

17 CIR \_\_\_\_\_ (2012)

**NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS**

SERVICE EMPLOYEES INTERNATIONAL ) CASE NOS. 1299, 1300, 1301  
UNION )

(AFL-CIO) LOCAL 226, )

) FINDINGS AND ORDER

Petitioner, )

v. )

)

DOUGLAS COUNTY SCHOOL DISTRICT 001, )

)

Respondent. )

**APPEARANCES:**

For Petitioner:

Timothy S. Dowd

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For Respondent:

David J. Kramer

D. Ashley Robinson

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**Before Commissioners McGinn, Burger, and Lindahl**

**MCGINN, COMMISSIONER**

**NATURE OF THE CASE**

This matter was brought before the Commission by three bargaining groups of Service Employees International Union (AFL-CIO) Local 226 (“Union” or “Petitioner”) against Douglas County School District 001 (“OPS” or “Respondent”). The Petition for the office personnel division was filed January 27, 2012 (CIR Case No. 1299). The Petition for the educational paraprofessionals division was filed January 27, 2012 (CIR Case No. 1300). Finally, the Petition for the operations division was filed on January 30, 2012 and then amended April 2, 2012 (CIR Case No. 1301). The three Petitions were consolidated for purposes of trial.

In its Petitions, Petitioner alleges that Respondent committed a prohibited practice in violation of Neb. Rev. Stat. § 48-824(1) (Reissue 2004) by failing to bargain about a mandatory subject of bargaining before making a unilateral change in terms and conditions of employment. Trial was held on July 31, 2012 before the Honorable Bernard J. McGinn. Exhibits were received into evidence and sworn testimony was adduced. The matter was then submitted on briefs. The Commission now finds and orders as follows:

**FACTS**

Petitioner is the duly recognized collective bargaining representative for three bargaining groups consisting of full-time employees in the office personnel division, educational paraprofessionals division, and operations division of OPS.

The facts are as follows: each bargaining unit entered into two separate collective bargaining agreements with OPS for the 2010-2011 and 2011-2012 school years. Article 9 of each agreement sets forth the amount of vacation time entitled to an employee based on time in service, but not the manner in which an employee was to accrue or receive vacation time. Article 2 of each agreement incorporates the OPS Policies and Regulations by reference, providing that OPS may act to change the Policies and Regulations after the effective dates of

the collective bargaining agreements. OPS has changed its Policies and Regulations section 4.21 regarding vacation several times over the last 52 years, with and without approval from the Union.

Prior to 2007, eligible employees were granted their annual vacation days in a single lump sum initially on September 1<sup>st</sup> and then changed to August 1. Employees who worked at least six months of the school year were considered to have accrued their allotted vacation days, and were given such days in one lump sum at the beginning of the school year. If an employee terminated or quit less than 6 months into the school year and had used vacation days for the school year, the employee had to repay OPS for any vacation days used in excess of those accrued. If an employee terminated or transferred to a non-vacation eligible position after 6 months but before the end of the school year, earned vacation days were prorated and any days taken in excess of the amount earned were deducted from the final paycheck. Those hired after February 28<sup>th</sup> were not eligible to earn or receive vacation for the remainder of the school year.

In 2007, OPS changed section 4.21 of its Policies and Regulations in response to the Nebraska Supreme Court decision in *Roseland v. Strategic Staff Management*, 272 Neb. 434 (2006). In *Roseland*, paid vacation was a part of the employment agreement as a fringe benefit, and therefore any accrued vacation provided for in the employment agreement became due and payable as wages upon termination of employment. *Id.* After *Roseland*, OPS Policies and Regulations section 4.21 stated that all eligible employees received their vacation days on August 1<sup>st</sup> every year with the ability to carry unused vacation days over to the next year. Employees were allowed to accrue up to 5 days more than allotted based on years of service as stated in the collective bargaining agreement. New employees hired or that transferred to a 12-month position after August 1<sup>st</sup> received a prorated amount of vacation days based on hire or transfer date. Any employee who was terminated or transferred to a non-vacation eligible position was paid the balance of their vacation days in the final paycheck. The Union and OPS agreed to work together on a case-by-case basis to ensure that no employee would receive less vacation than the agreed-upon amount in the collective bargaining agreements.

