NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES LOCAL 61 of the AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, Petitioner, v. STATE OF NEBRASKA, Respondent.	)	Case No. 1561 FINDINGS OF FACT AND ORDER

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Before Commissioners Neuhaus, Jones, Blake

NATURE OF THE CASE

This matter comes before the Commission upon the Prohibited Practices Petition filed on December 13, 2023 by Petitioner Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees ("Union"). The Petition alleges that actions of the Respondent State of Nebraska ("State"), were in violation of the Industrial Relations Act ("Act"), Neb. Rev. Stat. §§ § 48-824(1) and (2)(e), and the State Employees Collective Bargaining Act ("SECBA"), Neb. Rev. Stat.§ 81-1386(1) and (2)(e) based upon

Respondent's alleged unilateral change to, and refusal to negotiate in good faith over, a mandatory subject of bargaining. The Order on Motion for Temporary Relief was issued by the Commission on December 29, 2023. The Order on Motion to Clarify was issued by the Commission on January 10, 2024. Respondent's Pretrial Brief was filed February 23, 2024. A trial was held on February 24, 2024, at which time evidence was received and argument was heard on the record. Petitioner's Post-Hearing Brief was filed March 27, 2024. Respondent's Post-Trial Brief and Request for Attorney's Fees and Costs was filed on April 8, 2024. Petitioner's Post-Hearing Reply Brief was filed April 12, 2024.

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). The Petitioner is the exclusive collective bargaining agent for eight of the twelve bargaining units defined in Neb. Rev. Stat. § 81-1373. (Neb. Rev. Stat. § 81-1373(a) Maintenance, Trades & Technical, (b) Administrative Support, (c) Health & Human Care Nonprofessional Bargaining Unit, (d) Social Services & Counseling Bargaining Unit, (e) Administrative Professional, (h) Health & Human Care Professional, (i) Examining, Inspection and Licensing, and (j) Engineering, Science & Resources).

The Respondent is a public employer pursuant to Neb. Rev. Stat.§ 48-801(12) and employer pursuant to Neb. Rev. Stat. § 81-1371(5). At all times relevant to this matter, the parties have been covered by an effective collective bargaining agreement ("CBA") between the Petitioner and the Respondent covering wages, hours and conditions of employment. The current CBA applies to eight bargaining units of the State of Nebraska, and covers the period July 1, 2023

through June 30, 2025. The parties previously bargained in good faith over the issues of remote work and working hours during negotiations for the current CBA, which occurred from August 2022 through January 2023. The parties ratified and signed the current CBA on February 25, 2023. During these most recent negotiations, the Union proposed and negotiated for a remote work policy that would have narrowed the State's long-standing management rights. The Union ultimately withdrew its remote work proposal (89:1-6) and in turn received a "historic" and "record-breaking" contract that provided bargaining unit members with "the largest salary increase in the 35-year history of the State Employees Collective Bargaining Act." (289:5-290:8). Further, the parties agreed to a "zipper" clause, Article 1.3, pursuant to which each party agreed it had the right and opportunity to make demands and proposals and each "voluntarily and unqualifiedly waived the right, and agreed that the parties shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered" in the Agreement. (287:8-297:10, Exs. 1, 514).

Specifically, Article 3-Management Rights of the current CBA, which has remained unchanged during all times relevant herein (92:14- 21; Exs. 1, 500, 501), provides in relevant part:

> 3.1 It is understood and agreed that the Employer possesses the right to operate and direct the employees of the State and its various agencies to the extent that such rights do not violate its legal authority, and to the extent such rights are not modified by this Contract. These rights include, but are not limited to:
>
> 3.2 The right to determine, effectuate and implement the State's budget, mission, goals; and objectives.
>
> 3.3 The right to manage and supervise all operations and functions of the State.
>
> 3.4 **The right to establish, allocate, schedule, assign, modify, change and discontinue** Agency operations, **work shifts, and working hours.**
>
> 3.5 **The right to establish, allocate, assign, or modify an employee's duties and responsibilities** and the resulting classification of such duties and responsibilities.
>
> 3.7 **The right to** hire, examine, promote, train, transfer, **assign**, and retain employees; suspend, demote, discharge or take other disciplinary action against employees for just

cause; and to relieve employees from duties due to lack of work or funds, or the employee's inability to perform his/her assigned duties after the Employer has attempted to accommodate the employee's disability.

