

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF POLICE, )  
LODGE #26, )  
Petitioner )  
v. )  
LINCOLN COUNTY, NEBRASKA, )  
Respondent, )  
SHERIFF OF LINCOLN COUNTY, )  
NEBRASKA, )  
Respondent, )  
LINCOLN COUNTY BOARD OF )  
COMMISSIONERS, )  
Respondent. )

Case No. 1388

**FINDINGS AND ORDER**

NEBRASKA COMMISSION  
OF INDUSTRIAL RELATIONS  
FILED

NOV 02 2015

CLERK

APPEARANCES:

For Petitioner

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For Respondent

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Before Commissioners Carlson, Spray, and Partsch

**NATURE OF THE CASE**

On January 23, 2015, the Fraternal Order of Police, Lodge #26 (“Union” or “Petitioner”) filed this action with the Commission, alleging that Lincoln County (“County”), the Lincoln County Sheriff (“Sheriff”), and the Lincoln County Board of Commissioners (the “Board,” together with the County and Sheriff, “Respondents”) committed a prohibited practice under the Nebraska Industrial Relations Act (“Act”) when Respondents unilaterally changed and refused to

bargain with Petitioner regarding the monthly rate of pay of employees, the terms of payment, and the use of vacation and compensatory time.

A trial was held April 21, 2015 before the Honorable Joel E. Carlson.

## **FACTS**

For at least 28 years, the County has paid employees' monthly wages, benefits and overtime compensation on the last business day of each month, which might include payment for hours not yet worked. In 2014, the Nebraska Legislature passed LB 560 to amend NEB. REV. STAT. §§48-1228, 48-1230 and 48-1231 of the Nebraska Wage Payment and Collection Act, "to provide powers and duties for the Commissioner of Labor; to provide for enforcement of the Nebraska Wage Payment and Collection Act; *to change requirements for employers to provide wage statements as prescribed*; to harmonize provisions; and to repeal the original sections." (Emphasis added). 2013 Bill Text NE LB 560.

LB 560 specifically amended NEB. REV. STAT. §48-1230 to require employers to provide a detailed wage statement, which is to include the actual hours worked.

"On each regular payday, the employer shall deliver or make available to each employee, by mail or electronically, or shall provide at the employee's normal place of employment during employment hours for all shifts a wage statement showing, at a minimum, the identity of the employer, the hours for which the employee was paid, the wages earned by the employee, and deductions made for the employee."

NEB. REV. STAT. 48-1230(2).

In June 2014, the County began to analyze what would need to be done in order to comply with the changes mandated by LB 560. The County determined that it would transition the payroll system in order to comply with the amended law by establishing a two-week pay lag between the end of the pay period and the pay day.

On October 13, 2014, the Board passed a resolution adopting a new Payroll Conversion Plan (the "Plan") which would set the pay period from the 16<sup>th</sup> day of the month to the 15<sup>th</sup> day of the following month, with the pay day set as the last working day of the month after the end of the pay period. In order to transition to the new Plan, the County would shift the pay period by a certain number of days with the pay day commencing on the last business day of the month. For example, the first pay period of 2015 began on January 1, 2015 and ended January 29, 2015 with

the pay day as the last working day of the month. The next pay period would then begin January 30, 2015 and would end February 25, 2015. The pay day for this pay period would be the last working day of February 2015. The Plan would continue to adjust the start and end of the pay period throughout the year until the final month in November, 2015, where the pay period would begin on November 16, 2015 and end December 15, 2015. The pay day for this final pay period of transition would be the last working day of December 2015. As a consequence, eight hours of pay would be deducted from an employee each month of the transition, equaling 88 hours by November 2015. The Board would allow employees the option to cash out accrued vacation days, personal days or compensatory time, "limited to the number of days needed so the deferment would not affect the employees [sic] normal monthly paycheck." (Exhibit 24).

