

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF POLICE)
LODGE #51,)
)
Petitioner,)
)
v.)
CITY OF ALLIANCE, NEBRASKA, a)
Political Subdivision of the State of)
Nebraska,)
)
Respondent.)

Case No. 1369
Representation Docket 490

FINDINGS AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

MAR 12 2015

CLERK

APPEARANCES:

For Petitioner

Gary L. Young
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For Respondent

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Before Commissioners Lindahl, Spray and Partsch

NATURE OF THE CASE

On May 7, 2014, a Petition was filed by the Fraternal Order of Police Lodge #51 (“Union” or “Petitioner”) seeking an election for certification as the exclusive bargaining agent for the following employees of the City of Alliance (“City” or “Respondent”): Sergeant, Police Officer II, Police Officer I, Dispatch Supervisor, Senior Dispatcher, and Dispatcher. On May 21, 2014 the Commission determined that Petitioner made the sufficient showing of interest as required by Commission Rule 10.

Respondent filed its Answer June 2, 2014, stating that the Petition failed to comply with Commission Rule 6(A)(1) and (3). Additionally, Respondent asserted that the employees cannot be represented by Petitioner due to lack of community of interest, the prohibition against guards and non-guards represented in the same bargaining unit, and that the Dispatch Supervisor should

not be placed in the bargaining unit because she is a supervisor as defined by NEB. REV. STAT. § 48-801(14) (2012 Cum. Supp.). Finally, Respondent argued that the Petition is barred by virtue of an existing collective bargaining agreement (“CBA”) for two separate groups, and that the Commission lacks subject matter jurisdiction to alter the two existing CBAs.

On June 5, 2014, Petitioner filed a Motion to Amend its Petition, which was granted by the Commission on June 11, 2014. Petitioner filed an Amended Petition on June 16, 2014, which corrected the Rule 6(A)(1) and (3) deficiencies. On June 23, 2014 the Commission determined that the Petitioner met its Rule 10 showing of interest. Respondent filed its Amended Answer on June 30, 2014, re-asserting the affirmative defenses of lack of community of interest, the guard/non-guard prohibition, that the Dispatch Supervisor is a statutory supervisor, and the Petition is barred due to the two separate CBAs.

A trial was held on November 24, 2014 to determine whether 1) the above-mentioned job classifications share a sufficient community of interest to be included in the same bargaining unit; 2) whether the Dispatch Supervisor is a supervisor and should be excluded from the unit; and 3) whether the Sergeant, Police Officer I, and Police Officer II should be in a separate bargaining unit from Dispatchers due to the Guard/Non-Guard Rule. Respondent also raised two additional issues: 1) whether the Commission lacks subject matter jurisdiction to alter two existing collective bargaining agreements by combining employees already covered by those agreements, and 2) whether Petitioner failed to state a claim upon which relief can be granted by failing to comply fully with CIR Rule 6(A)(1).

FACTS

Petitioner has been the recognized bargaining agent for these job classifications for at least ten years. Petitioner and Respondent have operated with two separate contracts and names for the employees in question: the Alliance Police Officers Association Fraternal Order of Police Lodge 51A contract covers the job classifications of Sergeant, Police Officer I, and Police Officer II, while the Alliance Communications Officers Association Fraternal Order of Police Lodge 51B contract covers the Dispatch Supervisor, Senior Dispatcher, and Dispatcher positions. Despite the two contractual names, both CBAs are negotiated by Petitioner and the employees are all part of the Fraternal Order of Police Lodge 51.

The Police Officer I is the entry-level officer position and Police Officer II is the next higher step position. Police Officers I and II work as patrol officers, responding to emergency calls, interrogating witnesses and suspects, making arrests, and assisting citizens. Police Officers I and II prepare reports, conduct investigations, obtain evidence and prepare cases for filing of charges. Additionally, a Police Officer II may serve as a shift supervisor in the Sergeant's absence, a Field Training Officer, a School Resource Officer, Investigator, or a K-9 Officer.

The Police Sergeant serves as the shift supervisor for the sworn officers and other assigned staff, and supervises the scheduling and coordination of small shift changes. The Sergeant reviews police reports and evaluates arrests to determine whether a subject should be detained or placed in jail. Sergeants also work as patrol officers, responding to emergency calls, interrogating witnesses and suspects, making arrests, assisting citizens, and preparing reports. The Sergeant reports to the Police Lieutenant.

