NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

GENERAL DRIVERS AND HELPERS UNION, LOCAL NO. 554, Petitioner, v. DUET formerly known as ENCOR OF THE EASTERN NEBRASKA HUMAN SERVICES AGENCY, Respondent.	)	Case No. 1549 FINDINGS OF FACT AND ORDER

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Before Commissioners Jones, Blake and Neuhaus

NATURE OF THE CASE

This matter comes before the Commission upon the Petition filed on July 21, 2023 by Petitioner General Drivers and Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters ("Union"). The Petition alleges that actions of the Respondent Duet of the Eastern Nebraska Human Services Agency ("Duet"), were in violation of Neb. Rev. Stat. §§ 48-824(1), 48-824(2)(a), (b), (e), (f) and (g). Respondent's Answer to Petition and Affirmative Defenses was filed August 7, 2023. Pretrial briefs were received by both parties on October 16, 2023. A trial was held on October 18, 2023, at which time evidence was received and argument was heard on the record. At the end of that trial, clarification of the status quo was requested by Petitioner. A Status Quo Order was issued on October 25, 2024. The Commission instructed counsel to provide written closing arguments with citations to the record by November 13, 2023. The Commission also provided the parties the option to file simultaneous reply briefs by

November 20, 2023. The transcript was not completed and available to the parties until November 14, 2023. Therefore, the briefing schedule was extended to December 1, 2023, with optional reply briefs to be filed by December 8, 2023. Each party filed its brief and reply brief. On December 11, 2023, without leave of the Commission, the Petitioner filed an additional Supplemental Reply Brief.

FINDINGS OF FACT

Petitioner General Drivers and Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters is a "labor organization," as that term is defined in Neb. Rev. Stat. § 48-801(7), and is the exclusive bargaining agent for the bargaining unit consisting of Eastern Nebraska Human Services Agency employees working within the Duet program ("bargaining unit"). Respondent Duet of the Eastern Nebraska Human Services Agency is a "public employer" within the meaning of Neb. Rev. Stat. § 48-801(12) and employs those employees who compose the bargaining unit. Prior to the dispute in the instant case, Petitioner and Respondent entered into a collective bargaining agreement ("CBA") covering wages, hours, and conditions of employment for the bargaining unit for the period of July 1, 2020 through October 31, 2023. Article 19-Insurance discusses insurance and provides the rates effective for each year of the 3-year contract. Article 26-Duration of Agreement states "This Agreement shall be effective from July 1, 2020, until October 31, 2023, with a re-opener for wages only for the one year periods beginning on November 1, 2021 and 2022." (Exhibit 1). Additionally, Respondent's contract with a third party, the Teamsters affiliated insurance provider, Team Care, expired October 31, 2023.

While the relevant CBA did not expire until October 31, 2023, the health insurance section of the CBA is silent on the cost of premiums after July 1, 2023. (Exhibit 1, pg. 17). In February 2023, Team Care, the Teamster-affiliated multi-employer health insurance provider of the Central States Southeast and Southwest Areas Health and Welfare Fund (the "Team Care

Plan"), announced a new, three-year "Not to Exceed" ("NTE") premium obligation. Team Care's new NTE premium commitment provided for up to a 25% increase over three years, and a July 2023 increase of 7%. (Exhibits 501, 504, 505; T86:19-87: 11). Those "new" premium terms were neither bargained, nor approved, by the parties.

In March 2023, Duet's bargaining representative, Mark McQueen, notified Union's bargaining representative, Todd Bell, that Duet was unwilling to accept Team Care's unilaterally announced July 2023 increase. McQueen also stated that he wanted health insurance to be the first priority in the parties' upcoming 2023 contract renewal negotiations. (Exhibit 506). Bell ignored McQueen's notice for over six weeks.