3.8 **The right to increase, reduce, change, modify and alter the composition and site of the work force.**

3.12 **The right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures or policies**.

(Ex 1, pg.6-7, emphasis added).

It is undisputed that the State has implemented and used telework (remote work) policies and agreements for many years before the current CBA. (Exs. 506, 507, 508, 509, 510, 511). Every employee called to testify on behalf of the Union admitted they were subject to these policies, signed telecommuting agreements and understood that telecommuting was a privilege that could be terminated by the State at any time for any or no reason (173:6-175:5; 188:21-189:20; 191:20-192:5; 204:12-17; 206:25-207:7; 226:24-227:11; 234:4-5; 241:18-242:15). The State has previously exercised its right to revoke employee telework privileges (192: 1-5; 268: 12-22) and the Union has never filed a grievance over the use of these telework policies and agreements or the revocation of an employee's ability to work remotely thereunder (49:10-16; 260:20-261:3; 268: 23-270:10).

On November 9, 2023, Governor Jim Pillen issued Executive Order 23-17 ("EO-23-17"). (Ex. 503). After EO 23-17 was issued, the Union demanded the State negotiate over remote work. (Ex. 2) The State properly declined to renegotiate remote work, relying upon Article 3 of the CBA as well as Article 1.3.

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 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."

> The State Employees Collective Bargaining Act shall be deemed controlling for state employees and state employers covered by such act and is supplementary to the Industrial Relations Act except when otherwise specifically provided or when inconsistent with the Industrial Relations Act, in which case the State Employees Collective Bargaining Act shall prevail.
>
> The State of Nebraska, its employees, employee organizations, and exclusive collective-bargaining agents shall have all the rights and responsibilities afforded employers, employees, employee organizations, and exclusive collective-bargaining agents pursuant to the Industrial Relations Act to the extent that such act is not inconsistent with the State Employees Collective Bargaining Act.

Neb. Rev. Stat. § 81-1732.

DISCUSSION

The Prohibited Practices Petition alleges that the changes unilaterally dictated in EO 23-17, and the position taken by Respondent through the Executive Order 23-17 and letters from Dan Birdsall, Employee Relations Administrator and State's Chief Negotiator, and continuing support of their contents, constitutes a violation of the Act and SECBA.

Prohibited Practice Allegations

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:

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

Neb. Rev. Stat. §§48-824(1) and 48-824(2)(e).

The State Employees Bargaining Act further states:

(1) It shall be a prohibited practice for any employer, employee, employee organization, or exclusive collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
(2) It shall be a prohibited practice for any employer or the employer's negotiator to:
(e) Refuse to negotiate collectively with representatives of exclusive collective-bargaining agents as required in the Industrial Relations Act and the State Employees Collective Bargaining Act;

Neb. Rev. Stat. §81-1386.

Mandatory subjects of bargaining 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). Further, a topic can be established as a subject of bargaining if it has been a past practice between the parties. *Service Empl. Internat. Union v. Douglas Cty. Sch. Dist,* 20 CIR 35 (2019), *(citing NLRB v. Katz*, 369 U.S. 736, 745-747 (1962)). Some subjects are considered management prerogatives. "Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining." *Scottsbluff Police Officers Ass'n v. City of Scottsbluff*, 282 Neb. 676, 683 (2011). The Act only requires parties to bargain over mandatory subjects.

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). However, if a mandatory subject of bargaining is "covered by" the CBA, no further bargaining is required. *Fraternal Ord. of Police Lodge 31 v. City of York*, 309 Neb. 359, 960 N.W.2d 315 (2021).

The Nebraska Supreme Court, in *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, (2012), adopted the "contract coverage standard" to determine whether a topic is "covered by" a CBA. The contract coverage rule treats the issue of whether there has been a failure to bargain as a simple matter of contract interpretation; if the issue was covered by the CBA, then the parties have no further obligation to bargain the issue.

