

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF POLICE)
LODGE #24, and MITCHELL)
MEYER,)

Case No. 1412

Petitioners,)

FINDINGS AND ORDER

v.)

CITY OF GRAND ISLAND,)
NEBRASKA,)

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

Respondent.)

JUN 16 2016

CLERK

APPEARANCES:

For Petitioners:

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For Respondent:

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Before Commissioners Spray, Pillen, and Partsch

NATURE OF THE CASE

On November 9, 2015, the Fraternal Order of Police Lodge #24 (“Union”) and Mitchell Meyer (“Officer Meyer”) (or collectively “Petitioners”) filed this action with the Commission, alleging that the City of Grand Island, Nebraska (“City” or “Respondent”) committed a prohibited practice in violation of the Nebraska Industrial Relations Act (“Act”), Neb. Rev. Stat. § 48-824(1) and (2)(b), (e) when Respondent refused to provide requested documents to the Petitioners for use in administering the Collective Bargaining Agreement (“CBA”) between the parties. Commissioner J.L. Spray presided over a trial on February 11, 2016. The parties then submitted post-trial briefs.

FACTS

The Commission accepts the following facts as true pursuant to the Stipulation entered into by the parties. (Ex. 24). The Union is a "labor organization," as that term is defined in Neb. Rev. Stat. § 48-801(7), and is the exclusive collective bargaining agent of the bargaining unit consisting of Police Officers and Sergeants of the City of Grand Island Police Department ("GIPD"). Officer Meyer is a "public employee" as that term is defined in Neb. Rev. Stat. § 48-801(11), and is currently employed by the City as a Police Officer of the GIPD. Officer Meyer is a member of the bargaining unit which the Union represents, and has been working as a Police Officer for the GIPD for approximately one and a half years. The City is a political subdivision of the State of Nebraska, and is a "public employer" within the meaning of Neb. Rev. Stat. § 48-801(12) and employs those employees who compose the bargaining unit described above.

The CBA contains the following provisions regarding discipline of Police Officers and Sergeants in Article XVII(C):

1. Cause: Cause for disciplinary action shall include any cause so specified in the Employee Personnel Rules of the City of Grand Island, the Police Department Policy and Procedures Manual and the rules and regulations of the City Civil Service Commission.
2. Reprimand: The Police Chief or designated representative may reprimand any employee for cause. Such reprimand may be in writing and addressed and presented to the employee who will initial receipt. A signed copy shall be delivered to the Mayor's office for inclusion in the employee's personnel file. The employee may submit an explanation or rebuttal.
3. Civil Service: It is agreed by the parties that all applicable provisions of the Rules and Regulations of the Grand Island Civil Service Commission are hereby made part of this agreement and by this reference made part hereof.

It is the policy of the City of Grand Island to provide a system of progressive discipline which affords an opportunity for the resolution of unsatisfactory employee performance or conduct.

Such system shall include an appeal procedure to assure the equitable and consistent application of discipline.

Discipline may begin with the least severe disciplinary action and progress, if necessary, to more severe actions. However, the severity of the incident may warrant any level of initial disciplinary action.

(Ex. 1).

Chapter 12 of the Grand Island Municipal Code governs the Grand Island Civil Service Commission. (Ex. 2 and 3). In the case of terminations, the Code provides that the Chief of Police must draft an Accusation recommending termination and deliver it to the employee. The employee is then placed on administrative leave with pay and may request a hearing before the Mayor of the City of Grand Island on the Accusation. At the Mayoral hearing, the employee is allowed to present evidence in his defense. Under Section 12-8 of the Code, the Mayor is the only party authorized to terminate a Grand Island Police Officer. If, after the Mayoral hearing, the Mayor terminates the employee, then the employee may appeal the Mayor's decision to the Grand Island Civil Service Commission. Finally, the employee may appeal the Civil Service Commission's decision to the District Court of Hall County, Nebraska.

On September 18, 2015, Officer Meyer received his First Letter of Accusation recommending his termination from Grand Island Police Chief Steven Lamken. (Ex. 4). The letter generally alleged that on and after September 3, 2015, Officer Meyer failed to follow the Department's proper driving procedures during a pursuit of a fleeing suspect, disregarded the direct order of a supervisor during the pursuit, did not submit a complete report of his actions during the pursuit, and disregarded the direct order of a supervisor to submit an additional report following the pursuit. The letter specifically alleges that Officer Meyer violated various policies, rules, and regulations of the City and GIPD. Officer Meyer had no formal discipline in his personnel file prior to September 18, 2015.

