NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226,	)	Case No. 1440
Petitioner,	)	FINDINGS OF FACT AND ORDER
v.	)	
DOUGLAS COUNTY SCHOOL DISTRICT 001,	)	
Respondent.	)	

For Petitioner:

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For Respondent:

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Before Commissioners Carlson, Jones and Pillen

NATURE OF THE CASE

On March 27, 2017, the Service Employees International Union, (AFL-CIO) Local 226 ("Union" or "Petitioner") filed this action with the Commission, alleging that Douglas County School District 001 ("Respondent") committed a prohibited practice in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. § 48-824(1) when Respondent subcontracted bargaining unit work, specifically snow removal, which is a unilateral change of the terms and

conditions of employment. Commissioner Joel E. Carlson presided over a trial on June 20, 2017. The parties have submitted post-trial briefs.

FACTS

Petitioner is a labor organization as defined in Nebraska Revised Statute §48-801(6), and is the duly recognized collective bargaining representative for the full-time employees in the Maintenance and Operations Division of the Douglas County School District. The Petitioner has in force and effect a Collective Bargaining Agreement ("CBA") with Respondent covering such collective bargaining units (Ex. 1). Respondent is an employer within the meaning of Nebraska Revised Statute §48-801(4) with its principal office located at 3215 Cuming Street, Omaha, NE 68131.

The work of the bargaining unit employees represented by the Petitioner includes snow removal and maintenance of Respondent's properties. The above-described bargaining unit work has generally been exclusively performed by the bargaining unit employees represented by Petitioner. Snow removal around the buildings is performed by the custodians. Snow removal in parking lots is performed by truck drivers and relief engineers. (Tr. 33:12-34:21).

The Respondent decided to rebuild two (2) of their existing elementary schools, or more specifically Western Hills Elementary and Belle Ryan Elementary schools. (Tr. 36:24-38:2). While being rebuilt, these two existing elementary schools were combined temporarily at another property of the Respondent located on 60th & L Streets. This is not a permanent relocation. The 60th & L Street location is not the construction of a new school. It is a temporary swing site used to house both of the schools being rebuilt, which includes placement of all of the bargaining unit work from those schools in the temporary swing site location. (Tr. 192:7-193:21) The Respondent

has used temporary swing sites on several occasions over the last fifty (50) years (Tr. 209:20-210:13). Petitioner's members were assigned to the temporary swing sites to perform the maintenance duties they performed previously at Western Hills Elementary and Belle Ryan Elementary.

Petitioner became aware that Respondent had subcontracted out some snow removal work. On March 7, 2017, Petitioner requested that Respondent cease and desist from subcontracting out bargaining unit work (Ex. 18). There was only one meeting between the parties in which snow removal was even mentioned. This occurred on August 11, 2016 (Ex. 2). The primary purpose of that meeting was to discuss the prohibited practice petition in CIR Case 1422 filed on July 11, 2016. At that meeting, there were no substantive discussions about snow removal (Tr. 134:19-21; 134:4-21). There were no substantive discussions over the impact and effects of subcontracting the snow removal work (Tr. 24:7-11). There were no other meetings between the parties (Tr. 40:11-19). Local 226 did not declare an impasse on the subcontracting of snow removal at the conclusion of that meeting (Tr. 24:22-26:4; 135:3-8; 149:23-150:5; 181: 14-25). Local 226 was going to consider the Respondent's suggestion that subcontracting snow removal may be necessary (Tr. 303:12-15). The parties did not reach an impasse.

DISCUSSION

Respondent subcontracted some of the above-described bargaining unit work to non-bargaining unit employees and companies for certain newly acquired properties. Respondent failed to negotiate the decision to subcontract out the above-mentioned bargaining unit work to impasse prior to subcontracting it. Respondent's failure to negotiate in good faith regarding the subcontracting of that bargaining unit work to non-bargaining unit employees and companies constituted a change in terms and conditions of employment with respect to a mandatory subject

of collective bargaining, and as such, constituted a prohibited practice in violation of Nebraska Revised Statute §48-824(1).

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. The facts in this case constitute a viable prohibited practice claim, over which this Commission has jurisdiction 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

Neb. Rev. Stat. § 48-824)(1) states:

> (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.

