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, DEPARTMENT OF EDUCATION, Respondent.	)	Case No. 1570 FINDINGS OF FACT AND ORDER

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Before Commissioners Blake, Jones, Carlson.

NATURE OF THE CASE

This matter comes before the Nebraska Commission of Industrial Relations ("Commission") on a Prohibited Practices Petition filed by Petitioner, Nebraska Association of Public Employees Local 61 of the American Federation of State, County, and Municipal Employees ("Union"), against Respondent, State of Nebraska, Department of Education ("Department" or "NDE"). The Petition alleges that actions of the Respondent 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, an alleged mandatory subject of bargaining.

Petitioner's Pretrial Brief was filed April 14, 2025. Respondent's Pretrial Brief was filed April 15, 2025. A trial was held on April 16, 2025, at which time evidence was received, and argument was heard on the record. Petitioner's and Respondent's Post-Trial Briefs were filed on May 21, 2025. Petitioner's and Respondent's Reply Briefs were filed May 30, 2025.

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 representative for all regular employees of the State of Nebraska Department of Education, including those on probation, and those occupying fixed-term positions in job classification titles listed in the collective bargaining agreement ("CBA"). The Department is a public employer within the meaning of Neb. Rev. Stat. §§ 48-801(12) and 81-1371(5). At all times relevant, the parties were bound by a CBA covering wages, hours, and other terms and conditions of employment. The CBA does not expressly reference remote work, telecommuting, telework, or work-from-home arrangements.

The Department has maintained a policy allowing remote/telework arrangements for individual employees upon Department approval since at least 2010. Telework arrangements are governed by Department memoranda and individual telework agreements that require Department approval and expressly provide that telework is not a right and can be terminated by the Department at its discretion at any time. At least since 2010, employees who engage in remote work are required to request approval and execute individual telework agreements acknowledging these terms.

In 2010, the Department issued Administrative Memorandum #509, detailing the terms and conditions of telecommuting within the Agency. Exhibit 505. That memorandum required

approval by the Department of an employee's request to work remotely and the signing of an agreement to be bound by the Department's policies. The paragraph titled "Conditions of employment" states in part "[t]elecommuting is not an entitlement or a benefit, and in no way changes the terms and conditions of employment." Exhibit 505, pg 3. Appendix A of 2010 Administrative Memorandum #509 is the NDE Telecommuting Request Form, which states in part "I understand approval or denial of my request is at my Employer's discretion and is not a grievable issue." Exhibit 506. Appendix B of 2010 Administrative Memorandum #509 is the NDE Telecommuting Agreement. The Agreement states in part "[t]his document is not an employment contract and does not alter the employment status of the employee" and "[e]mployee recognizes that the telecommuting arrangement is not an employee benefit." Exhibit 507, pg. 1. Additionally, the section titled "Termination of Agreement" states:

> "Employee's participation as a telecommuter is entirely voluntary and is available only to employees deemed eligible at the Agency's sole discretion. Employee understands that the Employing Office may cancel the telecommuting arrangement and instruct the Employee to resume working at the original work site at any time. There exists no right to telecommute. The Employer will not be held responsible for costs, damages or losses resulting from cessation of participation as a telecommuter."

Exhibit 507, pg 2.

The Department issued a revised Administrative Memorandum #509 regarding the Telework Policy in December 2022. Exhibit 508. This revision maintained the Department's discretion regarding Telework Agreements.

> "The Department reserves the right to modify, suspend, or rescind any telework agreement whenever the Department determines that such action is necessary for its operations, or that the telework agreement is being abused. A telework agreement does not create any contractual right for the employee and does not alter the employment relationship between the employee and the Department. The essential terms of that employment relationship, including the Department's ability to terminate the employment relationship, will continue to be defined by the terms of any applicable personnel rules and/or bargaining agreements."

Exhibit 508, pg. 2.

Appendix A of the 2022 Administrative Memorandum #509 is the corresponding NDE Telecommuting Agreement. The scope of this agreement is stated as:

> "The Nebraska Department of Education (NOE) allows telework under Administrative Memorandum 509 to be a viable alternative work arrangement in cases where individual, position, and supervisor characteristics are best suited to such an arrangement. Telework is a voluntary work alternative; it is not an entitlement, is not an agency-wide benefit, and it in no way changes the terms and conditions of employment with the Nebraska Department of Education.
>
> All teleworking employees must complete and sign the Telework Agreement and the agreement must be approved by the appropriate authorities prior to working at alternative worksites."

Exhibit 509.

The current Administrative Memorandum #509 regarding the Telework Policy was issued March 2024. Exhibit 510. This revision also maintained the Department's discretion regarding Telework Agreements.

