

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

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

Case No. 1448

FINDINGS OF FACT AND ORDER

Petitioner,)

v.)

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

Respondents.)

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

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CLERK

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Before Commissioners Jones, Partsch and Blake

NATURE OF THE CASE

On September 12, 2017, 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 “Respondents”) committed prohibited practices in violation of the State Employees Collective Bargaining Act (“SECBA”), Neb. Rev. Stat. §81-1386(1) and §§81-1386(2)(e) and (f) by unilaterally implementing the use of body-worn cameras and by refusing to

bargain over the same. Commissioner Dallas D. Jones presided over a trial on December 21, 2017. The parties have submitted post-trial briefs.

FACTS

The parties stipulate to the following facts pursuant to Exhibit 20. Petitioner is a labor organization representing employees in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work; it is a labor organization as that term is defined in Neb. Rev. Stat. § 48-801 and within the meaning of that statutory clause. Petitioner is the exclusive collective bargaining agent for the Protective Service bargaining unit established by the State Employees Collective Bargaining Act, Neb. Rev. Stat. § 81-1369, et. seq. The Respondents, State of Nebraska and Department of Correctional Services, are employers as that term is defined in Neb. Rev. Stat. § 81-1371(5).

At all times relevant to this matter, the parties have been covered by collective bargaining agreements between Petitioner and Respondents covering wages, hours and conditions of employment, which agreements applied to the Protective Services bargaining unit for the periods of July 1, 2015 through June 30, 2017 and July 1, 2017 through June 30, 2019. Exhibit 1 is the 2017-2019 Collective Bargaining Agreement between NAPE/AFSCME and the State of Nebraska ("2017-2019 CBA"). Appendix M of Exhibit 1 specifically deals with the Department of Correctional Services Protective Services Bargaining Unit employees. There is also a 2015-2017 Collective Bargaining Agreement between NAPE/AFSCME and the State of Nebraska ("2015-2017 CBA"). There is no material difference between the 2017-2019 CBA and the 2015-2017 CBA relevant to this proceeding so the 2015-2017 CBA was not offered as an exhibit. Article 1 – Preamble, Sections 1.3 and 1.4 of the 2017-2019 CBA read in relevant part as follows:

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.

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 3 – Management Rights of the 2017-2019 CBA read in relevant part as follows:

3.1 It is understood and agreed that the Employer possesses the right to operate and direct the employees of the State and its various agencies to the extent that such rights do not violate its legal authority, and to the extent that such rights are not modified by this Contract. These rights include, but are not limited to:

3.3 The right to manage and supervise all operations and functions of the State.

3.12 The right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures, or policies.

3.14 The right to introduce new or improved methods, equipment, technology, or facilities.

(Ex. 1).

No proposal regarding use of body-worn cameras at Tecumseh State Correctional Institution (“TSCI”), or any other correctional institution in Nebraska, was presented to the Union by Respondents. The parties agree that this proceeding covers use of body-worn cameras at all Department of Corrections facilities.

In addition to the facts stipulated to by the parties, the Commission adopts the following facts. On August 25, 2017, James Jansen, a Major at TSCI, issued a memorandum to TSCI staff. (Ex. 2). This memorandum gave notice that effective August 28, 2017, body-worn cameras would be used in three locations at TSCI, and also stated that other housing units would be provided body-worn cameras at a later time. The Respondents had made the decision to begin this usage of body-worn cameras without making any proposals to the Union, and without engaging in any negotiations with the Union. (Ex. 20, #7) The Department had also developed rules and guidelines regarding the usage of the cameras without consulting or negotiating with the Union. (36:21-37:5; 38:13-18; 99:12-101:11; 125:25-126:3; 127:11-19; 128:15-129:22). The body-worn cameras went into use by bargaining unit employees either on the date listed in the memorandum or soon thereafter.

On September 1, 2017, John Antonich, the Executive Director of the Union, sent two emails on behalf of the Union to Scott Frakes, the Director of the Department of Correctional Services. (Ex. 12 & 13). In those emails, he requested that the use of body-worn cameras by bargaining unit employees stop immediately and that the Department bargain with the Union over the issue. Director Frakes refused to negotiate regarding the issue, and no negotiations have taken place since that time. (43:20-22). The Union does not oppose the use of body-worn cameras, but rather is concerned with the impact of the usage of the body-worn cameras on bargaining unit members and wishes to bargain those issues.