The Dispatcher and Senior Dispatcher monitor and answer telephones and radios in the dispatch center, gather information to transmit or relay to the necessary personnel, and dispatch police and other response vehicles for emergency responses. Dispatchers also maintain the radio and telephone communications log, prepare reports and correspondence, and assist in training new employees. The Dispatcher and Senior Dispatcher also assist the dispatchers in the neighboring Box Butte County Sheriff's office as needed. The Senior Dispatcher may serve as the supervisor in the Dispatch Supervisor's absence.

The Dispatch Supervisor performs the same daily duties as the Dispatcher and Senior Dispatcher and creates the dispatcher schedule, which is then given to the Police Lieutenant. The Dispatch Supervisor completes evaluations of a dispatcher's work performance using the forms and parameters created by the City's personnel department. The Dispatch Supervisor, along with other training officers, conducts on-the-job training for new hires. The Dispatch Supervisor is listed as the employee that maintains records for the F.B.I. Audit, Nebraska State Patrol Teletype Audits, NIBRS reporting system, Annual Report statistics, Alarm statistics, State Accident report statistics, Cash Register receipt reporting, 911 call reporting and Positron Database maintenance records; however, the Dispatch Supervisor testified that these reporting duties can and have been done by Dispatchers or the Senior Dispatcher. Although the position description for this position shows that the Dispatch Supervisor "works under the close supervision of the Chief of Police,"

during trial it was determined that in reality the Dispatch Supervisor reports to the Police Lieutenant.

DISCUSSION

Jurisdiction

Respondent raised two jurisdictional questions that the Commission must address. First, Respondent argues that the Commission lacks subject matter jurisdiction to alter existing bargaining agreements by combining employees covered by two separate agreements. Second, Respondent argues that Petitioner failed to comply with CIR Rule 6(A)(1) and thus fails to state a claim upon which relief can be granted.

Subject Matter Jurisdiction

NEB. REV. STAT. § 48-838(1) grants the Commission the authority to determine questions of representation on behalf of public employees and to certify the exclusive bargaining agent following a secret ballot election governed by the rules of the CIR. Under CIR Rule 6(A), a party may file a petition seeking an election and certification of a labor organization as the exclusive bargaining agent for an appropriate bargaining unit or to request a determination by the Commission of the appropriate bargaining unit. CIR Rules 10 and 11 further detail requirements that a petition include at least a thirty percent (30%) showing of interest to hold an election and the Commission procedures for said elections.

Despite the Commission's authority to promulgate rules regarding representation petitions, the Commission does not have jurisdiction to interpret and apply terms and conditions of a collective bargaining agreement. *International Brotherhood of Electrical Workers Local 1483 v. Omaha Public Power District*, 16 CIR 514 (2011). In *Transport Workers of America v. Transport Authority of the City of Omaha*, the Nebraska Supreme Court stated that:

“The CIR performs an important and vital function in resolving impasses in the public sector. It is not, however, a substitute for the District Court with regard to existing and agreed terms, tenure, and conditions of employment. It has not been made a court by the Legislature. The proper forum to resolve this dispute is the courts.”

205 Neb. 26, 35 (Neb. 1979).

In support of its argument, Respondent cites *Lincoln Firefighters Ass'n, Local 644 v. City of Lincoln*, 19 CIR __ (September 13, 2013), which held that the Commission did not have jurisdiction to exclude the Fire Equipment Mechanic, a job classification that was covered by the bargaining agreement, from the proposed bargaining unit because it would result in altering an existing collective bargaining agreement. However, *Lincoln Firefighters* is distinguishable from the present case. In *Lincoln Firefighters*, the parties had negotiated the composition of the bargaining unit, ceased contract negotiations prior to the filing of the Petition seeking to amend the bargaining unit, and ratified the contract before the filing of the Counter-Petition which sought to exclude the Fire Equipment Mechanic from the bargaining unit. *Id.* In the present case, the parties have not engaged in any negotiations. Both CBA 51A and 51B were set to expire on September 30, 2014. The termination clause in both Agreements clearly state that the contract would automatically renew every year unless either party provides the other written notification that it wished to terminate or modify the Agreement no later than 180 days before the contract expired. The evidence shows that the Union first notified the City in writing on February 26, 2014 of its wish to modify the two CBAs by combining the Agreements into one, well before the 180-day notification deadline. The Union reiterated this request several times before the 180-day deadline passed, and the City did not agree with the Union's request to recognize the two groups of employees as one bargaining group. The Commission has held previously that a change to the composition of a bargaining unit is a permissive subject of bargaining, whether the bargaining unit has been certified or voluntarily recognized. *Fraternal Order of Police, Lodge 41 v. County of Scotts Bluff*, 13 CIR 270 (2000). Without the City's agreement to the scope of the bargaining unit, the Union was left with the option of filing a petition with the Commission.