> "[T]he "covered by" and "waiver" inquiries . . . are analytically distinct. A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant. . . .
>
> Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant."

Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty., 284 Neb. 109, 116, (2012) (citing *Dep't of Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992)).

Applying this standard, the Commission must address the threshold question of whether the issues are "covered by" the CBA by examining whether it "fully defines the parties' rights" as to the topics. *Id.* To "fully define the parties' rights" does not, however, require that the CBA address the "full range of impact and implementation issues" of the alleged prohibited act. To require such, would be "both unrealistic and impermissible," as a tacit application of the "waiver" standard, a standard which is "antithetical to the contract coverage principles" applicable when assessing whether a practice is "covered by" a CBA. *Id.*

> "The Commission will not be persuaded by vague, all-inclusive statements in bargaining agreements that employers may do whatever they please, which if taken

> to their logical conclusion under the Respondents' arguments, would negate the entire agreement and the bargaining process established by the Industrial Relations Act. Broad statements to the effect that the public employer maintains the right to manage all operations of that entity and maintains the right to change or discontinue any regulations or procedures do not override the requirement of bargaining in good faith regarding subjects of mandatory bargaining."

Omaha Police Union Local 101 v. City of Omaha, 15 CIR 292, 300 (2007).

We have made it clear in our opinions that we will not allow broad and vague reservations to negate the entirety of the bargaining process, but this case does not approach any such result. We find no vagueness or ambiguity in the relevant sections of the CBA as applied to the issue of remote work. The plain language of the long-standing management rights article, agreed to by the parties, specifically allows the Respondent to unilaterally change work sites and related policies. Additionally, the evidence shows a long history of agency work site policies and individual work site agreements, promulgated under the Respondent's management rights and authority, that support the state's right to unilaterally change work sites. The Petitioner's own witnesses testified that they were aware that working from home was a privilege, not a right, that could be revoked by the employer at any time. (173:6-175:5, 189:2-20, 206:25-207:7, 226:24-227:11).

We specifically find Respondent did not violate Neb. Rev. Stat. §§ 48-824(1) and (2)(e) or Neb. Rev. Stat.§ 81-1386(1) and (2)(e). The subject of EO 23-17 is clearly "covered by" the CBA and well within the management rights retained by the State. Therefore, the State had no further obligation to bargain the issue. The Prohibited Practice Petition is dismissed with prejudice.

REMEDIAL AUTHORITY AND ATTORNEY FEES

Generally, our analysis would stop here. However, for purposes of determining Respondent's request for attorney fees and costs we will also address the clear and unmistakable waiver by the Petitioner.

Assuming, arguendo, that the facts before us supported a finding that remote work was a mandatory subject of bargaining **not** "covered by" the CBA, we would still dismiss this petition. The Commission has found that the duty to bargain can be waived. The burden of proving waiver was on the party asserting the waiver. *Washington County Police Officers Ass'n FOP Lodge 36 v. County of Washington*, 17 CIR 114 (2011). The Respondent could have easily met its burden to show that Petitioner waived its right to bargain, as the Petitioner both made and withdrew a specific remote work policy during the negotiations for the relevant CBA. Filing of the present petition was a disingenuous maneuver seemingly for the purpose of improperly delaying the implementation of EO 23-17 and boosting membership numbers using the subsequent press coverage. Petitioner is aware of the long existing telework policies, procedures and agreements promulgated under the State's management rights under which its members have been working. Petitioner specifically agreed to Article 1.3, voluntarily waiving the right to bargain over matters covered by the CBA. Petitioner made and withdrew a specific remote work policy proposal. The Petitioner, having full knowledge of the undisputed facts and applicable law, could not have reasonably or in good faith believed they would prevail by bringing this case before the Commission. Rather it appears to be a misuse of the Commission's status quo protections and process to delay the implementation of EO 23-17, and possibly to increase its membership. (Exs. 516, 517; 304: 14-313:4).

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, flagrant, aggravated, persistent, and pervasive prohibited misconduct by 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 Respondent is directed to submit within fifteen (15) 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.
3. 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 July 11, 2024.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

Gregory M. Neuhaus, Hearing Commissioner