

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF POLICE)
LODGE #88,)
Petitioner,)
v.)
STATE OF NEBRASKA,)
Respondent.)

Case No. 1514
Rep. Doc. No. 564

FINDINGS OF FACT AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

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CLERK

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Before Commissioners Neuhaus, Blake, and Jones

NATURE OF THE CASE

The Petitioner, the Fraternal Order of Police Lodge #88 (“FOP” or “Union”), filed a Petition to Clarify or Amend a Certified Unit on May 28, 2021, requesting the Commission enter an order that clarifies or amends the certified bargaining unit to include the position of Corrections Unit Case Manager (“Case Manager”). The Respondent, State of Nebraska (“State”), filed its Answer and Affirmative Defenses on July 8, 2021. A trial was held before the Honorable Gregory M. Neuhaus on March 22, 2022. Post-hearing briefs were submitted. On July 28, 2022, Petitioner filed a Motion to Reinstate Status Quo. Respondent filed their Response to the Petitioner’s Motion to Reinstate Status Quo on August 12, 2022. The Commission issued its Order on Motion to Reinstate Status Quo on August 15, 2022.

FINDINGS OF FACT

Petitioner is a labor organization representing employees in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work; it is a labor organization as that term is defined in NEB. REV. STAT. § 48-801(7). Petitioner is the exclusive collective bargaining agent for the Protective Services Bargaining Unit (“PSBU”). The PSBU is a statutorily created bargaining unit which encompasses employees of the State of Nebraska that are “institutional security personnel, including correctional officers, building security guards, and similar classes of employees.” NEB. REV. STAT. § 81-1373(1)(f). Respondent is an employer as that term is defined in Neb. Rev. Stat. § 81-1371(5).

Until 2018, the PSBU had been represented by the Nebraska Association of Public Employees Local 61 (“NAPE”), who collectively bargained on behalf of all employees classified in this unit. In 2015 and 2017, NAPE and the State entered into agreements regarding the wages and terms of employment for employees classified in the PSBU. (Exhibits 4 and 5). At the time, the unit was made up of 14 different job classifications, one of which was “Corrections Unit Case Manager.” (Exhibit 4, pg. 72; Exhibit 5, pg. 74-5). The State and NAPE agreed to a wage range for this specific classification. (Exhibit 4, pg. 72; Exhibit 5, pg. 74-5).

In 2018, the FOP filed a petition seeking to decertify NAPE as the bargaining representative for the PSBU and certify itself in NAPE’s place. The Petition included an allegation listing all job classifications sought to be included in the PSBU, which included “Corrections Unit Case Manager.” (Exhibit 2). The State denied this allegation on the basis that it was “without knowledge or information sufficient to form a belief as to the truth of the allegation.” (Exhibit 3, para. 6).

On July 28, 2018, the Commission entered a Certification Order finding that Petitioner should be certified as the bargaining representative for the PSBU, and finding that the PSBU included employees in the positions of Corrections Officer, Corrections Corporal, Corrections Sergeant, Corrections Unit Caseworker, Developmental Disabilities Safety and Habilitation Specialist, Mental Health Security Specialist I, Mental Health Security Specialist II, Military Security Specialist, Security Communications Specialist, Security Guard, Youth Security

Specialist I, Youth Security Specialist II, *Corrections Unit Case Manager*. (Exhibit 1, emphasis added). The State did not appeal that order.

After the certification of Petitioner as the exclusive bargaining representative of the PSBU, the parties began negotiating a new Labor Contract. In preparation for these negotiations, Petitioner sought information regarding the Corrections Unit Case Managers, but was informed by the Respondent that employees in this job classification were in a supervisory bargaining unit. (27:14-18). The Respondent has consistently refused to bargain for Corrections Unit Case Managers, taking the position that these employees are no longer in the PSBU in spite of this Commission's Certification Order. (30:3-21).

Respondent alleges that there are 2 distinct positions with the title "Corrections Unit Case Manager" with different administrative labels. The employees at issue in this case are administratively classified using a "V" code—V66442—which is intended to indicate a supervisory status. (Exhibit 8; 254:24–255:9). Within NDCS records, any employee who has ever occupied the position of a Corrections Unit Case Manager has been placed in the "V" classification of V66442. (Exhibit 8; 257:7–20). There exists no Nebraska Department of Correctional Services record of the Case Managers ever existing with the "P" non-supervisory classification of P66442. (316:4–9). There is no evidence that the job duties or responsibilities for this position have changed. Testimony from both current Case Managers and the Respondent's Human Talent Director state that Case Manager duties have not substantially changed at any time relevant to this proceeding. (77:14-78:8; 125:23-126:9; 325:23-326:17).

JURISDICTION

Commission Rule 12 allows a party to file a petition for clarification or amendment of a certified or recognized bargaining unit and sets forth the requirements for such a petition. The Commission promulgated this rule pursuant to its authority under NEB. REV. STAT. § 48-838(2) to determine the appropriate unit for bargaining purposes. The Commission can clarify or amend bargaining units based on the implied authority to determine questions of representation under NEB. REV. STAT. § 48-838.