In *Sidney Educators' Ass'n v. Sidney Public Schools*, 5 CIR 408 (1982), an incumbent recognized union that was the bargaining representative for certificated teachers in the school district filed a petition seeking an election to become certified as the exclusive bargaining agent for those same employees. The school district objected, arguing that the petition was barred by virtue of an existing collective bargaining agreement between the parties. Adopting the National Labor Relations Board doctrine established in *General Box Co.*, 82 N.L.R.B. 678 (1949), the Commission held that a labor organization which is a party to a contract with the employer is not precluded from seeking certification as the representative of employees during the term of that agreement. *Sidney Educators' Ass'n*, 5 CIR at 414-416.

In the instant case, the employees have been separated into two groups under CBAs 51A and 51B but Petitioner has been the union recognized by Respondent to bargain for both groups of employees. Under the *General Box* Rule, Petitioner as the incumbent recognized union is not precluded from seeking a certification election and with it invoking the jurisdiction of the Commission under § 48-838(1). We therefore find that the existence of a collective bargaining agreement between Petitioner and Respondent does not preclude Petitioner from seeking a certification election pursuant to CIR Rule 6(A).

Failure to State a Claim

Respondent argues that Petitioner failed to comply with CIR Rule 6(A)(1) and thus fails to state a claim upon which relief can be granted. CIR Rule 6(A)(1) states in relevant part that petitions for an election and certification of a labor organization shall indicate which job classifications are sought to be excluded from the bargaining unit. In paragraph 10 of its Amended Petition, Petitioner lists the job classifications to be included in the bargaining unit and that it was “not aware of any job classifications that it desires to be excluded from the unit.”

Although the Amended Petition did not specifically exclude any job classifications when describing the proposed unit, such as the Police Chief or Lieutenant, the bargaining unit description plainly stated which job classifications Petitioner was seeking to include. It stands to reason that if a job classification was not among those listed in paragraph 10 of the Amended Petition, then that job classification is excluded. We therefore find that Petitioner has complied with CIR Rule 6(A)(1).

Community of Interest

A community of interest must exist within a group of employees in a collective bargaining unit. *American Association of University Professors v. Board of Regents*, 198 Neb. 243 (Neb. 1977). The following factors should be considered when determining whether a community of interest exists: mutuality of wages, hours, and working conditions; the duties and skills of employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units. *Id.* These factors are not the only factors to be considered, and equal weight need not be given to

each factor. *Sheldon Station Employees Association v. Nebraska Public Power District*, 202 Neb. 391 (Neb. 1979).

NEB. REV. STAT. § 48-816(3)(b) creates a presumption of a community of interest for all firefighters and police officers in a position or classification subordinate to the chief of the department and his or her immediate assistant or assistants holding authority subordinate only to the chief, allowing these classifications to be placed in a single bargaining unit. No evidence was presented at trial to suggest that there is much argument regarding the community of interest shared between the Police Sergeant, Police Officer I, and Police Officer II. Based upon this statutory presumption, the job classifications of Police Sergeant, Police Officer I and Police Officer II shall be presumed to share a community of interest.

The real issue is whether the classifications of Dispatcher, Senior Dispatcher, and Dispatch Supervisor share a strong enough community of interest with the sworn officers to warrant their inclusion in the same bargaining unit. The evidence presented supports a finding of a community of interest between the Police Sergeant, Police Officer I, Police Officer II, Dispatcher, Senior Dispatcher, and the Dispatch Supervisor. These positions are paid an hourly rate, work 12 hour shifts, and work out of the same building, the Law Enforcement Center. The employees may be operating under two separate contracts, but many of the contractual provisions and policies are the same. As to the extent of union organization, the sworn officers and dispatchers have all been represented by Petitioner for several years, and both officers and dispatchers hold leadership positions within the Union, have voting rights, and hold Union meetings as one group.