In December 2014, employees of the Lincoln County Sheriff's office were given written notice of the Plan, and employees signed a form confirming receipt of the written notice. On December 15, 2014, the Union's national labor specialist sent a letter to the Lincoln County Attorney to demand that the County cease and desist from implementing the new Plan and to request bargaining. After a meeting on January 5, 2015, the Board sent a letter to the Union dated January 6, 2015 to request negotiations on the limited question of complying with the changes of LB 560 on January 12, 2015. The parties were unable to meet until January 22, 2015. During the meeting, Petitioner presented proposals regarding the Plan. However, Respondents indicated that the Plan would be implemented as of January 1, 2015 for the upcoming pay day scheduled for January 30, 2015. A Board Commissioner at the meeting indicated that he would take the Union's proposals to the Board meeting scheduled for January 26, 2015. Additionally, the County Clerk indicated that she could make changes to the Plan before the January 30, 2015 pay day if the Board voted to approve changes to the Plan during its January 26, 2015 meeting.

Petitioner filed this action on January 23, 2015. During the Board meeting of January 26, 2015, the Board chose not to make any changes to the Plan. The January 30, 2015 payroll was paid pursuant to the Plan. The Petitioner then filed a motion for status quo. The Commission entered a status quo order which required the County to rescind the pay lag during the pendency of this litigation.

## **DISCUSSION**

Petitioner alleges that Respondents committed a prohibited practice when it refused to negotiate with Petitioner regarding changes to the monthly payroll schedule and unlawfully unilaterally implemented the Plan before the parties negotiated to impasse. Petitioner also alleges that Respondents violated the Act by directly dealing with bargaining unit employees regarding the use of vacation and compensatory time banks to supplement their paychecks under the Plan.

Respondents argue that the Commission lacks jurisdiction to hear the case. If jurisdiction is found, Respondents argue that they had the management right to establish and modify statutory financial policies and accounting procedures and that the Collective Bargaining Agreement (“CBA”) does not require that the County pay employees on a monthly basis. Additionally, Respondents contend that there was no refusal to bargain on the part of Respondents because Respondents proposed to negotiate with Petitioner about economic impacts of their management right decision to create and implement the Plan.

### **Jurisdiction**

The Commission finds that it has jurisdiction to determine whether the Respondent has committed a prohibited practice. Respondents contend that the Commission lacks jurisdiction to hear this case, as it amounts to a breach of contract claim which requires the Commission to interpret and apply terms and conditions of an existing CBA. The facts in this case may very well establish a breach of contract claim of which the Commission has no jurisdiction to determine. The facts in this case also constitute a viable prohibited practice claim; which this Commission has been given jurisdiction to adjudicate by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. See *Nebraska Ass’n of Public Employees, Local 61 v. State of Nebraska Dep’t of Correctional Services*, 19 CIR 13 (2014), *South Sioux City Educ. Ass’n v. South Sioux City Public Schools*, 16 CIR 12 (2008), *aff’d* 278 Neb. 572 (2009); *Ewing Educ. Ass’n v. Ewing Public Schools*, 12 CIR 242 (1996). Petitioner has successfully invoked the jurisdiction of the Commission.

### **Prohibited Practice Allegations**

#### **Refusal to Bargain in Good Faith**

The Commission finds that the Plan unilaterally implemented by Respondents would “vitally affect” the terms and conditions of employment. As such, the Plan implemented by

Respondents is a mandatory subject of bargaining. Respondents had a duty to bargain in good faith with Petitioner regarding implementation and economic impact of the Plan. Therefore, Respondents' failure to bargain with Petitioner regarding the Plan is a per se violation of the Industrial Relations Act and a prohibited practice.

NEB. REV. STAT. § 48-816(1)(a) defines good faith bargaining as the “performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...”. The Act does not require parties to agree to any proposals put forth in negotiations, only that the parties “confer in good faith” about those subjects which are mandatory subjects of bargaining. Section 48-824(1) states that it is a prohibited practice for any public employer to refuse to negotiate in good faith with respect to a mandatory subject of bargaining. In *NLRB v. Katz*, the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. 369 U.S. 736, 737 (1962).