Neb. Rev. Stat. § 48-824

The Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. 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 "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010).

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).

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*, 369 U.S. 736, 737 (1962), 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. In *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska,* 15 CIR 95 (2005), the Commission held 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."

See also *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001,* 286 Neb. 755 (2013).

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).

Both parties cite to *Service Employees International Union Local* 226 *v. School District No. 17 of Douglas County, Nebraska,* 10 CIR 140 (1989) as authority in this matter but argue that the decision impacts the present case in different manners. In *SEIU Local 226 v. School District No. 17*, the Local 226 bargaining unit petitioned for a ruling that the School District had engaged in bad faith bargaining when it entered into a subcontract for custodial services at a new middle school. The Commission ruled the School District had not violated its statutory bargaining obligations.

That decision has instructive principles for the present case but the facts and application of facts are distinguishable from the present case. In *SEIU Local 226 v. School District No. 17,* the School District subcontracted work for a new middle school. Here, there were two elementary schools temporarily displaced to a swing site. The staff assigned to do snow removal at the two elementary schools continued their duties at the swing site. While there may not be a replacement of employees at the swing site, there is a loss of bargaining unit work at the swing site.

In *SEIU Local 226 v. School District No. 17*, there were economic considerations driving the need to subcontract for custodial work at the new middle school. In the present case, there was a lack of economic considerations demonstrated which led to a lack of bargaining over whether the Petitioner could meet any perceived staffing problems to conduct the snow removal work. The meeting held on August 11, 2016 was primarily focused on other Local 226 work. Snow removal work was mentioned in passing. Snow removal work was not substantively bargained, nor did impasse occur.

The Commission finds that subcontracting bargaining unit work would "vitally affect" the terms and conditions of employment. As such, the subcontracting of snow removal by Respondent is a mandatory subject of bargaining. Additionally, Petitioners have established that the transfer of bargaining unit work to temporary swing sites is an established past practice that the employees could reasonably expect to continue. Respondent had a duty to bargain in good faith with Petitioner regarding the subcontracting of bargaining unit work and failed to do so. Respondent took the position that Petitioner does not want to allow subcontracting of its work and that excuses the Respondent from engaging in substantive negotiations with the Petitioner. In the present case, substantive negotiations did not occur. As such, the Commission rejects the Respondents' assertions that negotiations were at impasse simply because the Petitioner would prefer not to

subcontract work. Therefore, Respondent's failure to bargain with Petitioner regarding the subcontracting of bargaining unit work is a per se violation of the Industrial Relations Act and a prohibited practice. The Commission notes that the Respondent previously stipulated to a very similar finding regarding the subcontracting of bargaining unit work in CIR Case 1422. (Ex. 5).

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.

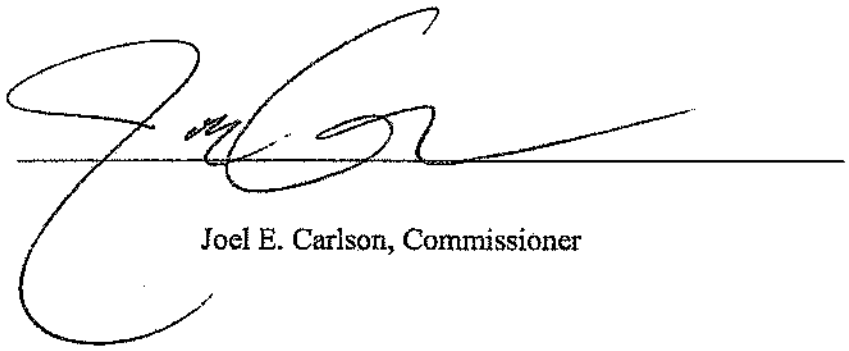
IT IS THEREFORE ORDERED that Respondent shall:

1. Cease and desist from failing to bargain in good faith with the Service Employees International Union, (AFL-CIO) Local 226 regarding mandatory subjects of bargaining, specifically snow removal.
2. Cease and desist from subcontracting bargaining unit work, specifically snow removal, without first bargaining to impasse.

All Panel Commissioners join in the entry of this Order.

Entered November 8, 2017.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Joel E. Carlson, Commissioner