There are obvious differences in job duties and skills between the sworn officers and dispatchers, and the sworn officers in Alliance are subject to civil service laws which do not apply to dispatchers. There is some interchange between officers and dispatchers, as some officers are trained to work as dispatchers and are currently doing so due to a shortage of dispatch employees. However, dispatchers cannot interchange with officers unless they are themselves sworn officers. These differences do not overcome the community of interest shared between the officers and dispatchers and the policy against undue fragmentation of bargaining units. Any unit less than departmental size is generally not favored under the Industrial Relations Act. See *International Brotherhood of Electrical Workers Local Union No. 2025 v. Nebraska Public Power District*, 14 CIR 150 (2003). The public policy considerations of NEB. REV. STAT.

§48-802(1) requires the Commission to ensure the continuous operation of government services. Fragmented units interfere with that public policy and should therefore be avoided whenever possible. *International Brotherhood of Electrical Workers v. State of Nebraska: Nebraska Educational Television Commission, and the Board of Regents of the Univ. of Neb.*, 3 CIR 23 (1975). We therefore find that the proposed bargaining unit employees share a sufficient community of interest to warrant inclusion in the same bargaining unit.

Supervisors

The next issue for determination is whether the Dispatch Supervisor is a supervisor and should therefore be excluded from the proposed bargaining unit. Although we have determined that a community of interest exists between the sworn officers and dispatchers to warrant their inclusion in one bargaining unit, NEB. REV. STAT. § 48-816(3)(a) provides that a supervisor shall not be included in a single bargaining unit with any other public employee who is not a supervisor. Section 48-801(14) states that:

“Supervisor means any public employee having authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, regard, or discipline other public employees, or responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with such action the exercise of such authority is not a merely routine or clerical nature but requires the use of independent judgment.”

To be classified as a supervisor, an employee needs to possess only one of the enumerated supervisory powers, but must do so in the exercise of independent judgment. See *Fraternal Order of Police Lodge 48 v. County of Saunders*, 13 CIR 352 (2001). However, it is important to distinguish between truly supervisory personnel, who are vested with genuine management prerogatives, and employees such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees” who are entitled to join collective bargaining units despite performing those minor supervisory duties. See *Neligh Ass’n Group v. City of Neligh*, 13 CIR 305 (2000)(quoting *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). The status of a supervisor is determined by an individual’s duties, not by title or job classification, and that employee must exert the power to act as an agent of the employer and exercise independent judgment in some way. *International Brotherhood of Electrical Workers Local Union No. 1597 v. Howard County*, 16 CIR 382 (2009). Supervisors are excluded from units with those who they

supervise in order to minimize potential conflicts of interest. See *Nebraska Ass'n of Pub. Employees v. Nebraska Game & Parks Comm'n*, 197 Neb. 178 (1976).

In the present case, the Dispatch Supervisor is responsible for scheduling shifts for herself and the other Dispatchers, training new Dispatchers, and performing some supervisory functions. However, any supervisory functions that the Dispatch Supervisor may perform do not rise to the level of ultimate authority over the other Dispatchers. The Dispatch Supervisor does not use her independent judgment to hire, fire, transfer, promote, suspend, lay off, recall, discharge, assign, regard or discipline other employees, adjust grievances or to effectively recommend such actions. Although she may have the authority to send an employee who is being disruptive on the job home, this does not amount to having the ultimate authority to continue or cease that employee's employment with the City. According to the Police Chief, any recommendation that the Dispatch Supervisor may give in regards to an employee receiving a letter of reprimand, whether to retain or not to retain a trainee, or whether to hire or not hire a candidate is considered an opinion and is not effective. Training new hires is not exclusive to the Dispatch Supervisor, and could be conducted by any officer or dispatcher that is a training officer. As the Commission stated in *Fraternal Order of Police Lodge #15 v. City of Norfolk and Norfolk Police Division*, 8 CIR 287 (1986), "the positions in question do not exercise ultimate authority over the fate of their subordinates. The power to hire, fire, layoff and promote lies exclusively within the hands of upper management." The Dispatch Supervisor does not exercise sufficient independent judgment to be considered a statutory supervisor under § 48-816(3)(a). We therefore find that the Dispatch Supervisor is not a supervisor and may be included in the bargaining unit.