DISCUSSION

Petitioner alleges that Respondent committed a prohibited practice when it unilaterally implemented the usage of body-worn cameras at TSCI. Further, Petitioner alleges that Respondent committed a prohibited practice by refusing to bargain in good faith over a mandatory subject of

bargaining. Respondents argue that the implementation of body-worn cameras is not a mandatory subject of bargaining. In the alternative, if found to be a mandatory subject of bargaining, Respondents argue it was “covered by” the CBA and there was no further obligation to bargain.

Jurisdiction

Under Nebraska's Industrial Relations Act, the Commission has the authority to decide industrial disputes (Neb. Rev. Stat. § 48–819.01 (Reissue 2010)) and to determine whether any party to an agreement has committed a prohibited practice.

The State Employees Collective Bargaining Act shall be deemed controlling for state employees and state employers covered by such act and is supplementary to the Industrial Relations Act except when otherwise specifically provided or when inconsistent with the Industrial Relations Act, in which case the State Employees Collective Bargaining Act shall prevail.

The State of Nebraska, its employees, employee organizations, and exclusive collective-bargaining agents shall have all the rights and responsibilities afforded employers, employees, employee organizations, and exclusive collective-bargaining agents pursuant to the Industrial Relations Act to the extent that such act is not inconsistent with the State Employees Collective Bargaining Act.

Neb. Rev. Stat. § 81-1732.

The Commission finds that it has jurisdiction to determine whether the Respondent has committed a prohibited practice. Respondent contends that it had no obligation to negotiate. Respondent also states that if the body-worn cameras are found to be a mandatory subject of bargaining, then the Commission lacks jurisdiction to hear this case, as it requires the Commission to interpret the terms and conditions of an existing CBA. The facts in this case constitute a viable prohibited practice claim; 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).

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;”

Mandatory Subject of Bargaining

Parties are only required to bargain over mandatory subjects of bargaining. Under SECBA, mandatory subjects of bargaining are those subjects of negotiation that employers must negotiate pursuant to the Industrial Relations Act (“Act”). Neb. Rev. Stat § 81-1371(9). 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). 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). Failure to bargain for any changes to these items is a per se violation of the Act and a prohibited practice.

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 (1979).

The Commission has used a relationship test in determining bargaining issues. "Whether an issue is one for bargaining under the Court of Industrial Relations Act depends upon whether it is primarily related to wages, hours and conditions of employment of the employees, or whether it is primarily related to formulation or management of public policy." *See Coleridge Educ. Ass'n v. Cedar County School Dist. No. 1-1-05-41. a/k/a Coleridge Community Schools*, 13 CIR 376 (2001).

In this case, the parties disagree as to whether the introduction and use of body-worn cameras is a mandatory topic of bargaining. This is a case of first impression for the Commission regarding body-worn cameras. There is limited case law regarding whether body-worn cameras are a mandatory subject of bargaining. However, NLRB cases regarding surveillance cameras generally provide some instruction. In *Colgate-Palmolive Co.*, 323 N.L.R.B. 515 (1997), the NLRB found that the “installation of surveillance cameras is analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing, all of which the Board has found to be mandatory subjects of bargaining. They are all investigatory tools or methods used by an employer

to ascertain whether any of its employees have engaged in misconduct.” *Id.* In *National Steel Corp. v. N.L.R.B.*, 324 F.2d 928 (7th Cir. 2003), the Seventh Circuit Court of Appeals considered a situation where a company refused to negotiate over installation and use of surveillance cameras. The court held that the use of the cameras was clearly a mandatory topic of bargaining, relying heavily upon *Colgate-Palmolive* and its language regarding privacy and disciplinary concerns. 324 F.2d at 932. These cases obviously differ from the instant case in that they deal with hidden cameras, which had the investigatory purpose of watching for employee wrongdoing.

The Respondents’ stated purpose for implementing body worn- cameras is safety, and for use in controlling inmates and recording interactions with inmates. (133:11-18). There is no dispute that is true. That does not mean that they could not also be used for other purposes, like employee discipline. TSCI Warden Hansen testified that the recordings from the cameras could and would be used to support disciplinary action against employees. (97:12-98:8; 104:17-105:8) NAPE/AFSCME Executive Director Antonich testified, discipline is one of the absolute core issues about which there must be negotiations. (46:4-11).

We also note that the Florida Public Employee Relations Commission has recently found in a similar case that:

“a public employer's initial decision on whether to implement BWCs is a management right under Section 447.209, Florida Statutes. Therefore, the decision itself is not a mandatory subject of bargaining. Nevertheless, given the substantial effects that this decision would likely have on the terms and conditions of employment, there will clearly be some aspects of implementation that are mandatorily negotiable, such as how the recordings will be used in disciplining officers and when the BWCs must be activated.”