The first bargaining session on this subject occurred on May 24, 2023. Bell refused to take any position, except to ambiguously state "we still have a contract." McQueen asked Bell to explain himself, and specifically whether he meant that the CBA required Team Care coverage after July 1, 2023. Bell refused to clarify or take any specific position. In fact, despite McQueen's multiple requests between May 24 and the parties' second bargaining session on June 21, 2023, Bell persistently refused to state Union's position. Later, on June 21, 2023, Bell denied that he previously refused to clarify the Union's position. The Union finally made a specific health insurance proposal shortly before the parties June 21, 2023 bargaining session. As Duet previously announced during the parties' May 24, 2023 bargaining session, Duet proposed a plan provided through Blue Cross Blue Shield of Nebraska ("the BCBS Plan") and reiterated that it was unwilling to stay with Team Care. The Union proposed an entirely new Teamster-affiliated Michigan Conference of Teamsters Welfare Fund ("the Michigan Plan") but was also willing to stay with Team Care as a fallback position.

Meanwhile, Duet announced it was unwilling to pay Team Care's unilaterally announced July premium increase. In response, Team Care threatened to suspend coverage. Rather than risk suspended coverage, Duet then capitulated and agreed to pay the increased Team Care premium rate for July 2023 while negotiations continued with the Union.

During the parties' in-person bargaining session on June 21, 2023, McQueen reminded Bell that it was inappropriate for Bell to circumvent him and make proposals directly to the Executive Director, Debbie Herbel. (Exhibit 594, p.2). Despite McQueen's clear warning, and Bell's admission on cross examination that McQueen "is probably the lead negotiator", Bell later sent a text directly to Herbel on July 13, 2023, requesting a private, in-person meeting. Herbel agreed (not knowing the agenda or subject matter). Bell admitted on cross examination that when he requested the meeting and met with Herbel, there was no ambiguity in Duet's negotiating position, but he wanted the meeting with her because she had "the final yes or no." When asked if he thought he might get a different response from her than he had been getting from McQueen, Respondent's lead negotiator, he evasively answered "I wanted to talk to her about the issues." The clear import of Bell's testimony is he did not like the position Respondent's lead negotiator had taken during negotiations, so he made direct contact with Herbal with the goal of convincing her to take a different position, without Respondent's lead negotiator knowing about it.

During the parties' final bargaining session on July 14, 2023, Duet made additional concessions with regard to the BCBS Plan but was unwilling to accept the Teamster's proposed Michigan Plan. The Union refused to change its bargaining position, and also refused to agree to Duet's proposed BCBS Plan. Sensing that the parties may be at impasse, Duet then asked the Union to break the deadlock by permitting bargaining unit employees to vote on Duet's proposal. Bell refused to clarify whether Union would allow a vote, evasively declaring "we will follow the

bylaws." McQueen asked whether the bylaws permitted a vote. Bell refused to clarify. McQueen then asked for a copy of the bylaws. Bell refused to provide them. Thus, the parties reached impasse on July 14, 2023. (Exhibit 613).

Prior to the July 14 meeting, Duet asked its employees (bargaining unit and non-bargaining unit) in two separate email surveys whether they supported Duet's proposal to move to the BCBS Plan. (Exhibit 9). In both surveys, the employee support for change was overwhelming. Having previously determined the parties had reached impasse; on July 17, 2023, the Respondent announced to the Union its intent to implement its final offer and switch the bargaining unit employees to the BCBS Plan effective August 1, 2023. To quickly gather needed information from employees, the Respondent offered a steak dinner to the area that first completed the open enrollment forms. This was agency wide and included both bargaining and non-bargaining unit members. (Exhibit 8). On July 21, 2023, Team Care threatened Duet with a federal lawsuit. (Exhibit 617). Later that same day, Duet announced its intent to relent and keep the bargaining unit employees in Team Care throughout the duration of the CBA as demanded by Team Care. (Exhibit 618). Effective August 1, 2023, Duet did switch the non-bargaining unit employees from the Team Care Plan to the BCBS Plan. The Respondent did not implement any changes to the CBA or the bargaining unit members' insurance coverage during the contract period.

