

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA PROTECTIVE)
SERVICES UNIT, INC., d/b/a)
FRATERNAL ORDER OF POLICE)
LODGE #88,)

Petitioner,)

v.)

STATE OF NEBRASKA,)

Respondent.)

and)

THE NEBRASKA ASSOCIATION)
OF PUBLIC EMPLOYEES, LOCAL)
61 of the AMERICAN FEDERATION)
OF STATE, COUNTY AND)
MUNICIPAL EMPLOYEES)
(NAPE/AFSCME),)

Respondent.)

Case No. 1435
Rep. Case No. 526

OPINION AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

JUL 31 2017

CLERK

APPEARANCES:

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Before Commissioners Pillen, Carlson and Blake

NATURE OF THE CASE

On March 3, 2017, the Nebraska Protective Services Unit, Inc., d/b/a/ Fraternal Order of Police Lodge #88 (“Petitioner”) filed this action with the Commission, requesting that the Commission issue an order directing a combination election be held to choose whether Respondent NAPE/AFSCME should continue as the exclusive bargaining representative for the Protective Services Bargaining Unit (“Unit”). Further, if the majority of those voting chose to decertify the existing bargaining representative, that the Petitioner be certified to be the exclusive bargaining representative.

On March 17, 2017, the Commission issued the Clerk’s Report to the Commission verifying that the Petitioner provided a sufficient showing of interest for an election to be held. Respondent NAPE/AFSCME filed its Answer on March 24, 2017, in which it raised a number of defenses to the Petition. On March 28, 2017, Petitioner filed a Motion for Leave to File Discovery and Request for Hearing. Commissioner Sarah S. Pillen presided over a trial on May 25, 2017. The parties have submitted both pre-trial and post-trial briefs.

FACTS

Respondent NAPE/AFSCME is currently the exclusive bargaining representative of those members of the Protective Services Bargaining Unit established by Neb. Rev. Stat. § 81-1373(1)(f). The Unit consists of employees of the State of Nebraska that serve in the following job classifications:

- A. Corrections Officer
- B. Corrections Corporal
- C. Corrections Sergeant
- D. Corrections Unit Caseworker
- E. Developmental Disabilities Safety and Habilitation Specialist
- F. Mental Health Security Specialist I
- G. Mental Health Security Specialist II
- H. Mental Health Security Specialist III
- I. Military Security Specialist
- J. Security Communications Specialist
- K. Security Guard
- L. Youth Security Specialist I
- M. Youth Security Specialist II

At the time of the trial in this matter the Unit employees were covered by a collective bargaining agreement between the Respondent State of Nebraska and the Unit with an expiration date of June 30, 2017. (Ex. 6). Neb. Rev. Stat. §81-1379 requires that negotiations begin for a replacement agreement by the second Wednesday of September in the year preceding the expiration of an active agreement. Pursuant to Neb. Rev. Stat. §81-1379, Respondent NAPE/AFSCME and Respondent State of Nebraska began negotiations at the appointed time in September 2016 for a 2017-2019 agreement. Negotiations were completed in January 2017, and the contract was ratified by a vote of the bargaining unit and signed by representatives of both parties. There is now a fully executed contract with an effective date of July 1, 2017. (Ex. 500).

On October 21, 2016, Petitioner Nebraska Protective Services Unit, Inc. filed its Articles of Incorporation with the Nebraska Secretary of State. (Ex. 1). Nebraska Protective Services Unit, Inc. has affiliated itself with the Fraternal Order of Police (FOP) as Lodge #88. There was no evidence presented that local FOP lodges have any authority over each other. There was also no evidence presented that the State or National FOP has the authority and power to exercise control over the locals or that they are exercising such control. On the contrary, there was substantial evidence presented through the testimonies of Jim Maguire, John Francavilla, and Michael Chipman that local lodges retain their own separate identities and control their own internal business, including collective bargaining.

Petitioner decided to attempt to decertify NAPE in late August of 2016. Informational meetings were held at facilities across the state in November 2016. Those participating were instructed on the rules for collecting signatures. Collection of signatures began on December 5, 2016. (Tr. 90:6-92:19). In February 2017, Corporal Hardy conducted a security audit at the Community Correction Center in Lincoln. Richard Kahm saw Mr. Hardy hand out approximately seven or eight signature cards as employees were gathered for shift roll-call. (Tr. 22:22-29:18). There was no evidence presented that those cards were signed or returned to Mr. Hardy on the premises or during work time. There was no evidence of any other improper collection of signature cards during the Petitioner's campaign. Over a period of three months, over 25 people participated in many signature gathering events properly held by the Petitioner which resulted in 683 signatures being collected. (Tr. 97:5-99:10).