“The Commission determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.”

*Communication Workers of America, AFL-CIO v. County of Hall, Nebraska*, 15 CIR 95 (2005). See also *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001*, 286 Neb. 755 (2013).

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.

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).

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). 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 considering the definition of the various subjects of bargaining, decisions of the National Labor Relations Board (“NLRB”) are instructive but not controlling. The National Labor Relations Board (“NLRB”) has held that changes in payroll periods are a mandatory subject of bargaining. *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 N.L.R.B. 1125 (1998), enforced 177 F.3d 52 (1st Cir. 1999). In *Visiting Nurse Services*, the employer unilaterally implemented a new payroll system to change employees from a weekly payroll schedule to a biweekly payroll schedule without bargaining to impasse with the Union.

Further, a topic can be established as a subject of bargaining 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).

#### Management Prerogative and Economic Impact

The Commission finds that the Respondents' management rights do not remove Respondents' duty to bargain regarding the Plan. In the present case, Respondents argue that Article II, Section 2(J) of the CBA, which states that the County has the management right to establish, implement, modify, and change statutory financial policies, accounting procedures for County personnel, gives them management prerogative to create and implement the Plan. As the Commission has previously stated:

“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).

Although the change in the monthly payroll practice may have some element of management prerogative, the payroll practice had been in place for at least 28 years. By all accounts, employees had become dependent on when and how their pay would be distributed and how vacation and compensatory time could be accrued and used. Respondents' Plan did not change the date that employees would be paid, but would adjust the pay period for employees over the course of 11 months. The forced decision to either take an eight hour per month reduction in pay or use vacation or compensatory time to make up the loss is essential to an employee's financial and personal position. The economic impact that the change in the monthly payroll practice would cause is also a mandatory subject of bargaining.

The January 22, 2015 meeting between the parties was at best an illusory attempt on the part of the Respondents to bargain the economic impact of the Plan. Respondents intended to implement its Plan without any further bargaining or considering any alternatives to comply with LB 560. As a per se prohibited practice has been found, further analysis of good faith bargaining is unnecessary to the resolution of this case.

## Waiver

The Commission finds that the Petitioner did not waive its right to bargain. Respondents argue that Petitioner waived its right to object to the Plan based upon Respondent's management rights under the CBA. The Commission has found that the duty to bargain can be waived. The burden of proving waiver was on the party asserting the waiver. *Washington County Police Officers Ass'n/F.O.P. Lodge 36 v. County of Washington*, 17 CIR 114 (2011). In *Fraternal Order of Police Lodge 21 v. City of Ralston*, 12 CIR 59 (1987), the Commission stated that the standard of proving waiver of a statutorily protected right must be clear and unmistakable. Additionally, once a union has notice of a proposed change in a mandatory subject of bargaining, it must make a timely request to bargain. "A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table." *Id.* (citing *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 321 (8<sup>th</sup> Cir. 1966)). "It is well settled Board law that 'when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.'" *Id.* (citing *Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789, 790 (1990)). Notice from the employer does not have to be formal, and it is not unlawful for the proposed change to be presented as a fully developed plan. *Id.*

Respondents began working on changes to the monthly payroll practice as early as June 2014 in anticipation of the change in the Nebraska Wage Payment and Collection Act. The Board approved the new Plan during its meeting on October 13, 2014. The County gave employees written notices of the new Plan in December 2014, and employees signed forms to show that they had received the notices. On December 15, 2014, the Union's national labor specialist sent a letter to the Lincoln County Attorney to demand that the County cease and desist from implementing the new Plan and to request bargaining (Exhibit 3). This letter put the County on notice that the Union opposed the implementation of the Plan. The Petitioner's actions to force bargaining in the matter were timely under the circumstances and do not constitute a waiver of its rights to bargain.

