

19 CIR ____ (2013)

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

LINCOLN FIREFIGHTERS ASSOCIATION,) CASE NO. 1321
LOCAL 644,) REP. DOC. NO. 459
)
Petitioner,) FINDINGS AND ORDER
v.)
)
CITY OF LINCOLN, NEBRASKA,)
)
Respondent.)

APPEARANCES:

For Petitioner:

John E. Corrigan
Dowd Howard & Corrigan, LLC
1411 Harney Street, Ste 100
Omaha, Nebraska 68102

For Respondent:

John C. Hewitt
Cristin Berkhausen
Cline Williams Wright Johnson &
Oldfather, L.L.P.
1125 South 103rd Street, Ste 600

Before Commissioners Lindahl, Blake, and Pillen

NATURE OF THE CASE:

On January 23, 2013, the Lincoln Firefighters Association Local 644 (“Union” or “Petitioner”) filed a Petition seeking clarification of a bargaining unit which includes certain employees of the City of Lincoln (“City” or “Respondent”) within the Fire and Rescue Department. Specifically, Petitioner seeks clarification as to whether the newly-created position of Fire Air Technician should be included in the current bargaining unit.

On February 14, 2013, Respondent filed its Answer and Counter Petition for Unit Amendment, asserting that the Fire Air Technician should not be included in the bargaining unit and that additionally the Fire Equipment Mechanic position does not share a community of interest with the existing bargaining unit and should be excluded. On March 29, 2013 Petitioner filed a Motion to Dismiss Respondent’s Counter-Petition, alleging that the Commission lacked subject matter jurisdiction to hear Respondent’s Counter-Petition regarding the Fire Equipment Mechanic. Trial was held on April 2, 2013 at the Commission before the Honorable Loren L. Lindahl. Subsequent to the trial, the parties submitted post-hearing, reply, and surreply briefs for consideration.

FACTS:

The bargaining unit in question currently includes employees that hold the ranks of Firefighter, Fire Apparatus Operator, Fire Captain, Fire Prevention Inspector I and II, Firefighter/Paramedic, Fire Equipment Mechanic and Captain-EMS Training. Petitioner seeks to include the newly-created position of Fire Air Technician, while Respondent seeks to exclude this position as well as remove the position of Fire Equipment Mechanic from the current bargaining unit.

The Fire Equipment Mechanic has been part of the bargaining unit since at least 1974. Fire Equipment Mechanics repair and perform maintenance on all fire apparatus, ambulance vehicles, and related equipment, and test fire equipment for defects. Fire Equipment Mechanics work a 40-hour workweek. Fire Equipment Mechanics can be called out to the fire ground to provide assistance for any problem equipment. These employees are issued turnout gear, or the same gear that any employees deployed to a fire scene are

required to wear. At some point, Fire Equipment Mechanics were required by the City to take the Firefighter I certification course for basic firefighting skills although possessing the Firefighter I certification is not required for the position. The Fire Equipment Mechanic is entitled to out of class pay if assigned to fill the space of an absent Division Chief of Logistics and Maintenance in excess of four hours, is paid on-call pay if on on-call status during the weekend, and receives longevity pay under the collective bargaining agreement. The City currently employs two Fire Equipment Mechanics, and they are housed out of the Municipal Services Center.

The Fire Air Technician position was created in the fall of 2012 and is responsible for the maintenance, repair, and testing of respiratory protection equipment used by firefighters. This work includes performing annual fit testing for all respiratory protection equipment and fire fighting gear; keeping record of all maintenance schedules, repairs and testing; ensuring equipment compliance with NFPA standards; and recalibrating air quality testing equipment. The filling of air bottles, repair, and maintenance work performed by this job classification was previously performed by the Fire Equipment Mechanic and other bargaining unit employees in the Union. The coordination of face fit testing was performed by a member of the Public Association of Governmental Employees ("PAGE") union.

The Union sought to include the Fire Air Technician in the bargaining unit during negotiations. However, the City did not agree that the position shared a community of interest with the bargaining unit and placed the Fire Air Technician in the PAGE bargaining unit. Subsequent to the filing of the Petition, the new collective bargaining agreement ("CBA") for 2012-2014 was ratified by the Union around February 25, 2013 and ratified by the City around March 25, 2013. The Fire Equipment Mechanic was included in the description of the bargaining unit for the CBA.