On February 10, 2017, Dawn Renee Smith, Communications Director of the Nebraska Department of Correctional Services, sent without comment, a link to an Omaha World-Herald

article. (Ex. 502). There was no evidence produced as to which employees were included in the “All” group that were allegedly sent the email. In fact, the exhibit itself shows only “From: Smith, Dawn Renee; Sent: Friday, February 10, 2017 5:05 PM; Subject: News of Interest”; there is no indication of the recipients at all. Further, testimony was given that at least in Nebraska State Penitentiary, officers and corporals are not allowed to have e-mail (Transcript pg. 100, line 1:9). It is clear from testimony that Ms. Smith may send several news articles a day that pertain to the Department. No evidence was presented regarding the criteria or process used by Ms. Smith in deciding what information to pass along and to whom that information is sent. There was no evidence that Ms. Smith, the Department of Corrections, or Respondent State of Nebraska took a position regarding the FOP’s efforts to decertify the Respondent NAPE/AFSCME.

The Petition in this matter was filed on March 3, 2017. There were approximately 1604 members of the Unit as of March 17, 2017. (Ex. 10). The Clerk verified that the Petitioner provided 683 proper signatures of members of the bargaining unit supporting the request for an election for decertification of the Respondent NAPE/AFSCME and certification of the Petitioner, i.e. 43% of the Unit.

DISCUSSION

The issue at hand is whether or not an election should be held to allow the Unit to vote whether to decertify NAPE/AFSCME as the exclusive bargaining representative for the Unit and to certify the Petitioner as the new exclusive bargaining representative for the Unit. Respondent NAPE/AFSCME asserts that the Petition in this matter should be dismissed. Respondent NAPE/AFSCME alleges that the Petitioner failed to file its Petition in a timely manner. Respondent NAPE/AFSCME alleges that the Petitioner and Respondent State of Nebraska engaged in activities that fatally tainted the process of collecting a showing of interest to support holding an election and also tainted any subsequent election. Respondent NAPE/AFSCME also alleges that the Fraternal Order of Police (FOP) should be barred from representing the Nebraska Protective Services Unit due to a conflict of interest.

Jurisdiction

“The commission shall determine questions of representation for purposes of collective bargaining for and on behalf of public employees and shall make rules and regulations for the conduct of elections to determine the exclusive collective-bargaining agent for public employees...the commission shall certify the exclusive collective-bargaining agent for employees affected by the Industrial Relations Act

following an election by secret ballot, which election shall be conducted according to rules and regulations established by the commission.”

Neb. Rev. Stat. §48-838(1)

The Commission has established rules which govern the process of conducting elections to certify an exclusive bargaining representative for a bargaining unit. Under CIR Rule 6, Rule 9 and Rule 10, a labor organization wishing to seek an election for the decertification of a bargaining representative for an established bargaining unit and for an election to be certified as the exclusive bargaining representative of the unit is entitled to such an election if it complies with two basic procedural steps: (1) it provides a showing interest from the members of the bargaining unit that is supported by 30% of the members of the bargaining unit; and (2) that it files the request for an election within the proper filing period.

Collection of Showing of Interest

Respondent alleges that Petitioner FOP and Respondent State of Nebraska engaged in activities that have fatally tainted the process of collecting a showing of interest to support holding an election and also tainted any subsequent election.

Corporal Hardy handed out only seven or eight cards at a time when bargaining unit members were on company premises either at or immediately prior to work time. There was no evidence presented that the cards were completed at that time, nor that the individuals that were improperly given cards were among the individuals who completed showing of interest cards. Further, the actions of Mr. Hardy were taken on his own and were against the training and instructions given by the Petitioner. The Commission finds there was insufficient evidence presented to find that the Petitioner, through Mr. Hardy, tainted the process of collecting the showing of interest.

The Respondent asserts that the Respondent State of Nebraska improperly supported the Petitioner’s efforts by sending an email that described the decertification in only positive terms. The email complained of by the Respondent NAPE/AFSCME included only a hyperlink to a publicly accessible Omaha World-Herald article, sent with no further comment by the Department’s Communications Director. As to the assertion that no counterpoint was ever distributed, there was no evidence presented that there was such an article published; let alone that it was not passed along to the unknown recipients of the February 10, 2016 email. The Commission finds there is insufficient evidence to support the claim that the Respondent State of Nebraska,

through its Communication Director, took a position either for or against the possible decertification of the Respondent NAPE/AFSCME.

Timeliness

Petitioner asserts that CIR Rule 9 provides two options for a party wishing to file a petition for decertification. Respondent alleges that the Petition was not filed in a timely manner. CIR Rule 9 establishes when petitions for decertification may be properly filed. CIR Rule 9(II)(C)(1) states that a petition for decertification may only be filed between the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding either;

- a. Termination of an existing agreement, contract or understanding, or
- b. Preceding commencement of a statutorily required bargaining period, whichever is earlier.