With respect to the management rights as outlined in the CBA, the provision allowing the County to "modify and change statutory financial policies" is overly broad and does not constitute a waiver on such important mandatory subjects of bargaining. Respondents failed to prove a waiver by the Petitioner.

### **Direct Dealing**

The Commission finds that direct dealing occurred when the County contacted the members of the bargaining unit directly regarding the use of individual vacation and compensatory time to supplement their reduced paychecks under the Plan. The County communicated directly to members of the Union through email and direct notices (Exhibits 16 and 17). The County's act of bypassing union representation by directly dealing with bargaining unit employees regarding mandatory topics of bargaining is a prohibited practice pursuant to subsections (a), (e) & (f) of Neb. Rev. Stat. § 48-824(2).

The United States Supreme Court has held that bypassing a certified or recognized collective bargaining agent and dealing directly with a represented employee concerning a mandatory subject of bargaining, such as wages and other terms and conditions of employment, violates NLRA § 8(a)(1) and (5). *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944). The NLRB uses the following criteria in determining whether direct dealing has occurred: (1) the employer communicated directly with its union-represented employees; (2) the communication was for the purpose of establishing or changing the wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was to the exclusion of the union. *Southern Cal. Gas Co.*, 316 N.L.R.B. 979 (1995).

### **Wage Law Compliance**

Respondents also argue that its Plan seeks to bring the contract into compliance with LB 560 and that the Respondents had no choice but to alter their payroll to comply with the new State law. Compliance with a new law does not remove the duty to bargain over mandatory subjects of bargaining. *IBEW v. OPPD*, 16 CIR 394 (2009), *aff'd* 280 Neb. 889 (2010). Further, there was evidence that there were alternatives to bring Lincoln County into compliance with LB 560 that did not require Respondents to choose this specific plan that was unilaterally implemented.

## **REMEDIAL AUTHORITY**

In its Petition, Petitioner prays that the Commission order Respondents to cease and desist implementation of any change to the number of days or hours in a monthly payroll check and any attempts to direct deal with the employees represented by the bargaining unit. Petitioner also requests that the Commission order Respondent to pay costs, including attorney fees to Petitioner.

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). In the present case, the Commission finds that an order requiring that the offending party cease and desist from committing the prohibited practice found by the Commission is clearly within its authority and will therefore be ordered.

The Commission has authority to award attorney's fees, but has found it to be an appropriate remedy in cases where an employer's misconduct was flagrant, aggravated, persistent, and pervasive. See *Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.*, 16 CIR 401 (2010). Respondents' actions in this case do not rise to the level deemed appropriate for the award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

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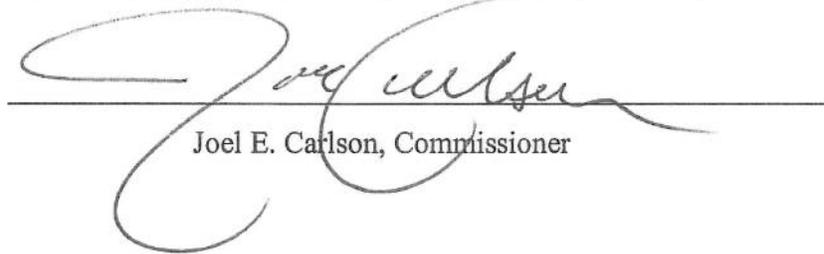
IT IS THEREFORE ORDERED that Respondents shall:

1. Cease and desist from failing to bargain in good faith with the Fraternal Order of Police, Lodge #26 regarding mandatory subjects of bargaining.
2. Cease and desist from unilaterally implementing its Payroll Conversion Plan or any other change to the number of days or hours in a monthly payroll check without first bargaining to impasse.
3. Cease and desist from direct dealing with employees represented by the Fraternal Order of Police, Lodge #26.

All Panel Commissioners join in the entry of this Order.

Entered November 2, 2015.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Joel E. Carlson, Commissioner