Officer Meyer timely requested a Mayoral Hearing on the First Letter of Accusation, which was scheduled for Wednesday, October 7, 2015. On October 1, 2015, while Officer Meyer was on paid administrative leave for the First Letter of Accusation, the Department issued Officer Meyer a Second Letter of Accusation. (Ex. 6) The letter generally alleges that, on August 10, 2015, Officer Meyer conducted an unconstitutional search and seizure of a suspect's bag and spoke in an unprofessional manner to the suspect and fellow officers. The Second Letter of Accusation specifically alleges Officer Meyer violated various rules, regulations, and policies of the City, as well as the United States Constitution. Officer Meyer timely requested a Mayoral Hearing on the

Second Letter of Accusation. The Second Mayoral Hearing is currently pending pursuant to this Commission's Order on Motion for Temporary Status Quo, dated November 12, 2015.

On October 5, 2015, Petitioners sent an email to Respondent requesting a copy of a Written Reprimand previously issued to GIPD Officer Bellici. (Ex. 8). On October 6, 2015, Respondent denied the request for a copy of Officer Bellici's Written Reprimand. (Ex. 9). The Mayoral Hearing on Officer Meyer's First Letter of Accusation was held on October 7, 2015. (Ex. 500 and 501). The Mayor decided at the hearing on the First Letter of Accusation that he would not make a determination regarding whether to terminate Officer Meyer until after his Mayoral Hearing on the Second Letter of Accusation. (Ex. 500, pg. 82). On October 29, 2015, Respondent submitted a Written Response (Brief) to the Mayor following the First Mayoral Hearing. (Ex. 10).

On October 30, 2015, Petitioners sent a letter to Respondent requesting certain documents and information, including disciplinary information regarding other Officers and former Officers of GIPD. (Ex. 11). On November 4, 2015, Respondents denied the requests of the Union and Officer Meyer, except that Respondents agreed to produce GIPD emails and documents related to Officer Meyer and the incidents giving rise to his First and Second Letters of Accusation. (Ex 12).

Among other documents, Respondent produced the documents described in Exhibits 13 and 14 after receiving the requests for documents and information contained in the October 30, 2015 letter. Mayor Jensen granted Petitioners' request to supplement the record of the First Mayoral Hearing with the documents in Exhibits 13 and 14. (Ex 15). At the time of trial, Officer Meyer was still employed by Respondent and on paid administrative leave pending the Mayor's decision following the Second Mayoral Hearing.

DISCUSSION

Petitioners allege that the Respondent committed a prohibited practice in violation of Neb. Rev. Stat. § 48-824(1) and (2)(b), (e) when it refused to provide information requested to permit the Petitioners to administer the existing collective bargaining agreement. The Respondent contends that it is not required to provide any information to the Petitioners other than the Accusation pursuant to the CBA, the City Personnel Rules and Chapter 12 of Grand Island Municipal Code.

Jurisdiction

The Commission has been given jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. Respondent attempts to classify the issue at hand as a uniquely personal termination, over which the Commission does not have jurisdiction. It is true that the Commission does not have subject matter jurisdiction with respect to "uniquely personal" matters. *See Nebraska Dept. of Roads Employees Ass'n v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973), *See also, Schmieding v. City of Lincoln and Lincoln General Hospital*, 2 CIR 60 (1972). *Schmieding* very clearly held that uniquely personal matters are not within the legislative policy behind the Industrial Relations Act. Here, however, it is not the unique circumstances of the proposed termination that is at issue. The issue is whether the Respondent committed a prohibited practice under the Industrial Relations Act.

Further, Respondent contends that the Commission lacks jurisdiction, as the claim amounts to a breach of contract claim which requires the Commission to interpret and apply terms and conditions of an existing CBA. It is also true that the Commission does not have subject matter jurisdiction over a breach of contract claim. However, the Commission has jurisdiction over prohibited practice claims even if the same facts constitute a breach of contract claim. *See Lamb v. Fraternal Order of Police Lodge*, 293 Neb. 138 (2016); *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). The facts in this case constitute a viable prohibited practice claim. Therefore, the Petitioner has invoked the jurisdiction of the Commission.