Guard/Non-Guard Prohibition

The next issue for determination is whether the guard/non-guard prohibition prevents the sworn officers and dispatchers from being represented by the same bargaining unit. Respondent argues that the guard/non-guard prohibition applies due to the inherent conflict of interest recognized in *Fraternal Order of Police, Lodge 41 v. County of Scotts Bluff*, 13 CIR 236 (1999). Petitioner argues that the guard/non-guard prohibition does not apply where police and dispatchers are fully integrated into the work of law enforcement.

This Commission has held in several cases that guard and non-guard employees can neither be in the same bargaining unit nor be represented by the same union. See *Fraternal Order of Police, Lodge 41 v. County of Scotts Bluff*, 13 CIR 236 (1999); *Nebraska Association of Public Employees v. County of Richardson*, 12 CIR 100 (1994). A guard under this rule is defined as “any person employed...to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premise.” *County of Scotts Bluff*, 13 CIR at 238. Using the National Labor Relations Board as guidance, the Commission has stated that the reason for the guard/non-guard prohibition is “to insure to an employer that during strikes or labor unrest among his other employees, he would have a core of plant protection employees who could enforce the employer’s rules for protection of his property and persons thereon without being confronted with a division of loyalty between the Employer and dissatisfied union members.” *Communication Workers of America v. Hall County*, 12 CIR 53 (1994)(quoting *McDonnell Aircraft Corp.*, 109 NLRB No. 147 (1954)).

We have placed officers and dispatchers in a single bargaining unit in the past. See *Fraternal Order of Police Lodge 48 v. County of Saunders*, 13 CIR 352 (2001); *Fraternal Order of Police Lodge 45A v. City of Beatrice*, 13 CIR 295 (1999). In *City of Beatrice*, the Commission held that the lead dispatcher, public safety dispatcher, and community service officers were an integral part of Beatrice’s law enforcement team and could lawfully be part of the bargaining unit with the police sergeant and police officer. The Commission reasoned that although these positions were not sworn law enforcement officers, they were “essential links” to the law enforcement team’s efforts to safeguard its employees and the public and enforce its rules, laws, and ordinances. 13 CIR at 304.

In the present case, the Dispatcher Supervisor, Senior Dispatcher and Dispatcher are in constant contact and interaction with the Sergeant, Police Officer II and Police Officer I. Dispatchers are the life line for the officers, tracking officer’s whereabouts and dispatching backup for an officer in need. Testimony during trial made clear the importance of dispatchers to the officers in the field. Dispatchers must know the officers’ policies, procedures, reporting requirements, and code in order to effectively do their job. Dispatchers monitor and secure the doors leading in and out of the police station and can lock down the doors if an incident should occur. Dispatchers may also detain arrestees if an officer is temporarily disposed and watch over detainees using restrooms to collect urine samples for drug and alcohol testing. The evidence

presented strongly supports Petitioner's contention that the Dispatcher, Senior Dispatcher, and the Dispatch Supervisor are integral to the law enforcement team in Alliance.

CONCLUSION

We therefore find that an appropriate bargaining unit shall consist of all employees of the City of Alliance in the classifications of Sergeant, Patrol Officer II, Patrol Officer I, Dispatch Supervisor, Senior Dispatcher, and Dispatcher. It is therefore ordered that a secret ballot election shall be conducted within a reasonable time from the date of this Order within the above described unit.

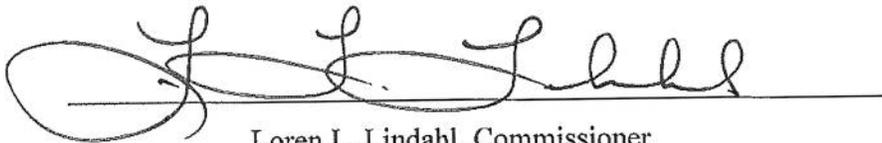
IT IS THEREFORE ORDERED that:

1. The appropriate bargaining unit shall be all employees of the City of Alliance, Nebraska in the classification of Sergeant, Patrol Officer II, Patrol Officer I, Dispatch Supervisor, Senior Dispatcher and Dispatcher.
2. A secret ballot election shall be conducted within a reasonable time from the date of this Order within the bargaining unit ordered above.

All Panel Commissioners join in the entry of this Order.

Entered March 12, 2015.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

A handwritten signature in cursive script, appearing to read "Loren L. Lindahl", is written over a horizontal line.

Loren L. Lindahl, Commissioner