

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

IN THE MATTER OF THE LABOR)
CONTRACT NEGOTIATIONS)
BETWEEN)
)
STATE OF NEBRASKA)
)
and)
)
STATE LAW ENFORCEMENT)
BARGAINING COUNCIL.)
)

Case No. 1479
FINDINGS OF FACT AND ORDER

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

MAR 01 2019

CLERK

APPEARANCES:

For the State of Nebraska

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Before Commissioners Vannoy, Jones, and Partsch

NATURE OF THE CASE:

This is an action jointly brought under the State Employee Collective Bargaining Act, Neb. Rev. Stat. § 81-1369ff (“SECBA”) by the State of Nebraska and the State Law Enforcement Bargaining Council (“SLEBC”).

The State of Nebraska is the employer in this matter. SLEBC is the representative of the bargaining unit of law enforcement employees of the State of Nebraska that was established by

the SECBA for law enforcement employees. *See* Neb. Rev. Stat. § 81-1373(g).¹ Under the terms of the SECBA, SLEBC and the State of Nebraska negotiate every two years to form the terms of a collective bargaining agreement, which in each case covers a two-year period that corresponds with the two-year biennial state budget. Neb. Rev. Stat. § 81-1377. Accordingly, the collective bargaining agreement period at issue in the case is July 1, 2019, to June 30, 2021.

The negotiations that are the subject matter of this action began in September 2018, in compliance with Neb. Rev. Stat. § 81-1379. After some time, the parties submitted the matter to mediation in compliance with Neb. Rev. Stat. § 81-1381. On January 10, 2019, the parties reduced to writing all agreed-upon issues and exchanged final offers to one another on each unresolved issue. *See* Neb. Rev. Stat. § 81-1382(1). On January 15, the parties brought this action in a joint submission of all unresolved issues in compliance with Neb. Rev. Stat. § 81-1382, which is identified as Exhibit 501. As such, the Commission has jurisdiction to resolve these issues pursuant to our authority to establish “rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained by peer employers for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.” Neb. Rev. Stat. § 81-1383(1).

There are a small number of issues for the Commission to resolve for the parties under its authority provided in Neb. Rev. Stat. § 81-1383, each involving a holiday compensatory time benefit currently contained in the parties’ collective bargaining agreement. (Exhibit. 500, p. 32).

The State of Nebraska identified the outstanding issues involving this benefit to be resolved as follows:

¹ The bargaining unit is composed of the following classifications: State Patrol Trooper, State Patrol Sergeant, State Patrol Investigation Officer, State Patrol Investigation Sergeant, State Patrol Trooper acting as Pilot, State Patrol Sergeant acting as a Pilot, State Fire Marshal Deputy, Game and Parks Conservation Officer, and Game and Parks Conservation Officer Lead Worker. (Exhibit 500).

1. Whether holiday compensatory hours when used should be counted as hours worked for the purposes of overtime.
2. Whether the State of Nebraska should be allowed to mandatorily schedule employees off work when their holiday compensatory time balance exceeds 120 hours.
3. Whether, when employees work on a designated holiday, they should be compensated, in the employer's discretion, in either premium pay or holiday compensatory time.
4. Whether holiday compensatory time should be maintained in a separate leave bank.

State of Nebraska's Amended Statement of Issues (February 8, 2019).

SLEBC identified the outstanding issues to be resolved as follows:

1. Whether employees who are required to work on a holiday are paid by accrued holiday compensatory time in a holiday compensatory time bank, or are paid premium pay for time worked on a holiday.
2. If there is a holiday compensatory time bank for working on a holiday, under what terms does that banking of time operate?

SLEBC Statement of Issues Outstanding for Trial (February 7, 2019).

I. Array.

The first step in the comparability analysis required is to determine the comparator states to be included in the array. The Parties have stipulated that Indiana, Iowa, Kansas, Wyoming, and Wisconsin shall be included in the array of comparable peers. The State of Nebraska has proposed South Dakota, Arkansas and Oklahoma for inclusion in the array. SLEBC has proposed Colorado and North Dakota for inclusion in the array.

In order to determine the array the Commission is guided by Neb. Rev. Stat. §§ 81-1383(2), which states:

- (c) For purposes of determining peer employer comparability, the following factors shall be used by the commission:

- (i) Geographic proximity of the employer;
- (ii) Size of the employer, which shall not be more than twice or less than one-half, unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar;
- (iii) The employer's budget for operations and personnel; and
- (iv) Nothing in this subdivision (2)(c) of this section shall prevent parties from stipulating to an array member that does not otherwise meet the criteria in such subdivision, and nothing in such subdivision shall prevent parties from stipulating to less than seven or more than nine array members.