The Petition specifically alleges that the Respondent violated Neb. Rev. Stat. §48-824 by: "[u]nilaterally ***implementing*** the Duet Plan for three years ***without even opening or conducting bargaining*** on a new post October 31, 2023 CBA and by unilaterally ***insisting that the Union agree to negotiate for a health plan that included nonbargaining (sic) unit employees***." (Emphasis added) These allegations are contrary to the undisputed evidence and unsupported by any credible evidence. As of the date of trial, the "Duet Plan" had not been implemented

unilaterally or otherwise for the bargaining unit members and several bargaining sessions had occurred, initiated by Respondent. Further, both non-bargaining unit and bargaining unit members were on a Team Care plan, administered by Teamsters-affiliated insurance company prior to the dispute in the present case. As McQueen credibly explained:

> Q. Okay. I don't see any discussion of bargaining unit versus non-bargaining unit folks in Exhibit 614. Was that topic something that was in the background during these negotiations?
>
> A. In terms of an issue being negotiated, we were never negotiating nor discussing inclusion versus exclusion of bargaining unit versus non-bargaining unit. That was a complete nonissue. It may have been mentioned as a toss-away in some fashion, as has been the case for the last several years, but that was not a disputed issue. That was not a contested issue. That was not a debated issue.
>
> Q. Did Team Care ever communicate with you or Debbie Herbel about what its position was on the non-bargaining unit employees and their coverage moving forward?
>
> A. Team Care, the only position that Team Care took with respect to non-bargaining unit employees is, if you don't want to pay the 6 percent premium increase for them, then you can do whatever you want with them. You can take them out of Team Care if you want.

(Tr: 107:3-23)

The Commission is not called here in this prohibited practice case to adjudicate the relative virtues of the individual health insurance proposals. However, it is relevant to the allegations of both the Petitioner and Respondent that Respondent's BCBS proposal was not vastly different or overall more expensive to its employees. We note Petitioner's curious refusal to consider seemingly equal or better (for the employee) plans that were not administered by a Teamster affiliated insurance company. As McQueen explained, "[a] single parent with two children staying with Team Care is essentially $10,000 in the hole, as compared to the proposal that we put on the table. It's a devastating financial consequence." This is contrary to what the Petitioner claims is one reason they are insistent that Duet stay with a Teamsters affiliated plan—avoiding increased costs. (Exhibits 594 & 614).

JURISDICTION

The Commission has jurisdiction to adjudicate alleged violations of the Industrial Relations Act ("Act') by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. The Commission has the power and authority to make such findings and to enter such temporary or permanent orders as the Commission may find necessary to provide adequate remedies, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute. Neb. Rev. Stat. § 48–819.01. Furthermore, Neb. Rev. Stat. § 48-823 states the "Act and all grants of power, authority, and jurisdiction made in such act to the Commission shall be liberally construed to effectuate the public policy enunciated in §48-802. All incidental powers necessary to carry into effect the Industrial Relations Act are hereby granted to and conferred upon the Commission."

PROHIBITED PRACTICE ALLEGATIONS AND FINDINGS

The current Petition before the Commission sets out several prohibited practice allegations relating to the alleged unilateral implementation of a new insurance plan by Respondent prior to the expiration date of the CBA. The Petition specifically alleges violations of Neb. Rev. Stat. §§48-824(1), 48-824(2)(a), (b), (e), (f) and (g). Respondent's Answer and Affirmative Defenses allege, in part, that the Union has unclean hands because it has engaged in bad faith bargaining over the subject set forth in its Petition.

Neb. Rev. Stat. § 48-824 provides in relevant part:

> (1) It is a prohibited practice for any public employer, public employee, public employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
>
> (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;

(b) Dominate or interfere in the administration of any public employee organization;

(e) Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act;

(f) Deny the rights accompanying certification or recognition granted by the Industrial Relations Act; and

(g) Refuse to participate in good faith in any impasse procedures for public employees as set forth in the Industrial Relations Act.

(3) It is a prohibited practice for any public employee, public employee organization, or bargaining unit or for any representative or collective-bargaining agent to:

(a) Interfere with, restrain, coerce, or harass any public employee with respect to any of the public employee's rights granted by the Industrial Relations Act;

(b) Interfere with, restrain, or coerce a public employer with respect to rights granted by the Industrial Relations Act or with respect to selecting a representative for the purposes of negotiating collectively on the adjustment of grievances;

(c) Refuse to bargain collectively with a public employer as required by the Industrial Relations Act; and

(d) Refuse to participate in good faith in any impasse procedures for public employees as set forth in the Industrial Relations Act.

