

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF)
PUBLIC EMPLOYEES, LOCAL 61 of)
the AMERICAN FEDERATION OF)
STATE, COUNTY AND MUNICIPAL)
EMPLOYEES,)

Case No. 1399

FINDINGS AND ORDER

Petitioner,)

v.)

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

THE STATE OF NEBRASKA,)
NEBRASKA DEPARTMENT OF)
CORRECTIONAL SERVICES,)

JAN 25 2016

Respondents.)

CLERK

APPEARANCES:

For Petitioner

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For Respondent

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Before Commissioners Partsch, Spray and Blake

NATURE OF THE CASE

On July 29, 2015, the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees (“Union” or “Petitioner”) filed this action with the Commission, alleging that the Department of Correctional Services of the State of Nebraska (“Department” or “Respondent”) committed a prohibited practice in violation of the State Employees Collective Bargaining Act (“Act”) when Respondent implemented a change from 8-hour shifts to 12-hour shifts for certain bargaining unit employees at the Tecumseh State Correctional Institution (TSCI) following a May 10, 2015 riot. Commissioner

David J. Partsch presided over a trial on October 15, 2015. The parties then submitted post-trial briefs.

FINDINGS

The Union and the Department were parties to a collective bargaining agreement (CBA) covering the period July 1, 2013 to June 30, 2015 (Ex. 1), and are now parties to a new agreement covering the period July 1, 2015 to June 30, 2017. The parties have stipulated that there are no differences between the two agreements that are of any consequence to this matter. (Ex. 2). Both CBA's contain the following language that one or both of the parties have deemed of significance to the consideration of this matter:

ARTICLE 1-PREAMBLE

Section 1.3 The parties acknowledge that during the negotiations which resulted in this Contract, each had the right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Contract. Therefore, the Employer and the Union, for the duration of this Contract, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Contract. This Contract may only be amended during its term by the parties' mutual agreement in writing.

Section 1.4 The Employer agrees that prior to making any change in terms and conditions of employment which are mandatory subjects of bargaining and not otherwise covered by this Contract, to meet and bargain with the Union in an attempt to reach an agreement. If no agreement is reached, the terms and conditions of employment shall not be altered, unless the Employer has a compelling need to change a term or condition of employment. When the Employer has a compelling need to change a term or condition of employment and no agreement has been reached through bargaining, the Employer may implement the change and the unresolved issue may by mutual agreement, at the time of the dispute, of the parties be submitted to final and binding arbitration. The losing party shall bear the cost of arbitration. Notwithstanding the above, the Union and the Employer reserve their rights to enforce this and any provision of the contract through the courts.

ARTICLE 7-WORK SCHEDULES

Section 7.1 Work Schedules: Work schedules are defined as an employee's assigned hours, days of the week, days off and shift rotations.

APPENDIX M.I DEFINITIONS

M.I.4 EMERGENCY - Escape, riot, fire, hostage situation, natural disaster, or other unusual situation, declared by the Director and/or designee, which threatens, or may threaten the security of the institution, work area or safety of the public, employees, inmates and/or others.

APPENDIX M.3 HOURS OF WORK

M.3.1 Employees scheduled work day shall ordinarily be eight (8) hours. A meal period shall be considered time worked, as shift employees are considered on duty from the beginning of their shift until they finish their shift. Meals shall be expeditious and only the amount of time reasonable and necessary to eat shall be used.

M.3.1.1 Labor and Management agree to establish an agency-wide Labor Management Committee to meet and discuss alternative work shifts. The Union and Management shall select four (4) representatives each, from their respective sides, to form this committee. The Labor Management Committee will report its findings and recommendations by July 1, 2003. Any alternative work shift recommended shall guarantee the employer's ability to provide services, meet all work demands as defined by the employer, and to the extent practicable, meet employee personal scheduling preferences.

M.3.2 Employees shall not be unreasonably denied rest periods not to exceed a total of thirty (30) minutes during each work day. The Employer retains the right to respond to emergency situations by not allowing a rest period. Lack of relief staffing is considered a reasonable reason for denying rest periods.

M.3.3 Work Schedules and Changes - Correctional Officers, Correctional Corporals, and Correctional Unit Caseworkers will be assigned to permanent shifts and permanent days off. This is subject to the Agency providing ten work days written notice to the affected employees prior to making changes in their permanent work schedules, except when requested or agreed to by the Employee or in cases of emergency as defined in M.I.4. Subject to Institutional needs, Sergeants will be assigned to a permanent shift and days off, and will rotate from post to post on that shift every six months; except for Sergeant positions designated as an exempt post. When making assignments or conducting the bidding process for shift/days off seniority will be taken into considerations; however, Institutional needs will be the determining factor. Sergeants may be temporarily assigned to a different shift and/or days off, to fulfill Institutional needs or for training purposes. M.4.2 is not applicable to Sergeants; however the provisions of M.13.1 do apply.