The statute sets out three factors in picking an array. Neb. Rev. Stat. §§ 81-1383(2)(c)(i) and (iii) do not define proximity or budget considerations. However, it is clear that size of the employer has a clear parameter. If a potential array member is less than half the size of Nebraska, then that state does not qualify as a comparator. If it is more than twice the size of Nebraska, it does not qualify. With respect to determining the size of the employer, both Parties presented data with respect to full-time, non-university employees in each state. However, there were significant differences with respect to the actual numbers of such full-time public employees, most notably in Colorado. While SLECBC relies on evidence that there were approximately 32,000 full-time non-university employees in Colorado (Exhibit 6: Case 1480 Exhibit 503), the State presented more credible evidence that there were approximately 37,000 such employees (Exhibit 6: Case 1480 Exhibits 1, 32, and 63). The State, additionally, presented evidence as to the overall populations of the five states not in the agreed upon array. We have reviewed both of those criteria, namely full-time non-university employees and overall population in determining whether the size of the prospective comparators meets the parameters provided in the statute. We place primary emphasis on the number of employees. Using those data categories, we find that Arkansas and Oklahoma both satisfy the statutory size requirements.

Colorado, South Dakota and North Dakota are all disqualified from further scrutiny due to failure to fall within this size limitation.

With respect to proximity, both Parties presented the measure to be the distance between Lincoln, Nebraska, and the capitol of the other states. The Commission finds that, in the context of the application of Neb. Rev. Stat. §81-1383(2)(c)(i), the distance between Little Rock, Arkansas and Oklahoma City, Oklahoma and Lincoln, Nebraska, namely 484 and 371 miles respectively, does not disqualify those states from inclusion in the array. With respect to the operating and personnel budgets, there were disparities in the data presented by the parties. However, nothing in the evidence was persuasive to disqualify the remaining states of Arkansas and Oklahoma on the basis of the budget information provided.

Therefore we conclude that Arkansas and Oklahoma meet all of the comparator criteria. We select an array of 7 states, which includes the five stipulated states of Iowa, Kansas, Wyoming, Wisconsin and Indiana; plus Arkansas and Oklahoma.

II. Current Practice Regarding Holiday Compensatory Time.

The parties do not dispute that all employees in the bargaining unit receive their ordinary pay for their regular shift on a scheduled holiday. (22:8—23:10). Employees are also paid premium pay when the employee performs work on the holiday, at the premium rate of 1.5 times their regular rate of pay. (See Exhibit 506).

Under the holiday compensatory bank terms in Section 11.1.4 of the parties' collective bargaining agreement, the State agencies for the employees in this unit currently maintain a separate accounting bank of time that is earned by employees who work on scheduled holidays. (Exhibit 500, p. 32). In addition to receiving pay for the holiday that all employees who are not working on the holiday receive, those employees who actually work on the holiday currently

receive compensation for the hours they work in one of two ways, at the employer's sole discretion (24:2-10), in the form of 1.5 times the number of hours that they work, in (1) pay, or (2) hours of "holiday compensatory time" placed in the holiday compensatory time bank.² (Exhibit 500, p. 32).

Employees accrue holiday compensatory time on an unlimited basis. When these employees reach the level of 240 hours in their bank, the Agency may schedule the employee off of work to reduce the number of hours in the holiday compensatory time bank down to the level of 240 hours. (Exhibit 500, p. 32; 23:11-22). Furthermore, the Agency that employs them may also, at any time, pay out any portion of the hours of pay in any employee's holiday compensatory time bank that exceed 240. (Exhibit 500, p. 32). The "holiday compensatory time bank" is not the same bank as the employee's overtime compensatory time bank. The overtime compensatory time bank operates separately and under different terms.³ (Exhibit 500, pp. 30-31; 24:24-27:24).

III. Rate of Pay for Working on a Holiday.

SLEBC presented data regarding the rate of pay for work on a holiday. (Exhibit 506). Rate of pay was not presented as an issue for the Commission's determination. (See Exhibit 501). Nonetheless, the evidence presented confirms there should be no change to compensating employees at a 1.5 times rate for work on a holiday. (Exhibit 506; 42:3-24). Accordingly, the practice of paying employees premium time of 1.5 times the employee's hourly rate for all hours worked on a holiday shall continue.

² To be complete: the employee receives 1.5 times the rate of pay for each hour of work on the holiday that is within the employee's regular shift. If an employee is required to work on the holiday in excess of the employee's regular shift, the Agency is required to pay the employee for the excess time at the rate of 2 times his or her ordinary rate of pay, in cash. The Agency does not have the discretion under the agreement to pay this "excess time" into the holiday compensatory time bank. (Exhibit 500, p. 32).