Prohibited Practice Allegations

Neb. Rev. Stat. § 48-824 states in part:

- (1) It is a prohibited practice for any public employer, public employee, public employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
- (2) It is a prohibited practice for any public employer or the public employer's negotiator to:

- b. Dominate or interfere in the administration of any public employee organization;
- e. Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act.

Neb. Rev. Stat. § 48-824

The Commission has previously held that refusing to furnish information requested by the Union for the purpose of investigating potential grievances is a prohibited practice. *Omaha Police Union Local 101, IUPA AFL-CIO v. City of Omaha et al.*, 15 CIR 355 (2007). A public employer's duty to bargain in good faith requires the employer to furnish the union, upon a good faith request, information which is necessary and relevant to the union's administration of the parties' bargaining agreement. *Id.* at 358. Once the relevance of information is determined, the employer's refusal to honor the information request is a "per se violation" of the Act. *Id.*

To determine whether the requested information is relevant, the Commission applies a relaxed "discovery-type" standard. *Id.*; see Neb. Ct. R. Disc. § 6-326(b)(1) ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). The Commission then determines whether the information would be "of use" to the union in carrying out its duties. *Omaha Police Union*, 15 CIR at 358. Under this standard, the Commission recognized employers will be required to give unions "a broad range of potentially useful information." *Id.*

Decisions under the National Labor Relations Act (NLRA) are helpful in interpreting the Nebraska Industrial Relations Act, but are not binding. *Crete Educ. Ass'n v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 22 (2002). The Commission concludes that the relevant provisions of Neb. Rev. Stat. § 48-824 are sufficiently similar to 29 U.S.C.S. § 158(a) to provide guidance in the application of our statutes.

In *NLRB v. Pfizer, Inc.*, 763 F.2d 887 (7th Cir. 1985), the National Labor Relations Board (NLRB) sought enforcement of its order finding that respondent employer had violated the National Labor Relations Act, 29 U.S.C.S. § 158(a)(1), (5), by refusing to supply information relevant to the processing of an employee grievance and ordering production of that information and other remedies. Respondent asserted that the information was irrelevant to the grievance and confidential. The court affirmed petitioner NLRB's order because an employer's duty to bargain collectively included the duty to furnish information relevant to a union's performance of its duties.

The court also noted that a mere probability that such information was relevant and of use to the union was sufficient to compel an employer to supply information and that personnel files were not per se confidential.

The Commission finds that the information requested by the Petitioners is both relevant and of use to the Union. The term “equitable and consistent” implies comparison by definition. In order to determine whether particular discipline is equitable and consistent, one must first evaluate other instances of discipline. Here Respondent claims that by wholly denying Petitioners’ requests for disciplinary records they are protecting the privacy of other Officers. Yet Respondent’s Representatives testified openly to disciplinary matters involving both named and unnamed Officers at the Mayoral Hearing. (Ex. 500). Here Petitioners are not requesting unfettered access to employee files. Further, Petitioners expressed willingness to work with the City to address privacy concerns and to accept redacted records. The Commission finds the Respondent’s denial to provide the disciplinary information requested by Petitioners to be a prohibited practice and a per se violation of the Act.

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). In the present case, the Commission finds that the Respondent has committed a prohibited practice under the Nebraska Industrial Relations Act. Therefore, an order requiring that the Respondent cease and desist from committing the prohibited practice is clearly within the authority of the Commission and will be ordered.

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Attorney Fees

The Commission has authority to award attorney's fees, and 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). Respondent's actions in this case do not rise to the level deemed appropriate for an award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

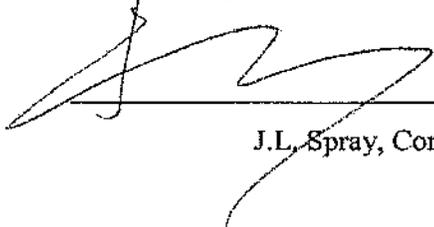
IT IS THEREFORE ORDERED that Respondent shall:

1. Cease and desist from refusing to provide information to the Petitioners which is necessary and relevant to the Union's administration of the parties' bargaining agreement.
2. Cease and desist from refusing to furnish relevant and necessary disciplinary information as requested by the Petitioners.

All Panel Commissioners join in the entry of this Order.

Entered June 16, 2016.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



J.L. Spray, Commissioner