DISCUSSION

The Petitioner requests that the Commission clarify or amend the PSBU to include state employees with the job classification of “Corrections Unit Case Managers”. The party seeking modification of an existing collective bargaining unit has the burden to prove by preponderance of the evidence that it is entitled to the modification sought. *Kimball Educ. Ass’n v. Kimball Public Schools*, 14 CIR 242 (2003).

Respondent alleges that the Case Managers are not included in the PSBU and that they are supervisors. In order to be classified as a “supervisor” under NEB. REV. STAT. § 48-801, an employee must first have the authority to engage in one of twelve enumerated activities. These include the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or to adjust grievances. NEB. REV. STAT. § 48-801(14). Additionally, under this Statute it is irrelevant whether a job classification is called a “supervisor” or “manager,” has an office, or has other job classifications subordinate to it in a chain of command or organizational chart. In other words, “the job classification in question must be sufficiently supervisory in reality and not just a supervisor on paper.” *International Ass’n of Firefighters Local 647 v. City of Grand Island*, 19 CIR 8 (2013). “In general, the burden of proving an exemption rests on the party claiming it. Particularly, where an employer is attempting to show that employees were supervisors, the employer has the burden of proving their supervisory status in labor proceedings.” *Hamilton Cnty. EMS Ass’n v. Hamilton Cnty.*, 291 Neb. 495, 503 (2015). “[T]he statutory definition of “supervisor” must be read narrowly “to assure that exemptions from [the Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.” *Neligh Ass’. Group v. City of Neligh*, 13 CIR 305 (2000), citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

The Commission also carefully considers the public policy surrounding collective bargaining agreements. In Nebraska, the public policy as expressed in Neb. Rev. Stat. § 48-802 is “the continuous, uninterrupted and proper functioning and operation of the governmental service...” This public policy underpins the Commission’s desire to preserve a bargaining unit’s stability and continuity, absent a reason for disruption or alteration of the status quo. *Marcy Delperdang v. United Electrical, Radio, and Machine Workers of America*, 13 CIR 400 (2001).

When determining the appropriateness of an existing collective bargaining unit, the Commission must give due regard to this public policy while considering all the evidence presented.

In 2018, the issue was before us whether Corrections Unit Case Managers were part of the bargaining unit and we made a specific finding that they were (Exhibit 1). At the trial of the present matter, we learned the State was quietly using two different classifications of Corrections Unit Case Managers before the FOP filed the petition seeking to decertify NAPE as the bargaining representative for the PSBU, the State was doing so during those proceedings, and has continued doing so since we entered the Certification Order finding that Petitioner should be certified as the bargaining representative for the PSBU and finding that the PSBU included Corrections Unit Case Managers. Yet, during those proceedings it said nothing about its position that some Corrections Unit Case Managers are not Corrections Unit Case Managers. We further note that it did not appeal the finding that PSBU included Corrections Unit Case Managers. Rather, it appears it simply ignored the order of the Commission and continued taking the position that the employees who are Corrections Unit Case Managers are not Corrections Unit Case Managers for purposes of the 2018 order. For purposes of the action before us, we do not recognize the State's unilateral differentiation of Corrections Unit Case Managers.

The State has not offered any evidence to explain the alleged differences in duties and responsibilities between the empty position of "P66442 Case Manager" and the "V66442 Case Manager" position that is actually used. There is no reason to believe that there is any difference between the Corrections Unit Case Managers referred to in the Certification Order and previous labor contracts, and those referred to in Exhibit 8. Nor has the State offered any evidence to show that the Certification Order was specifically referring to "P66442 Case Managers." The language of the Certification Order itself does not distinguish between different classifications of Corrections Unit Case Managers, and it makes no mention of classification codes. It explicitly states that "Corrections Unit Case Managers" are included in the PSBU. (Exhibit 1). Thus, there is no reason to think that this order was limited to one classification of Corrections Unit Case Managers at the exclusion of any others. Specifically, there is no reason to think the Certification Order was referring to an empty and never-used position code, at the exclusion of the position that employees actually fill. All Corrections Unit Case Managers, whether classified now by the Respondent as within the "P" code or "V" code are Corrections Unit Case Managers and are

included in the PSBU. The evidence before the Commission does not support modification of the existing bargaining unit.

Further, Respondent alleged that Case Managers are supervisors and therefore should be excluded from the PSBU. Respondent failed to prove that the Case Managers exercised any of the 12 enumerated duties found in NEB. REV. STAT. § 48-801(14) with the degree of independent judgment required to be considered supervisors under the statute. Therefore, the Corrections Unit Case Managers should not be removed from their bargaining unit.

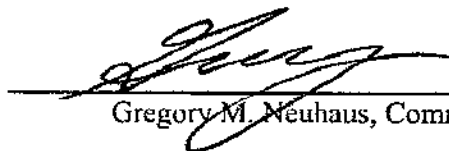
ORDER

1. The Commission hereby clarifies that the Protective Services Bargaining Unit has included, and will continue to include all employees with the position title of “Corrections Unit Case Managers” pursuant to the Certification Order issued in CIR Case 1462.
2. The Commission orders that the parties are to pay their own costs and fees.

All Panel Commissioners join in the entry of this Order.

Entered September 9 2022.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Gregory M. Neuhaus, Commissioner