(Ex. 1).

On May 10, 2015, inmates rioted at TSCI resulting in a loss of control at the facility for approximately ten hours. During the riot, inmates caused extreme property damage and many

injuries to inmates and staff. Tragically, during the chaos of the riot, two inmates were killed. Due to the riot, Department of Correctional Services Director Scott Frakes declared an "emergency" at TSCI. Director Frakes temporarily instituted 12-hour shifts for some employees represented by the Union. (93:5-94:2; Ex. 4). These employees normally worked 8-hour shifts. The 12-hour shifts continue to be utilized at TSCI.

Upon learning of the schedule changes, Union Executive Director Mike Marvin contacted Department representatives to discuss the situation. He informed them of his concern regarding the lack of notice and negotiation, but allowed the situation to remain unchanged while short-term efforts were made to stabilize TSCI. (22:16-25:13) On June 1, 2015, Mr. Marvin contacted Director Frakes to request a meeting regarding the 12-hour shift issue. Mr. Marvin and Director Frakes met on June 2, along with several other individuals. At the meeting, Mr. Marvin expressed his concern on behalf of the Union that the schedule change could not be maintained without negotiation with the Union. (26:1-27:12).

Director Frakes expressed to Mr. Marvin that TSCI was short-staffed and the 12-hour shift pattern helped to deal with that problem. (33:6-10). It is generally uncontested that TSCI has been short-staffed since it first opened many years ago. (29:1-8; 58:4-59:15; 158:3-25). In fact, the Department has raised the concept of 12-hour shifts to alleviate short-staffing at TSCI in past years. (29:9-31:5). In response to the Department's staffing concerns, the Union made a proposal during the negotiations for the 2015-2017 CBA to allow for the use of 12-hour shifts at TSCI. (18:20-21:24; 31:6-14; Ex. 7).

Being regularly short-staffed was only exacerbated by the riot. During and immediately following the riot inmates were placed on total lockdown, meaning all movement of prisoners from their cells was forbidden. As of the time of trial, approximately five months after the riot, the facility was still on modified lockdown with highly restricted movement of prisoners. During the total lockdown, TSCI needed increased staff to complete tasks normally performed by inmates, such as cooking and serving meals, cleaning, etc. Increased staffing is also necessary during modified lockdown, as staff must monitor inmate movement with increased security for cleanup and construction crews. (86:14-89:7).

On June 17, 2015, Mr. Marvin transmitted a document prepared by the Union bargaining committee as an offer to prevent their filing of a prohibited practice case. (Ex. 12). The document contained provisions whereby the Department could negotiate to keep its 12-hour shift

practice at TSCI for a period of time until management's post-riot concerns were resolved. On July 22, 2015, Mr. Marvin was notified the Department would not engage in negotiations on the issue. (Ex. 13). Mr. Marvin authorized the filing of this prohibited practice case the same day.

DISCUSSION

Petitioner alleges that Respondent committed a prohibited practice by unilaterally changing terms and conditions of employment that are outlined in the parties' CBA. Specifically, that the Respondent has changed the length of employees' work shifts from 8-hour shifts to 12-hour shifts without negotiating with the Union. Respondent argues that the Commission lacks jurisdiction to hear the case as the parties have previously negotiated the topic, and the result of that bargaining is encompassed in the CBA, therefore no further bargaining is required.

Jurisdiction

The Commission finds that it has jurisdiction to determine whether the Respondent has committed a prohibited practice. Respondent contends 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 legal claims made in this case shall only be reviewed as prohibited practice claims, which this Commission has been given jurisdiction to adjudicate by virtue of Neb. Rev. Stat. §§ 81-1386, and 81-1387. 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).

Respondent suggests that if jurisdiction is exercised, then the Commission will have to determine whether an emergency exists or how long an emergency continued. Here the parties agree that an emergency existed at least at the time of the riot. While the Petitioner agrees that an emergency did exist, it cannot give a definitive answer to when it believes the emergency ceased. The Commission declines to determine that date independently, nor is it necessary for the consideration of the prohibited practice claim as is demonstrated below.

Prohibited Practice Allegations

Neb. Rev. Stat. § 81-1386 provides in relevant part:

“(1) It shall be a prohibited practice for any employer, employee, employee organization, or exclusive collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.

(2) It shall be a prohibited practice for any employer or the employer's negotiator to:

(e) Refuse to negotiate collectively with representatives of exclusive collective-bargaining agents as required in the Industrial Relations Act and the State Employees Collective Bargaining Act;

(f) Deny the rights accompanying certification or exclusive recognition granted in the Industrial Relations Act or the State Employees Collective Bargaining Act;”

Neb. Rev. Stat. § 81-1386.