DISCUSSION:

Petitioner is seeking a unit clarification to determine whether the newly created position of Fire Air Technician shares a community of interest with the bargaining unit represented by the Union. Respondent argues that the Fire Air Technician does not share a community of interest with the bargaining group, and that the unit should be amended to remove the Fire Equipment Mechanic from the unit because it also does not share a community of interest with the unit. On March 29, 2013 Petitioner filed a Motion to Dismiss Respondent's Counter-Petition to exclude the Fire Equipment Mechanic from the

bargaining unit for lack of subject matter jurisdiction.

Jurisdiction

Petitioner argues that the Commission lacks subject matter jurisdiction to exclude the Fire Equipment Mechanic from the bargaining unit because doing so would alter an existing collective bargaining agreement, an action which Petitioner argues is outside the Commission's jurisdiction. Article I, Section B of the CBA states that "Employee shall mean any uniformed, regular, full-time employee of the Lincoln fire and Rescue Department of the City of Lincoln, Nebraska, **including and limited to** Firefighter, Fire Apparatus Operator, Fire Captain, Fire Prevention Inspector(s) I and II, Firefighter/Paramedic, Fire Equipment Mechanic, and Captain C EMS Training." (Emphasis added).

Commission Rule 12 allows a party to file a petition for clarification or amendment of a certified or recognized bargaining unit and sets forth the requirements for such a petition. The Commission promulgated this rule pursuant to its authority under NEB. REV. STAT. § 48-838(2) to determine the appropriate unit for bargaining purposes.

However, the Commission does not have jurisdiction to interpret and apply terms and conditions of a collective bargaining agreement. *International Brotherhood of Electrical Workers Local 1483 v. Omaha Public Power District*, 16 CIR 514 (2011). The Nebraska Supreme Court stated in *Transport Workers of America v. Transport Authority of the City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979) that

"The CIR performs an important and vital function in resolving impasses in the public sector. It is not, however, a substitute for the District Court with regard to existing and agreed terms, tenure, and conditions of employment. It has not been made a court by the Legislature. The proper forum to resolve this dispute is the courts."

Id. at 35. The parties ratified the CBA covering August 16, 2012 through August 31, 2014. The language of Article I, Section B of the CBA clearly states which job classifications are considered "Employees" and therefore covered by the CBA. The Fire Equipment Mechanic is listed very clearly as being an "Employee" covered by the CBA. The Commission does not have the authority to alter collective bargaining agreements. That is a function for the courts.

Respondent argues that the Commission has jurisdiction to hear the Counter-

Petition, as Commission rules allow for a party to seek amendment of an existing bargaining unit. Respondent cites the recent case *County of Lancaster v. Local 2468 of the American Federation of State, County and Municipal Employees AFL-CIO*, 17 CIR 262 (2012) to support its argument. In *County of Lancaster*, the Commission held that changes to the composition of a bargaining unit is a permissive subject of bargaining, meaning that the subject can be raised by either party during bargaining but the non-raising party is not required to bargain over it, and allowed for a Rule 12 amendment to a long-existing bargaining unit. *Id.* at 268.

Respondent is correct in its reading of *County of Lancaster* in that the case illustrates a circumstance for the allowance of amending an existing bargaining unit. That being said, there are differences between *County of Lancaster* and the present case. The parties in *County of Lancaster* did not negotiate about the composition of the bargaining unit and had not ratified a collective bargaining agreement before the unit clarification petition was filed, so there was no question of possible contract interpretation. In the present case, the parties had ceased negotiations for a new contract prior to the filing of the Petition and ratified the contract shortly before the filing of the Counter-Petition. The composition of the bargaining unit was discussed in negotiations. The evidence shows that the Union requested that the Fire Air Technician be included in the bargaining unit and that the City did not believe that the position shared a community of interest with the other positions, including the Fire Equipment Mechanic, and placed the position within the PAGE unit. There is no evidence that the City ever brought forth the Fire Equipment Mechanic's inclusion in the bargaining unit as an issue for negotiation despite the fact that the composition of the bargaining unit was being negotiated. The CBA ratified by the parties clearly includes the Fire Equipment Mechanic in the list of "Employees" covered by the CBA, as well as its wages and terms and conditions of employment as agreed upon. We are without jurisdiction to make any changes to the existing bargaining agreement. Therefore, the Commission finds that we are without subject matter jurisdiction over Respondent's Counter-Petition and Petitioner's Motion to Dismiss Respondent's Counter-Petition is hereby granted.

