

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF POLICE,)
LODGE #45B)
Petitioner,)
v.)
GAGE COUNTY, NEBRASKA,)
Respondent.)
and)
SHERIFF OF GAGE COUNTY,)
NEBRASKA,)
Respondent,)
and)
GAGE COUNTY BOARD OF)
SUPERVISORS,)
Respondent.)

Case No. 1385

FINDINGS AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

MAY 28 2015

CLERK

APPEARANCES

For Petitioner

Thomas P. McCarty
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530 South 13th Street
Lincoln, NE 68508

For Respondent

Jerry L. Pigsley
Woods & Aitken LLP
301 South 13th Street
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Before Commissioners Lindahl, Carlson and Partsch

NATURE OF THE CASE:

On December 12, 2014, the Fraternal Order of Police Lodge #45B (“Union” or “Petitioner”) filed this action with the Commission, alleging that the Sheriff of Gage County, the Gage County Board of Supervisors and Gage County (“Sheriff,” “Board,” and “County,” together “Respondents”) committed a prohibited practice by unilaterally eliminating a policy of furnishing county patrol vehicles for employee take-home use. In their Answer, Respondents contend that the take-home vehicle policy is management prerogative, the current collective

bargaining agreement does not provide for take-home vehicles, and the current collective bargaining agreement contains a zipper clause which waives the parties' bargaining rights.

FACTS:

Gage County has provided county patrol vehicles for employee's take-home use since at least 2007. According to testimony, take-home vehicles are patrol cars that employees can take home at the end of a shift and then use to drive back to work the next day. The County is responsible for the cost of gasoline, maintenance, and insurance for the vehicles. The collective bargaining agreement ("CBA") in effect July 1, 2013 through June 30, 2017 does not include a provision regarding this take-home vehicle policy.

In November 2014, the Sheriff and Chief Deputy Sheriff met and decided to eliminate the policy of allowing Deputies and Investigators to take patrol cars home effective December 15, 2014. The Union President was informed of the decision. On December 2, 2014, an email was distributed to employees regarding the elimination of the take-home vehicle policy. Subsequent to the email, the Union held a meeting and passed a vote to demand negotiations on the elimination of the policy. On December 4, 2014, the Board and the Sheriff were each given a written demand to bargain from Union representatives. On December 10, 2014, the Board in its meeting discussed the Union's bargaining demand letter. The Board voted unanimously to disapprove reopening the collective bargaining agreement ("CBA") and entering into negotiations.

DISCUSSION:

The issue before the Commission is whether Respondents' elimination of take-home vehicles is a mandatory subject of bargaining.

There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Mandatory subjects 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 "vitaly affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). The Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1)(a).

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). In order to establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Education Ass'n* set forth the following test:

“A matter which is of fundamental, basic, or essential concern to an employee’s financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.”

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (Neb. 1979).

A topic can be established as a bargainable subject if it has been a past practice between the parties. “An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union.” *NLRB v. Katz*, 369 U.S. 736, 745-747 (1962). To establish past practice, the practice must have occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 N.L.R.B. 349, 353 (2003), *enfd.* Mem. 112 Fed.Appx. 65 (D.C. Cir. 2004). Once a topic has been found to be a mandatory subject of bargaining, the burden of proving a waiver falls on the party asserting the waiver.

In *Local Union 571 International Union of Operating Engineers v. County of Douglas*, 15 CIR 75 (2005), the Commission held that the practice of providing take-home vehicles is a mandatory subject of bargaining. See also *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292 (2007). As in *County of Douglas* and *City of Omaha*, the ability for Deputies and Investigators to drive a county vehicle to and from work is an economic benefit, especially for those employees who do not live in Beatrice where the Sheriff’s office is located. Exhibit 5 details the yearly total expense for each employee based upon round trip mileage at \$.575 per

mile, which for some employees could be a substantial added expense to the upkeep of their personal vehicles should take-home vehicles no longer be available.

In *County of Douglas* and *City of Omaha*, this benefit was not established as a result of bargaining. However, once clearly established, this benefit was found to be a mandatory subject of bargaining of which neither Douglas County or the City of Omaha could change without any notice to the union or bargaining. Such is the case in Gage County as well. Testimony during trial established that neither party submitted proposals or initiated discussions regarding the take-home vehicle policy during negotiations for the current CBA, but the practice continued after the CBA went into effect.

Respondent argues that eliminating the policy in the present case is a management prerogative due to the inclusion of CBA Article 31, Waiver of Bargaining Rights, and Article 3, Management Rights, which give the County the right to control the use of “office property.” However, there was testimony which stated that no changes were made to either Articles 3 or 31, as the majority of the CBA was carried over from the previous CBAs. The take-home vehicle policy has been in place since at least 2007, and those same Articles were in place granting Respondents the right to control the use of “office property.” As the Commission stated in *City of Omaha*:

“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).

Petitioner has clearly established that the benefit of providing take-home vehicles to certain employees of the Gage County Sheriff’s Office has a significant economic impact on the employees that receive the benefit. We therefore find that the practice of providing take-home patrol vehicles was a mandatory subject of bargaining, and Respondents committed a prohibited practice when the practice was unilaterally eliminated without bargaining with the Union.

Remedial Authority

The Commission has the authority to issue cease and desist orders following findings of prohibited practices and has done so in the past. See *Local Union 571 International Union of Operating Engineers v. County of Douglas*, 15 CIR 75 (2005); *Ewing Education Ass'n v. Holt County School District No. 29*, 12 CIR 242 (1996)(en banc). Ordering Respondents in the instant case to cease and desist from committing the prohibited practice is appropriate. In order to preserve the status quo as it existed prior to the prohibited practice, the Respondents should be ordered to cease and desist from its unilateral change to its take-home vehicle policy for employees of the Gage County Sheriff's Department. Further, the Respondents should cease and desist from implementing changes to this policy without submitting the matter to the Petitioner as part of the collective bargaining process.

Attorney Fees

Not every prohibited practice will result in an award of attorney fees. To support an award of fees, under CIR Rule 42(b)(2a), it must be found that the party in violation has undertaken a pattern of repetitive, egregious, or willful prohibitive practice. We find that the Respondents' actions do not meet that standard. Petitioner's request for attorney fees is denied.

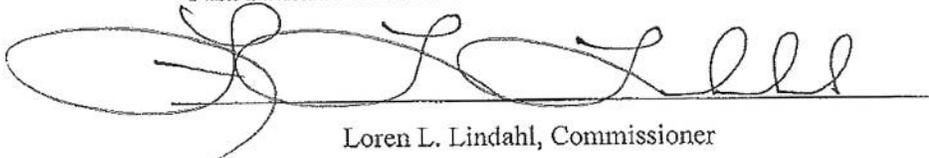
IT IS THEREFORE ORDERED that:

1. Respondent shall cease and desist from enforcing any implementation of changes in the furnishing of county patrol vehicles as take-home vehicles for employees of the Gage County Sheriff's Department.
2. Respondent shall cease and desist from implementing changes to its take-home vehicle policy without submitting the matters to the Petitioner as part of the collective bargaining process.

All panel Commissioners join in the entry of this Order.

Entered May 28, 2015.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Loren L. Lindahl, Commissioner