In a previous prohibited practice case between the same Petitioner and Respondent, *Nebraska Ass'n of Public Employees, Local 61 v. State of Nebraska Dep't of Correctional Services*, 19 CIR 13 (2014), the Commission found that the Department committed a prohibited practice when it unilaterally implemented a new scheduling program that allowed employees to voluntarily opt-in to working 12-hour shifts. The Commission ordered Respondent to cease and desist “from failing and refusing to bargain in good faith with the Petitioner regarding mandatory subjects of bargaining” and “from unilaterally implementing its pilot scheduling program without first bargaining to impasse.”

At first blush one would assume that if creation of a voluntary, opt-in program for employees to work 12-hour shifts is a prohibited practice when unilaterally implemented by an employer, the same employer would certainly not be able to unilaterally implement a requirement that all employees work 12-hour shifts. However, upon a careful review of precedent, the Commission does find that the Department has not committed a prohibited practice with its unilateral implementation of 12-hour work shifts under the current circumstances.

Unlike the new scheduling program the Department created previously, temporary shift changes are covered by the parties' CBA. In the prior case, the Commission specifically found

that the change made by the Department was “the implementation of an entirely new work scheduling program” which was not included in the CBA. The Commission therefore analyzed whether the Union had clearly, unequivocally and decisively waived its statutory right to bargain over such a mandatory topic of bargaining. While the Commission did not spend a lot of time in the 2014 opinion on whether the program was “covered by” the CBA, presumably because it was apparent that the program implemented was entirely new, we must always first cross the hurdle of CBA coverage before leaping to the analysis of waiver.

“[T]he “covered by” and “waiver” inquiries . . . are analytically distinct. A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant. . . .

Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant.”

Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty., 284 Neb. 109, 116, (2012) (citing *Dep't of Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992)).

The Nebraska Supreme Court adopted the “contract coverage standard” to determine whether a topic is “covered by” a CBA. *Id.* Applying this standard, the Commission must address the threshold question of whether shift durations are “covered by” the CBA. In conducting this inquiry, we examine whether the CBA “fully defines the parties' rights” as to this topic. *Id.*

The CBA provides that “Employees scheduled work day will *ordinarily* be eight hours.” (Ex. 1, M.3.1) (emphasis added). The CBA also includes a notice provision when permanent schedules are to be changed, with an exception to the notice requirement in cases of emergency. (Ex. 1, M.3.3). The parties’ agreed upon definition of “Emergency” includes riots or an “unusual situation, *declared by the Director* and/or designee, which threatens, or may threaten the security of the institution, work area or safety of the public, employees, inmates and/or others.” (Ex. 1, emphasis added).

Chronic staff shortage at TSCI is not an unusual situation in itself. However, the Respondent presented sufficient evidence that the aftermath of the May 2015 riot has created an

unusual situation which threatens, or may threaten the security of the institution, work area or safety of the public, contractors, employees, inmates and/or others. As such, the CBA specifically grants the Director discretion to declare an emergency and to change work schedules in an emergency without notice. The Commission will not second guess or disturb the Director's determination, nor will we insert the Commission into a debate over interpretation of these or any other contract provisions. Whether the current state of affairs at TSCI falls within the CBA's definition of "Emergency" is one of contract interpretation that is not for this Commission to decide, nor are we called to decide whether the CBA provisions have been breached by the Department.

The Commission finds that the topics of duration of work shifts and the process for schedule changes in an emergency are covered by the CBA which fully defines the parties' rights as to this topic. While not all contingencies are detailed in the CBA, the parties certainly have already bargained for the language they did agree upon. Holding the parties to a standard that would require the CBA to specifically address all possible scenarios that might arise with shift scheduling is "both unrealistic and impermissible." See, *Id.* (citing *Dept. of Navy, Marine Corps Logistics Base, supra*). Further, the parties bargained to give the Director broad discretion to declare when an emergency exists. The Respondent was under no duty to bargain again about whether or how temporary schedule changes should be implemented. We therefore find that Respondent did not commit a prohibited practice in violation of Neb. Rev. Stat. § 81-1386, and the Petition should therefore be dismissed.

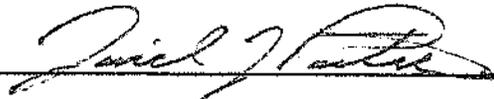
Dismissal of this Petition does not remove the Respondent's obligations to bargain in good faith regarding changes to mandatory subjects of bargaining not covered by the CBA. *Nebraska Ass'n of Public Employees, Local 61 v. State of Nebraska Dep't of Correctional Services*, 19 CIR 13 (2014). However, in this case the specific issue at hand has been negotiated and is "covered by" the parties' current CBA.

IT IS THEREFORE ORDERED that:

1. The Petition is hereby dismissed.

Entered January 25, 2016.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

A handwritten signature in cursive script, appearing to read "David J. Patsch", is written over a horizontal line.

David J. Patsch, Commissioner