



Motion for an Extension of Briefing Deadline. The motion was granted, and reply briefs were filed by July 7, 2014. The case was then deemed submitted.

## **FACTS**

On August 8, 2013, the Commission entered an order certifying Petitioner as the exclusive bargaining agent for the bargaining unit at issue in this case, and decertifying the United Food and Commercial Workers Local 293 (“UFCW”) as the exclusive bargaining agent for the same group. The collective bargaining agreement (“CBA”) between the UFCW and Respondent expired June 30, 2013, and union dues continued to be deducted from employee paychecks. Article 34 of the expired CBA contains a provision allowing for cancellation of union dues checkoff:

“Section 2 Cancellation:

Union dues deduction may be cancelled by an employee pursuant to the Union’s cancellation policy. Cancellations received by the Employer shall be effective with the next payroll period.” (Ex. 1).

On August 6, 2013, the UFCW President sent notification to Respondent to request that Respondent stop withholding union dues from all bargaining unit members’ pay checks effective through the week of August 3, 2013. Respondent complied with the request shortly thereafter.

After the Commission’s certification order was entered on August 8, 2013, Petitioner met with the Hall County Clerk in order to determine what needed to be done to establish dues checkoff for the new union. New union dues checkoff forms were signed and given to the Hall County Clerk on September 9, 2013. At the same time the Hall County Corrections Director sent Petitioner an email regarding the dues checkoff requests given to the Hall County Clerk, and informed Petitioner that he was seeking an attorney’s opinion because he was unsure that the parties were “to the stage of automatic withdrawal for dues.” (Ex. 3). On September 10, 2013, the Hall County Clerk returned all of the union dues checkoff forms to Petitioner, informing him that she had been instructed to not make any changes until negotiations for a contract between Respondent and Petitioner were complete. Petitioner met with the Hall County Corrections Director on September 16, 2013 to discuss the discontinuation of union dues checkoff.

On September 19, 2013, the Hall County Corrections Director sent an email to Petitioner stating that it was the opinion of the Hall County Attorney that the union dues checkoff

authorization from Respondent's previous contract with the UFCW did not survive the expiration of that agreement and decertification of that union. The Hall County Corrections Director also suggested that the parties meet to discuss possible dates for negotiations. (Ex. 7). Petitioner's Chief Negotiator contacted Respondent on November 19, 2013 to arrange a meeting to establish negotiations ground rules, and negotiations began between the parties in January 2014.

On March 4, 2014, Petitioner sent a letter to Respondent requesting that Respondent bargain with Petitioner regarding union dues checkoff and reinstate union dues checkoff for bargaining unit members during the negotiation period. (Ex. 8). Petitioner filed this prohibited practice action on March 7, 2014, alleging that Respondent violated NEB. REV. STAT. §§ 48-824(1) and (2)(e) when it eliminated union dues checkoff for the bargaining unit.

## **DISCUSSION**

NEB. REV. STAT. §48-824(1) states that it is a prohibited practice for any public employer to refuse to negotiate in good faith with respect to mandatory subjects of bargaining. Section 48-824(2)(e) also states that it is a prohibited practice for a public employer to refuse to negotiate with collective bargaining agents as required by the Industrial Relations Act (the "IRA" or "Act"). The Nebraska Supreme Court has declared that "decisions under the National Labor Relations Act ("NLRA") are helpful but not controlling" upon the Commission where statutory provisions are similar. *City of Grand Island v. AFSCME*, 186 Neb. 711 (1971). NEB. REV. STAT. §48-824(1) and NLRA §8(a)(5) have been held to be sufficiently similar for purposes of seeking guidance in interpreting the scope and application of our statutes. *See Omaha Police Union Local 101 v. City of Omaha*, 16 CIR 374 (2009).

There are three categories of collective bargaining subjects: mandatory, permissive and prohibited. Mandatory subjects are those which relate to "wages, hours and other terms and conditions of employment, or any question arising thereunder." NEB. REV. STAT. §48-816(1)(a). It is a per se violation of the Act for an employer to make unilateral changes to mandatory subjects of bargaining before impasse. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). When a CBA expires, NLRA §8(a)(5) obligates the employer, absent a clear and unmistakable waiver from the Union, to continue the terms and conditions of employment contained in the CBA that are mandatory subjects of bargaining until the parties either negotiate a new agreement or bargain to lawful impasse. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198-199 (1991).

The Commission is aware of the 50-year NLRB precedent under *Bethlehem Steel*, 136 N.L.R.B. 1500 (1962), *remanded on other grounds sub. nom. Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), which created an exception to the *Katz* doctrine for union dues checkoff. We also take note of Petitioner's Notice of Precedent filed June 27, 2014 regarding the recent United States Supreme Court decision in *NLRB v. Noel Canning et al.*, 2014 WL 2882090 (2014) and its potential effect on the NLRB's decision in *WKYC-TV, Inc.* 359 N.L.R.B. No. 30 (2012), which overruled *Bethlehem Steel*. Due to the uncertainty surrounding this issue on the federal level, we shall look to our own case law.