OPS has a long established practice of making changes to its Policies and Regulations section 4.21 under Article 2 of the collective bargaining agreement, which provides that:

“Each and every provision of the Policies and Regulations incorporated by specific reference herein, and made a part of this Agreement, shall be binding upon both parties hereto, in their language as of the date hereof, throughout the

term of this Agreement, notwithstanding that the School District may act to change the Policies and Regulation after the effective date of this Agreement.”

On February 9 and March 2, 2011, OPS met with the Union to advise of OPS's intentions to make changes to Policies and Regulations section 4.21. On May 16, 2011, the OPS Board of Education (“the Board”) voted to amend the Policies and Regulations section 4.21 effective August 1, 2011. Under the new amendment, employees accrued vacation time throughout the school year and were no longer allotted vacation time in a lump sum on August 1<sup>st</sup>. The Union did not appear at the Board meeting to oppose the changes, and were informed of the Board's adopted changes in a memorandum dated May 17, 2011.

Beginning June 2011, each bargaining unit engaged in substantive negotiations with OPS and ultimately signed collective bargaining agreements for the 2011-2012 school year. None of the bargaining units in question made any substantive proposals related to the method and manner of vacation accrual for the 2011-2012 school year.

## **DISCUSSION**

Petitioner argues that Respondent committed a prohibited practice by unilaterally implementing changes to the vacation accrual policy without bargaining. Respondent contends that it did not commit a prohibited practice when implementing changes to the vacation accrual policy because of past practice and further argues that the past dealings and subsequent agreements between the parties amount to a waiver of Petitioner's right to bargain.

Section 48-824(1) makes it a prohibited practice for any public employer to refuse to negotiate in good faith with respect to mandatory subjects of bargaining. An employer has a continuous duty to bargain over changes to a mandatory subject of bargaining before, during, and after the expiration of collective bargaining agreements unless the union clearly waives its right to bargain. *Scottsbluff Police Officers Association, Inc./F.O.P. Lodge 38 v. City of Scottsbluff*, 16 CIR 478; see also *Fraternal Order of Police Lodge 21 v. City of Ralston*, 12 CIR 59 (1994). We first need to establish whether Respondent was under a duty to bargain about the change in the vacation accrual policy.

There are three categories of collective bargaining subjects: mandatory, permissive, and prohibited. *International Union of Operating Engineers Local 571 v. City of Plattsmouth*, 14 CIR 89 (2002). *aff'd*. 265 Neb. 817 660 N.W.2d 480 (2003). The Industrial Relations Act only

requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1). The Commission in *Service Employees International Union, Local No. 226 v. School District No. 66*, 3 CIR 514 (1978), 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.” *Id.* at 515; See also *Coleridge Educ. Ass’n v. Cedar County School Dist. No. 14-0541, a/k/a Coleridge Community Schools*, 13 CIR 376 (2001).

Mandatory subjects of bargaining are not just topics for discussion during negotiations sessions. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of collective bargaining agreements. *City of Scottsbluff*, 16 CIR 478. The Commission in *City of Ralston* found that “the duty to bargain continues during the existence of a bargaining agreement concerning any mandatory subject of bargaining which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain.” This Commission has previously found vacation leave to be a mandatory subject of bargaining. *Fraternal Order of Police Lodge 41 v. County of Scotts Bluff*, 13 CIR 270 (2000). Therefore, Respondent would have a duty to bargain over any changes to the vacation accrual policy.

The duty to bargain can be waived. The burden of proving a waiver falls on the party asserting the waiver. The standard for proving waiver of a statutorily protected right must be clear and unmistakable and that in order for a union to bargain over a mandatory subject of bargaining, the union must make a timely request to bargain. *City of Scottsbluff*, 16 CIR 478; see also *City of Ralston*, 12 CIR 59.