> "The Department reserves the right to modify, suspend, or rescind any telework agreement whenever the Department determines that such action is necessary for its operations, or that the prescribed telework agreement conditions are being abused. A telework agreement does not create any contractual right for the employee and does not alter the employment relationship between the employee and the Department. The essential terms of that employment relationship, including the Department's ability to terminate the employment relationship, will continue to be defined by the terms of any applicable personnel rules and/or bargaining agreement."

Exhibit 510, pg 2.

Exhibit 511 contains two-thousand four hundred ninety-nine pages (2,499) of completed Telework Agreements completed by various employees. Some were completed under the 2022 version of Appendix A, Exhibit 509. Others were completed using the NDE Telework Request and Agreement updated March 2024. The March 2024 version of the NDE Telework Request and Agreement states "[t]elework is not an entitlement and in no way changes the terms and conditions of employment with the Nebraska Department of Education." The Telework Agreement Terms

further state "[t]his agreement does not alter the employment status of the employee" and "[t]his agreement is effective upon final approvals and continues until terminated by the NDE." Exhibit 511.

In response to operational needs, the Department determined that employees would generally be required to perform work at Department worksites and that remote work arrangements would be discontinued or limited. This determination was communicated to all NDE employees via email on August 22, 2023. Exhibit 1. The Department implemented this determination without bargaining with the Union.

JURISDICTION

The Commission has jurisdiction over this matter pursuant to Neb. Rev. Stat. §§ 48-824 and 48-825. The Commission is authorized to adjudicate alleged violations of the Industrial Relations Act and the State Employees Collective Bargaining Act ("SECBA"). 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.

DISCUSSION

The Petition alleges that the Department committed a prohibited practice by unilaterally discontinuing or substantially limiting remote work arrangements without first bargaining with the Union. The Department denies that it committed a prohibited practice and asserts that it acted within its retained management rights and consistent with long-standing policies and practices governing telework.

The Union bears the burden of proving by a preponderance of the evidence that the Department committed a prohibited practice. To prevail on a prohibited practice claim of unlawful unilateral action, the Union must establish that the Department changed a term or condition of

employment that was a mandatory subject of bargaining. The Union alleges that the Department's actions constituted a unilateral change to a mandatory subject of bargaining. The Department contends that no prohibited practice occurred because remote work has historically been discretionary, approval-based, and subject to termination by the Department, and because nothing in the CBA altered or restricted that discretion. 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 Employees International. Union v. Douglas County School District,* 20 CIR 35 (2019), *(citing NLRB v. Katz*, 369 U.S. 736, 745-747 (1962)). To establish a binding past practice, the practice must be regular and consistent and must create a reasonable

expectation that it will continue. 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 Association v. City of Scottsbluff*, 282 Neb. 676, 683 (2011). The Acts only require 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 Order of Police Lodge 31 v. City of York*, 309 Neb. 359, 960 N.W.2d 315 (2021).

The Nebraska Supreme Court, in *Douglas County Health Center Security Union v. Douglas County*, 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 reading the contract; 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 *Department 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).

The Commission has made it clear in its opinions that we will not allow broad and vague reservations to undermine the entire bargaining process; however, such concerns are not implicated by the facts of this case.

The Commission finds that the issue of remote work is not "covered by" the CBA. Because the agreement does not fully define the parties' rights on this issue, the Commission cannot rely on contract interpretation to resolve this dispute. However, the absence of clear contract coverage does not end the analysis. The Commission need not determine here whether remote work generally constitutes a mandatory subject of bargaining. Even assuming arguendo that it could be characterized as such, the Department's actions were consistent with its established policies and practices and the clear language of the remote work agreements. This did not constitute a change at all, let alone a unilateral change requiring bargaining. Here, the record demonstrates that, for

more than a decade, remote work within the Department has existed solely by virtue of Department approval and individual agreements, subject at all times to revocation at the Department's discretion. Employees were expressly informed, through written agreements, that telework was not a right and could be terminated at any time.

This long-standing policy and practice establishes that the Union and its covered employees could not reasonably expect remote work to continue indefinitely or to be immune from unilateral termination by the Department. If a practice is expressly discretionary and revocable, its modification or termination does not constitute a unilateral change to a mandatory subject of bargaining. Because the established practice regarding telework expressly reserved to the Department the discretion to modify, suspend, or rescind policies and practices governing telework the Department and did not create a reasonable expectation of continuation of the opportunity to telework, the Department's action did not constitute a unilateral change to an existing term or condition of employment.

Accordingly, the Union has failed to meet its burden of proving that the Department committed a prohibited practice. 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).

ORDER

IT IS THEREFORE ORDERED that the Prohibited Practices Petition is dismissed with prejudice; with each party is to pay its own costs and fees.

All Panel Commissioners join in the entry of this Order.

Entered February 23, 2026.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

/s/ *William G. Blake*

William G. Blake, Hearing Commissioner