Jacksonville Consolidated Lodge 5-30, Inc. Fraternal Order of Police v. City of Jacksonville, CA-2017-012 (2017).

Respondents argue that the body-worn cameras are simply an extension of the fixed cameras at the facility that already record inmate interactions and therefore are not a mandatory

subject of bargaining. We disagree. The Commission finds that the usage of body-worn cameras unilaterally implemented by Respondents would “vitaly affect” the terms and conditions of employment. Therefore, the Commission agrees with the Petitioner that the implementation of body-worn cameras is a mandatory subject of bargaining.

“Covered by” the CBA

If a mandatory subject of bargaining is “covered by” the CBA, no further bargaining is required. The Nebraska Supreme Court adopted the “contract coverage standard” to determine whether a topic is “covered by” a CBA. The contract coverage rule treats the issue of whether there has been a failure to bargain as a simple matter of contract interpretation; if the issue was “covered by” the CBA, then the parties have no further obligation to bargain the issue. To determine whether an alleged prohibited act is “covered by” the CBA, we must examine whether the CBA “fully defines the parties’ rights”. *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 117 (2012) To “fully define the parties’ rights” does not, however, require that the CBA address the “full range of impact and implementation issues” of the alleged prohibited act. To require such, would be “both unrealistic and impermissible”, as a tacit application of the “waiver” standard, a standard which is “antithetical to the contract coverage principles” applicable when assessing whether a practice is “covered by” a CBA. *Id.*

Turning to the facts of this case, section 3.14 of the CBA provides that the Respondent and Petitioner negotiated and agreed that the Respondent has “[t]he right to introduce new or improved methods, equipment, technology or facilities.” (E1, P.7) We are mindful that “[w]hen parties bargain about a subject and memorialize the result of their negotiations in a collective bargaining agreement, they create a new set of enforceable rules—a new code of conduct for themselves—on that subject. Because of the fundamental policy of freedom of contract, the parties are generally

free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of . . . the courts to interfere with the parties' choice." *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 Petitioner was under no obligation to agree to the language of section 3.14 of the CBA, but it did. There can be little debate that body-worn cameras are "equipment", and they either are, or incorporate, "technology". As compared to the existing stationary surveillance cameras in use by the Respondent, body-worn cameras may be "improved" technology or equipment. Since they were only in use at the time of bargaining on a limited, trial basis and had not been broadly and permanently implemented, they are somewhat "new" to the parties. On the other hand, body-worn cameras are not new technology. They have been in existence for some time, and they were familiar to the parties at the time bargaining between the parties resulted in the CBA. They were not just known to the parties, but they were being used on a trial basis during the time that negotiations for the CBA were occurring.

Based on a literal reading of section 3.14 of the CBA, we could conclude that under the language of the CBA, body-worn cameras constitute "new or improved ... equipment [or] technology". However, we could also just as easily conclude that the use of such cameras is a decision to implement a different use of existing technology and equipment, and involves nothing new or improved. This ambiguity illustrates the need to interpret the contract to determine whether this issue is "covered by" the CBA. While the Commission can look at a contract to determine whether a unilateral change in a condition of employment contained in a collective bargaining agreement is also a prohibited practice, we lack the jurisdiction to interpret the contract. It is for the district court to interpret an ambiguous contract and declare the rights under the same. *Lamb*

v. Fraternal Order of Police Lodge No. 36, 293 Neb. 138 (2016); *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572 (2009).

Collective bargaining is a skill which employers and unions must practice carefully and with precision. Contracts are made to clearly define the expectations of each stakeholder. Lay persons may criticize lawyers for being too detailed, but conflict arises when words subject to different interpretations are not clarified and agreed upon in advance. Section 3.14 of the CBA is ambiguous and from its vagueness conflict has emerged.

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While the Commission is one forum parties may turn to in order to resolve industrial disputes, it is a forum of limited scope and authority. The Commission only has those powers granted to it specifically by the legislature, as interpreted by the Nebraska appellate courts. The Commission lacks jurisdiction to interpret the ambiguity in the parties' contract; therefore, the Petitioner's petition before this Commission must be, and hereby is, dismissed.

IT IS SO ORDERED.

All Panel Commissioners join in the entry of this Order.

Entered October 26, 2018

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Dallas D. Jones, Commissioner