(4) The expressing of any view, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, is not evidence of any unfair labor practice under any of the provisions of the Industrial Relations Act if such expression contains no threat of reprisal or force or promise of benefit.

There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Mandatory subjects are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(A). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). The

Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. Neb. Rev. Stat. § 48-816(1)(A). Permissive subjects are legal subjects of bargaining that do not fit within the definition of mandatory subjects. See *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958). Either party may raise a permissive subject during bargaining, but the non-raising party is not required to bargain over a permissive subject. *Id.* Finally, prohibited bargaining subjects are those topics that the law forbids the parties from agreeing to bargain.

Mandatory subjects of bargaining are not just topics for discussion during negotiations. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of a collective bargaining agreement. *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292 (2007). When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining. Notice from the employer does not have to be formal, and it is not unlawful for the proposed change to be presented as a fully developed plan. Once a union has notice of a proposed change in a mandatory subject of bargaining, it must make a timely request to bargain.

> "A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table.... *Nor is a union in a good position to charge an employer with bargaining in bad faith when the union itself has exhibited little, if any, real desire to reach a bona fide contract benefitting the members of the bargaining unit which it, by law, is required to represent.*"

Service Employees. International Union (AFL-CIO) Local. 226 v. Douglas County School. District. 001, 286 Neb. 755, 769, 839 N.W.2d 290, 301 (2013). (Emphasis supplied)

> "The employer must give the union notice that it intends to make changes to the conditions of employment. But once notice is given, it places an obligation upon the union to request bargaining so as not to waive the employees' right to bargain. The union must act with due diligence in requesting bargaining. Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. *A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain.* Under federal case law, as under Nebraska law, the burden of proving waiver rests on the employer: To establish waiver of the right to bargain by union inaction, the employer must first

> show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change. In addition, the employer must show that the union failed to make a timely bargaining request before the change was implemented. (Internal quotations and citations omitted). (Emphasis supplied)

Id. at 767.

The Commission finds, as we have previously, that health insurance benefits are mandatory subjects of bargaining.

> "Health insurance coverage and related benefits, including health insurance exclusions, are akin to fundamental, basic, or essential concerns to an employee's financial and personal concern and, therefore, may be considered as involving working conditions. Accordingly, we determine that health insurance coverage and related benefits are mandatory subjects of bargaining under the IRA."

Scottsbluff Police Officers Ass'n, Inc., F.O.P. Lodge 38 v. City of Scottsbluff, 282 Neb. 676, 683–84, 805 N.W.2d 320, 328 (2011). See also *EULA v. Douglas Cnty., Nebraska*, 284 Neb. 121, 816 N.W.2d 721 (2012).

> "To bargain in good faith means the performance of the mutual obligation of the public employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Neb. Rev. Stat. §48-816(1)(a).

In *NLRB v. Katz*, 369 U.S. 736, 737 (1962), the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. In *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska,* 15 CIR 95 (2005), the Commission held that

> "an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

Id. at 104, *See also, Service Empl. Internat. Union v. Douglas Cty. Sch. Dist.,* 286 Neb. 755 (2013); *Service Empl. Internat. Union v. Douglas Cty. Sch. Dist,* 20 CIR 35 (2019).

The Commission has defined impasse as when parties have reached a deadlock in negotiations. *Fraternal Order of Police, Lodge 41 v. County of Scottsbluff*, 13 CIR 270 (2000).

The Commission will consider the totality of circumstances reflecting the parties' bargaining intent to determine if the parties are in fact bargaining in good faith. A party violates its duty to bargain in good faith by engaging in surface bargaining - negotiating under the pretense of bargaining while never intending to reach an agreement. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.,* 17 CIR 240 (2012), *see Continental Ins. Co. v. NLRB*, 495 F.2d 44 (2nd Cir. 1974).

"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).

