:23). The Mayor denied the grievance. (20:7-21:3). Petitioners appealed the denial to the City Council pursuant to Step 3 of the grievance procedure. The issue was placed on the agenda for the City Council meeting to be held on October 15, 2018. (Exhibits 511, 512). At the meeting, Petitioners, through Union President Larry Grim, elected not to proceed with the grievance, after his request to have the matter heard in Closed Session was denied. The City Council was then advised by its legal counsel that the Petitioners' choice not to proceed with its appeal ended the grievance process. (Exhibit 513, pg. 3).

On September 7, 2018, Ms. Beck presented to Ms. Killinger documentation of problems regarding her job performance concerning zoning permits. (Exhibit 508). On September 24, 2018, Ms. Beck presented to Ms. Killinger documentation of her deficiencies for the period of August 3, 2018, through September 24, 2018. Ms. Killinger refused to sign the documentation given to her. Union Steward Ed Thompson was present for this meeting with Ms. Beck. (Exhibit 509). On November 1, 2018, Ms. Beck presented to Ms. Killinger documentation of her deficiencies for the period of September 25, 2018, through October 30, 2018, with supporting documentation. (Exhibit 514).

At the November 5, 2018, City Council meeting, Ms. Beck was given authority to make decisions for the City Office. (Exhibit 515, pg. 5). On November 9, 2018, Ms. Beck met with Ms. Killinger and informed Ms. Killinger that she had not seen improvement in her work and gave Ms. Killinger a letter stating she had until Tuesday, November 13, 2018, by 9:00 a.m. to submit her resignation or be terminated. (Exhibits 518 and 519). On November 13, 2018, Ms. Killinger and Mr. Thompson came into Ms. Beck's office in response the letter instructing her to submit her resignation or be terminated. Mr. Thompson asked Ms. Beck if she would give Ms. Killinger a demotion. Ms. Beck stated, "Absolutely not, not due to the deficiencies I had received within the 90 days that I gave her the disciplinary warning letter." (135:24-136:13). Mr. Thompson then told Ms. Beck that Ms. Killinger was not going to resign, but wanted to be terminated. (138:14-18). Ms. Killinger's employment was then terminated. (Exhibit 519, 138:19-23).

JURISDICTION

The Commission has jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. The Commission does not have subject matter jurisdiction with respect to "uniquely personal" matters, such as Petitioner Killinger's termination. *See Nebraska Dept. of Roads Employees Ass 'n v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973), *See also, Schmieding v. City of Lincoln and Lincoln General Hospital*, 2 CIR 60 (1972). *Schmieding* held that uniquely personal matters are not within the legislative policy behind the Industrial Relations Act. Here, however, it is not the unique circumstances of the termination that is at issue. The issue is whether the Respondent committed a prohibited practice under the Act.

DISCUSSION

Petitioners allege that the Respondent, through City Clerk Beck has violated Neb. Rev. Stat. §48-824(2)(a),(c) and (d).

(2) It is a prohibited practice for any public employer or the public employer's negotiator to:

(a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;

(c) Encourage or discourage membership in any public employee organization, committee, or association by discrimination in hiring, tenure, or other terms or conditions of employment;

(d) Discharge or discriminate against a public employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony under the Industrial Relations Act or because the public employee has formed, joined, or chosen to be represented by any public employee organization.

Neb. Rev. Stat. §48-824(2)(a),(c) and (d).

The parties have raised a number of issues, including the adequacy of the allegations in the pleadings and pre-trial order, the importance of a dual motive and how to determine such situations, and how to formulate an appropriate remedy. We find we do not need to decide any of those issues. The only issue before us is whether the termination of Ms. Killinger was the result of her Union activity. Specifically, whether on November 13, 2018, Ms. Beck stated that she would not demote Ms. Killinger instead of terminating her because she had "gone to the Union" by grieving the August 2, 2018, disciplinary warning.

At the end of the meeting on November 13, 2018, Ms. Beck was asked by Mr. Thompson if a demotion was a possibility. Petitioners claim that her response was “no, since Val had gone to the Union that couldn’t happen”. (67:7). Mr. Thompson’s testimony leaves this alleged blatant anti-union statement unchallenged and unquestioned, and with no immediate reaction from either the employee or the Union Steward, and no additional questions asked. (67:7-14).

Ms. Beck denies any such statement was made by her. Instead, Ms. Beck testified that she told Mr. Thompson, "Absolutely not, not due to the deficiencies I had received within the 90 days that I gave her the disciplinary warning letter." (136:9-13). Ms. Killinger’s job performance is relevant, but only for the purpose of determining whether the stated reasons for her termination support the credibility of the witnesses. They do support the credibility of Ms. Beck, who had documented Ms. Killinger’s work performance as her supervisor, for both regular performance evaluations and pursuant to the August 2, 2018, disciplinary warning. Further, Ms. Killinger had previously indicated she would not be willing to give up her position of Deputy Clerk. (Exhibit 4, 137:23-138:5). It is unreasonable to find that Ms. Beck would have, at the last moment, as an aside to a Union Steward, make an obvious negative comment about union activity. Just as it is unreasonable to find that a Union Steward would have left such a statement unchallenged and unquestioned if made.

“It is for the trier of facts to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses”. *Joyner v. Steenson*, 227 Neb. 766, 769, (1988). When a party claims a statement was made, and the other party denies that it was made, we must weigh the evidence itself and also the demeanor of the witnesses. “The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness’ testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit”. *Fredericks Peebles & Morgan LLP v. Assam*, 300 Neb. 670, 686–87 (2018).

We find the testimony of Ms. Beck to be more credible than that of the Petitioners’ witnesses as to the alleged statement. The evidence does not support the Petitioners’ claim that the statement was made by Ms. Beck. We find a lack of credible evidence to support a finding that any anti-union motive was stated or that one was involved in the termination of Ms. Killinger. We make no finding as to whether the termination of Ms. Killinger was justified, as that is outside our jurisdiction. We therefore find that the Respondent did not violate Neb. Rev. Stat. §48-


824(2)(a),(c) and (d) with respect to the termination of Ms. Killinger. Accordingly, the Second Amended Prohibited Practices Complaint should be and is dismissed.

The Respondent requests attorney's fees and costs. The Commission has authority to award attorney's fees when there has been a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. The Commission has found it to be an appropriate remedy in cases where a party's misconduct was flagrant, aggravated, persistent, and pervasive. *See Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.*, 16 CIR 401 (2010). The Commission finds the evidence does not show what rises to a willful pattern or practice of such behavior. As such, we find the parties' actions in this case do not rise to the level deemed appropriate for an award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

All Panel Commissioners join in the entry of this Order.

Entered November 13 2019.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



William G. Blake, Commissioner