The Commission has not treated union dues checkoff differently than any other mandatory subject despite the existence of *Bethlehem Steel*. In *Fraternal Order of Police, Lodge 41 v. County of Scotts Bluff*, 13 CIR 270 (2000), the newly recognized union and the county were negotiating for a new contract and were working under an expired agreement with another union. The union dues checkoff was not eliminated until after the County board declared impasse and implemented what they considered their final offer to the union almost a year after negotiations began. The Commission found that the County had committed a prohibited practice because the parties were not at impasse before the proposal was implemented. The Commission chose to treat union dues checkoff as it does any other mandatory subject of bargaining, and we shall do the same here.

The evidence shows that the parties continued under the expired contract with the old union and did not begin bargaining for a new contract until January 2014. Respondent had ceased union dues checkoff in August 2013, well before any bargaining or possibility of reaching impasse with Petitioner. Therefore, we find that Respondent committed a prohibited practice when it ceased union dues checkoff for bargaining unit employees without first bargaining to impasse.

The fact that the unilateral change to the union dues checkoff provision occurred after an election involving two competing unions but before certification of election results does not change our view of the status quo. The NLRB has held that election results are not effective until certification, and parties maintain the status quo until the representation question is conclusively resolved, even if the election is for decertification or involves more than one union. *W.A. Krueger Co.*, 299 N.L.R.B. No. 141 (1990). If a challenging union is certified, the employer must abide by the existing terms and conditions of employment until either a new agreement is

reached or the parties reach lawful impasse. *See More Truck Lines, Inc.*, 336 N.L.R.B. 772, 773 (2001), *enfd.* 324 F.3d 735 (D.C.Cir. 2003).

The status quo in the present case was that union dues checkoff was in effect for bargaining unit employees. Respondent was obligated to maintain all existing terms and conditions of employment, which in our view included union dues checkoff in addition to all other mandatory subjects of bargaining contained in Respondent's expired collective bargaining agreement with UFCW. Respondent violated the status quo by eliminating union dues checkoff for bargaining unit employees without negotiation, and we therefore find that Respondent committed a per se violation of the Industrial Relations Act.

### **REMEDIAL AUTHORITY**

In its Petition, Petitioner requests that the Commission find that Respondent cease and desist from enforcing the elimination of union dues checkoff; return Petitioner to the status quo and reinstate union dues checkoff; award Petitioner costs incurred including, but not limited to, attorney fees; and any such other relief deemed just. During trial, Petitioner offered testimony to support a request for \$500.00 to make Petitioner whole for lost union dues following the discontinuance of union dues checkoff.

The Commission has the authority to order an appropriate remedy which will promote public policy, adequately provide relief to the injured party, and lead to the resolution of the industrial dispute. *See International Union of Operating Engineers, Local 571 v. City of Plattsmouth*, 14 CIR 89 (2002), *aff'd* 265 Neb. 817 (2003). We therefore order Respondent to cease and desist from engaging in its prohibited practice and return the parties to the status quo. We will not issue a bargaining order, as the parties were already engaged in negotiations regarding union dues checkoff during the commencement of trial. Finally, we shall also not order reimbursement of any union dues amounts not received by Petitioner.

Commission Rule 42(B)(2)(a) states that attorney fees may be awarded as an appropriate remedy when the Commission finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. We do not find that Respondent's actions meet the standard. The Commission is cognizant of our past decisions involving Hall County and our ordering of attorney fees for their egregious conduct. *See United Food and Commercial Workers District Local 22 v. County of Hall (Hall County I)*, 15 CIR 55 (2005), and *United Food and Commercial*

*Workers District Local 22 v. County of Hall (Hall County II)*, 15 CIR 167 (2006). However, some time has passed since *Hall County I* and *Hall County II* were decided. There may be inconsistencies in why Respondent made its decision to cease union dues checkoff, the evidence shows that both parties expressed their desires to bargain and were bargaining about union dues checkoff at the time that this matter was heard at trial. Respondent's actions in the present case do not rise to the level as those actions which prompted our award in *Hall County II*. Therefore, Petitioner's request for attorney fees is denied.

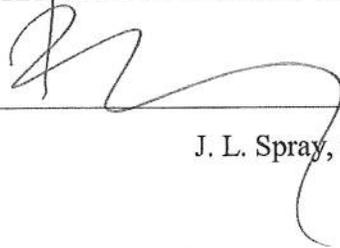
IT IS THEREFORE ORDERED that:

1. Respondent shall cease and desist from discontinuing union dues checkoff provisions for bargaining unit employees.

All panel Commissioners join in the entry of this Order.

Entered November 5, 2014.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



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J. L. Spray, Commissioner