On December 29, 1999, the Commission issued a memorandum regarding rule changes. This memorandum included a “brief explanation of the reason for the change or addition”. Relevant to this proceeding is the following:

“Rules 9C and 9G have been amended to allow entities that have statutorily required bargaining periods the option to file a petition for decertification, whether it be by the employer or by an employee, employees, or a labor organization, in a time period between the 120th and 60th day preceding the commencement of that statutorily required bargaining period.”

Exhibit 2, page I

“All contracts involving state employees and negotiated pursuant to the Industrial Relations Act or the State Employees Collective Bargaining Act shall cover a two-year period coinciding with the biennial state budget, except that the first contract entered into by a bargaining unit may cover only the second fiscal year of the biennium.”

Neb. Rev. Stat. §81-1377(4)

There is dispute about both the weight and meaning of the Commission’s use of the word “option” in the above memorandum. However, the result of practical application and plain meaning of CIR Rule 9 itself does not depend on an option. The current statutorily required bargaining timelines and statutorily defined contract periods for entities under the State Employees Collective Bargaining Act result in the commencement of a statutorily required bargaining period always being earlier than the termination of the existing

contract. In effect, the phrase “whichever is earlier” leaves only one possibility for entities that have statutorily required bargaining periods.

In this case, the commencement of the statutorily required bargaining period was September 14, 2016 and the expiration of the then existing contract was June 30, 2017. Therefore the appropriate window for filing the request for election would have been between the one-hundred twentieth (120th) day and the sixtieth (60th) day preceding September 14, 2016. The next available window for Petitioner to seek an election would be between the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding the commencement of the next statutorily required bargaining period. The Commission finds that the Petitioner did not file within the appropriate window under CIR Rule 9(II)(C)(1).

Conflict of Interest

Respondent NAPE/AFSCME alleges that the Fraternal Order of Police (FOP) should be barred from representing the Nebraska Protective Services Unit due to a conflict of interest. Respondent NAPE/AFSCME asserts there would be a guard/nonguard conflict of interest, in that sworn law enforcement officers that would be called to enforce the law against Protective Services Bargaining Unit members in the event of a strike or other illegal job action would also be represented by the same union as the Protective Services employees, although they would be members of different lodges.

The Commission has previously held that employees in the Protective Services Bargaining Unit are guards. *Communication Workers of America, AFL-CIO v. Hall County, Nebraska*, 12 CIR 53 (1994). There was insufficient evidence presented by Respondent NAPE/AFSCME for the Commission to now find otherwise. Nebraska law states that *bargaining units* may not include both guard and nonguard employees, nor may unions admitting guards into membership also represent *for purposes of collective bargaining* nonguard employees. *Lincoln City Emps. Union, Nat'l Asso. of Gov't Emps. v. Lincoln*, 210 Neb. 751, 755, 317 N.W.2d 63, 66 (1982) citing *Univ. Police Officers Union, etc. v. Univ. of Neb.*, 203 Neb. 4, 277 N.W.2d 529 (1979). (Emphasis added). In the present case, the dispute is not related to the composition of the bargaining unit. Therefore, if there was guard/nonguard conflict within the Unit, it would exist currently, even while the Unit is represented by NAPE/AFSCME. Of course, that allegation was not made. Further, there was substantial evidence presented that the Nebraska Protective Services Unit, Inc.

would be conducting its own collective bargaining separate from all other local lodges, the State FOP, or the National FOP.

The Nebraska Supreme Court has held that in order for a bargaining unit's representative to be found to be improper due to its affiliation with a national or international union, there must be actual evidence that - by its affiliation with the National - the new local can exercise actual control over a different local union in a manner that prevents the law enforcement function to continue properly. See *Lincoln City Employees Union v. Lincoln*, 210 Neb. 751 (1982). There was no evidence of actual control by the other local lodges, the State FOP, or National FOP over the Petitioner or other local lodges. In fact, there was substantial evidence to the contrary. The Commission finds there is not a conflict of interest created by the Petitioner's affiliation with the Fraternal Order of Police.

ORDER

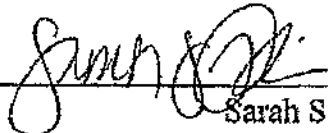
The Petitioner provided a proper and sufficient showing of interest for an election to be held. However, the Petition was filed outside of the proper window and therefore an election will not be held.

IT IS THEREFORE ORDERED that Petition in this matter is dismissed.

All Panel Commissioners join in the entry of this Order.

Entered July 31, 2017.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Sarah S. Pillen, Commissioner