Fire Air Technician

Petitioner contends that the Fire Air Technician should be included in the bargaining unit, and urges the Commission to adopt a National Labor Relations Board ("NLRB") standard for the inclusion or exclusion of a newly created job classification to an already

existing bargaining unit based on *In re Premcor, Inc.*, 333 N.L.R.B. 1365 (2001). Respondent argues that the Commission in *Marcy Delperdang v. United Electrical Radio and Machine Workers of America*, 13 CIR 400 (2001) clearly stated that NLRB standards do not apply with regard to unit clarification cases before the Commission, and that we should continue to use the “community of interest” standard which has developed in CIR case law.

We have followed a basic inquiry in bargaining unit determination as to whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. *American Association of University Professors v. Board of Regents of the University of Nebraska*, 198 Neb. 243, 261, 253 N.W.2d 1 (Neb. 1977). To determine whether a community of interest exists, we have examined several relevant factors including mutuality of interest in wages, hours and working conditions; duties and skills of employees; extent of union organization; desires of the employees; fragmentation of units; established policies of the employer; and statutory mandates to assure proper functioning and operation of governmental service. See *Sheldon Station Employees Association v. Nebraska Public Power District*, 202 Neb. 391, 275 N.W.2d 816 (Neb. 1979). Petitioner argues that the Commission should adopt a different method of determining whether a community of interest exists for a newly-created job classification as developed under the NLRB.

The Nebraska Supreme Court has stated that decisions under the NLRB are helpful but not controlling. See *City of Grand Island v. AFSCME*, 186 Neb. 711, 714, 185 N.W.2d 860 (1971); *Nebraska Public Employees Local Union 251 v. Otoe County*, 257 Neb. 50, 595 N.W.2d 237 (1999). We have used our discretion to follow or reject the guidance of the NLRB in the continuing development of our case law, especially in cases where similar facts have not been previously presented before the Commission for determination.

In *Delperdang*, the Commission declined to follow NLRB case law and adopt a higher standard of proof when a determination of an appropriate bargaining unit has been requested for a previously certified bargaining unit. In doing so, we stated that “NLRB case law is not helpful here where Nebraska case law has developed differently.” 13 CIR 400, 407 (2001). Respondent contends that this statement by the Commission meant that NLRB standards do not apply to unit clarification. We disagree with Respondent’s analysis of *Delperdang*. Our decision to reject the NLRB standard of proof in that case was based on the facts presented and should not be read as an overall ban on any consideration of

future developments of NLRB case law with regards to unit clarification cases.

Delperdang presented a familiar set of facts for consideration: whether an existing job classification should be included or excluded from a bargaining unit. Nebraska case law concerning a request for clarification or amendment under Rule 12 has developed to deal with similar cases. However, the Commission has yet to make a determination of an appropriate bargaining unit under the facts presented in this case: whether a newly created job classification that performs work previously performed within the existing bargaining unit should be included or excluded from that bargaining unit. We shall therefore look to NLRB case law as guidance.

Petitioner argues that the Fire Air Technician should be included in the bargaining unit because it performs duties that have historically been performed by the bargaining unit, citing *In re Premcor, Inc.*, 333 N.L.R.B. 1365 (2001). In *Premcor*, a position was created whose job duties consisted of those that had been performed by another job classification within the bargaining unit. A petition was filed to clarify whether this newly created position should be included in the existing bargaining unit, and it was found to be appropriately included. The NLRB explained that “once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit...” *Id.* at 1366.

We agree with Petitioner that the facts in the present case are analogous with *Premcor* and we shall adopt its analysis. The Fire Air Technician is performing the same basic functions that a unit classification had historically performed. The Fire Air Technician was created to maintain, repair and test the self-contained breathing apparatus worn by firefighters and EMS workers in the field. Although coordination of face fit testing was performed by a member of another union, the remainder of the assigned job duties for the Fire Air Technician had historically been performed by bargaining unit members represented by Petitioner. Under *Premcor*, no further analysis would be necessary.

Nor does further analysis reveal any change of circumstances that would justify removing the Fire Air Technician from the bargaining unit. There was no question of the validity of the prior job classification remaining in the bargaining unit, and the evidence does not factually support a finding that the new position with essentially the same functions should not continue to be included in the unit. We therefore find that the Fire Air Technician shares a community of interest with the bargaining unit and should be included

in the bargaining group represented by Lincoln Firefighters Association Local 644.

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion to Dismiss Respondent's Counter-Petition for Lack of Subject Matter Jurisdiction is hereby granted. Respondent's Counter-Petition for Unit Amendment is hereby dismissed.
2. The position of Fire Air Technician shares a community of interest and should be included in the bargaining unit represented by Lincoln Firefighters Association Local 644.

Entered September 13, 2013.