Considering the totality of the circumstances, the Commission finds that Petitioner failed to present any credible evidence or argument to support the prohibited practice allegations made against Respondent. The Commission finds the testimony of Respondent's bargaining representative, McQueen, to be far more credible than that of Petitioner's bargaining representative, Bell. The Commission finds that Respondent was well on its way to lawfully, and in good faith, implementing its insurance proposal, despite the challenges it faced when attempting

to bargain with Petitioner. But for the filing of the present petition, the Respondent would have met the three conditions discussed above regarding the lawful unilateral implementation of changes in terms and conditions of employment which are mandatory topics of bargaining. Even when Respondent was effectively held hostage by the combination of Team Care's unilateral increase in premiums, its threatened legal action if Respondent changed insurers, and Petitioners' conduct which failed to exhibit any real desire to resolve the problem in a manner benefitting the members of the bargaining unit, as opposed to other interests, the Respondent continued to abide by the spirit and letter of the Act. As such, the Petition should be dismissed with prejudice.

BAD FAITH ALLEGATIONS AND FINDINGS

Respondent's Answer and Affirmative Defenses allege, in part, that Petitioner has committed a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1). Respondent also requested, pursuant to CIR Rule 42, an award of attorneys' fees and costs, and such other relief as the Commission may deem appropriate.

> "We are mindful that good faith bargaining may be quite hard and still lawful. In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, we will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather, we must review all of its conduct, both away from the bargaining table and at the table, including the substance of the proposals on which the party has insisted. Such an examination is not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take." (Internal citations omitted).

County of Hall v. United Food and Commercial Workers District Local 22, 15 CIR 167 (2006).

The Commission finds that Petitioner willfully negotiated in bad faith in violation of Nebraska Revised Statute §48-824(1); as well as filed this matter in bad faith. Based on the totality of the circumstances, including Petitioner's conduct at the bargaining table, away from the bargaining table, and at trial, including the substance of its proposals and the arguments made to

attempt to justify its conduct, we find that Petitioner did not make a genuine effort to reach agreement, did not evince a mindset open to agreement, but rather, evinced one that was opposed to true give-and-take, intended to frustrate the bargaining process. At best, Petitioner negotiated under the pretense of bargaining while never intending to reach an agreement. The Petition, Petitioner's Statement of Issues and Petitioner's briefs in this matter distort, or simply misstate both facts and law relating to the issues between the parties. The exhibits and testimony are replete with evidence that Respondent made ongoing good faith efforts to negotiate, while Petitioner's representatives did not. While the Commission cannot divine what Petitioner's actual motive was (although it would not be an unfair inference to draw, that it had a peculiarly strong commitment to ensuring Respondent's health insurance premiums were made to a Teamsters-affiliated insurance provider), it is clear what Petitioner's motive was not—little, if any, real desire to reach an agreement to resolve the dispute over health insurance in a manner benefitting the members of the bargaining unit which it, by law, was required to represent.

REMEDIAL AUTHORITY AND ATTORNEY FEES

Pursuant to CIR Rule 42, 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 totality of the record before the Commission demonstrates that Petitioner engaged in a pattern of willful and persistent prohibited misconduct including, and relating to, its refusal to negotiate in good faith with respect to a mandatory topic of bargaining, specifically health insurance, as well as filing and pursuing this

action in bad faith. We therefore find an award of attorney costs and fees is appropriate for the purpose of making the Respondent whole and not as a sanction against the Petitioner.

IT IS THEREFORE ORDERED that:

1. The Petition is dismissed with prejudice.
2. The Petitioner shall cease and desist from failing to bargain in good faith with the Respondent regarding mandatory subjects of bargaining, specifically health insurance.
3. The Respondent is directed to submit within ten (10) business days of this order an affidavit of costs, expenses, and fees that were incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs
    a. The Respondent's affidavit should reflect the costs, work, time, fees, rates, reasonableness of such rates, and expenses claimed by Respondent in sufficient detail to be reviewed by the Commission.
    b. It should be executed by a person with personal knowledge of the facts, which may include counsel for the Respondent, if necessary, and will be received in evidence solely for the purpose of determining an appropriate remedy.
    c. Petitioner's counsel shall be served with a copy and may submit affidavit(s) in opposition within five (5) business days of filing.
4. Following receipt of this Commission's subsequent Order of Reimbursement, the Petitioner is to reimburse Respondent its reasonable attorney fees and costs as provided in that order.

All Panel Commissioners join in the entry of this Order.

Entered June 20, 2024.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

Dallas D. Jones, Hearing Commissioner