³ Neither party has made the terms of the employee's overtime compensatory time bank an issue to be resolved in this case. (See Exhibit 501).

IV. Method of Compensation for Work on a Holiday.

Currently, employees in the bargaining unit are compensated for working on a holiday in the form of premium pay (1.5 times the normal rate of pay) or compensatory time (also paid at 1.5 times the normal rate of pay), at the State's discretion. (Exhibit 500, p. 32). The State has presented evidence to support its position that it is prevalent to compensate employees for working on a holiday in the form of compensatory time. (Exhibit 3). Neither party has presented evidence to address the discretion component of the current practice. Therefore, there shall be no change to the current practice of compensating employees for working on the holiday in the form of premium pay or compensatory time, at the State's discretion.

V. Holiday Compensatory Time Bank.

The parties agreed that under any array, there is no prevalent practice for the existence of a separate holiday compensatory time bank. (Exhibits 2, 505; 40:9-41:5, 71:18-23). Accordingly, the parties' prior practice of tracking compensatory time earned for working on a holiday in a separate holiday compensatory time bank shall be discontinued beginning on July 1, 2019. In other words, if the State, in its discretion, compensates employees with compensatory time for working on holidays that occur on or after July 1, 2019, that compensatory time will not be placed in a separate compensatory time bank. Instead, such compensatory time shall be treated in accordance with the terms of the collective bargaining agreement between the Parties. The Commission makes no finding or recommendation as to the applicable contract terms since it is without the jurisdiction to interpret the contract. The Commission has no general jurisdiction over contractual disputes. *South Sioux City Educ. Ass'n v. South Sioux City Public Schools*, 16 CIR 12 (2008), *aff'd* 278 Neb. 572 (2009).

The question remains what to do with the existing holiday compensatory time that has

already or will be placed in the separate holiday compensatory time bank through June 30, 2019. In its pre-trial brief, the State suggested that any comp time earned for working a holiday should be treated in accordance with the Parties' already-established comp time practices, outlined in Article 10, Section 10.6 of the collective bargaining agreement.⁴ At trial, however, the State withdrew this suggestion as to Article 10.6 specifically, and stated that it is not asking to Commission to identify "which portion of the contract will cover holiday comp time in the future." (14:8-24).

SLEBC argued that the Commission cannot order such a result because "Comp Time," as contemplated by Article 10, was not an issue raised during negotiations or before the Commission. Neb. Rev. Stat. § 81-1382(2) expressly provides that "[n]o party shall submit an issue to the commission that was not the subject of negotiations." The Commission finds pursuant to the testimony of both parties' witnesses that *revisions* to Article 10, Section 10.6 of the collective bargaining agreement were not a subject of negotiations. (28:7-30:6, 83:15-84:24). However, neither party has asked the Commission to revise Article 10. During closing arguments, counsel for SLEBC also requested that the Commission enter an order to enjoin the State from applying Article 10 of the collective bargaining agreement to the existing holiday comp time hours.

The Commission finds that existing compensatory time that has already or will be placed in the separate holiday compensatory time bank through June 30, 2019, should be treated in accordance with the terms of the Parties' collective bargaining agreement(s) pursuant to which the compensatory time was earned and placed in the bank. Ordering anything to the contrary would deprive the parties of the benefits of their previously bargained agreements. Again, the

⁴ The State of Nebraska also presented the issue of whether the State should be allowed to mandatorily schedule employees off work when their holiday compensatory time balance exceeds 120 hours. Because of the Commission's other findings, we do not need to address this question.

Commission makes no finding or recommendation as to the applicable contract terms since it is without the jurisdiction to interpret the contract. The Commission has no general jurisdiction over contractual disputes. *South Sioux City Educ. Ass'n v. South Sioux City Public Schools*, 16 CIR 12 (2008), aff'd 278 Neb. 572 (2009).

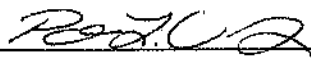
VI. Overtime Calculations.

The State of Nebraska also presented the issue of whether holiday compensatory time hours, when used, are counted as hours worked for the purposes of overtime. The State has presented evidence to support its position that holiday compensatory hours should not be considered, when used, to be hours worked for the purposes of calculating overtime. The evidence presented (Exhibit 4) supports the conclusion that counting such hours is not prevalent. Accordingly, it is ordered that the present practice of counting such hours during the calculation of overtime shall be discontinued.

All Panel Commissioners join in the entry of this Order.

Entered this 1st of March, 2019.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



Patricia L. Vannoy, Commissioner