### **Vacation Accrual Policy**

“An employer’s practices, even if not required by a collective bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employee’s employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change.” *Sunoco Inc.*, 349 NLRB 240, 244 (2007). The practice must be so regular and frequent that employees could reasonably expect it to continue on a consistent basis. *Id.*

The collective bargaining agreements in force for the three bargaining units set forth the number of vacation days an employee is eligible to receive based on years of service, but the

agreements do not specifically address the method in which employees are to receive their vacation time. The accrual method has instead been regulated by OPS's Policies and Regulations, which is reviewed annually. The evidence shows that since 2007, all vacation leave was made available to employees at the beginning of the school year on August 1. After August 1, employees were allowed to take vacation time off prior to having accrued that vacation time. The regularity of receiving vacation time in this manner established a past practice that OPS bargaining unit employees relied upon. As such, OPS would not be able to change the practice without notifying the Union of the change and giving opportunity to bargain.

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. *City of Ralston*, 12 CIR 59. In this case, OPS gave sufficient notice to the Union of its intention to change Policies and Regulations section 4.21 of the Policies and Regulations. The evidence shows that a practice had been established where section 4.21 had been changed several times over the last 52 years with and without Union involvement. In the instances where the Union had concerns over changes, the Union and OPS worked together to ensure that there were no ill effects of the new policy. The same practice seems to have occurred here. OPS notified the Union that changes were going to be made to Section 4.21, which would not alter the number of vacation days an employee was to receive per the contract but instead alter when and how the employee would have those days available to take. OPS and the Union met on February 9, 2011 and March 2, 2011 to discuss the proposed changes. The Board voted to adopt the changes on May 16, 2011, and employees were notified the next day that the changes were to be implemented August 1, 2011. Between May 2011 and August 2011, the parties engaged in negotiation sessions for the 2011-2012 school year, during which the Union did not present any proposals regarding the vacation accrual policy. Also, trial testimony indicates that OPS told the Union that it would work with the Union to ensure that no employees lost out on any vacations planned prior to the change and that no OPS bargaining unit employee has lost any vacation time or their ability to take vacation once the new policy was implemented.

Once a union has notice that an employer wants to change a mandatory bargaining subject, it must make a timely request to bargain with the employer. *City of Ralston*, 12 CIR 59. The Union contends that it did not waive its right to bargain because it requested that the parties bargain about the proposed changes three times- at each meeting with OPS and through a letter dated June 10, 2011. The Union president, in her testimony, admitted that the Union could have negotiated to impasse over the vacation accrual policy. She explained that the Union did

not negotiate the manner and method of vacation accrual because the Union was told that the matter was “non-negotiable.” She also testified that she thought the matter was in litigation.

We agree that this could be an indication that the Union did not want to waive its right to bargain about the subject and that the evidence does not support a finding of a clear and unmistakable waiver of its bargaining rights. However, the conclusion that the matter was in litigation was erroneous. Respondent provided testimony that one bargaining group did in fact bring the subject of vacation accrual to the bargaining table while bargaining for its 2012-2013 collective bargaining agreement and that the parties were still negotiating the issue as of trial. No bargaining proposals were brought forward during negotiations for the 2011-2012 contracts, which the parties began negotiating before the new vacation accrual policy was implemented. Despite testimony that OPS told the Union that the vacation accrual policy was “non-negotiable,” the evidence as a whole does not support the notion that OPS was not willing to have discussions with the Union about the vacation accrual policy. The reasons given for the Union’s failure to bargain to impasse on the manner and method of vacation accrual do not constitute a convincing basis for the Union’s claim that OPS committed a prohibited practice.

We therefore find that Respondent did not violate § 48-824(1). The petition is hereby dismissed.

IT IS THEREFORE ORDERED THAT the petition is hereby dismissed.

All panel Commissioners join in the entry of this Order.

Entered December 6, 2012.