NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1483, Petitioner,	)	Case No. 1508 Rep. Doc. No. 561
v.	)	FINDINGS OF FACT AND ORDER
OMAHA PUBLIC POWER DISTRICT, Respondent.	)	

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Before Commissioners Carlson, Vannoy, and Neuhaus.

NATURE OF THE CASE

The Petitioner, the International Brotherhood of Electrical Workers, Local 1483 ("IBEW, Local 1483" or "Union"), filed a Petition for Unit Clarification on August 10, 2020, requesting the Commission enter an order amending the bargaining unit to include the positions of Account Executive and Distribution Systems Operator. The Respondent, Omaha Public Power District ("OPPD" or "Employer"), filed its Answer on August 31, 2020, in which it asserts that the two above named positions do not share a community of interest with the bargaining unit employees currently represented by the Petitioner. A trial was held via video conference before the Honorable Joel E. Carlson on February 19, 2021. Post-hearing briefs were submitted.

FINDINGS OF FACT

Petitioner is a "labor organization" as defined in Neb. Rev. Stat. § 48-801(7). Respondent is a "public employer" as defined in Neb. Rev Stat. § 48-801(12). At all times relevant to this

matter, the parties have been covered by a collective bargaining agreement ("CBA") between Petitioner and Respondent covering wages, hours and conditions of employment for approximately 537 different job classifications, including Electric Service Designer and Systems Operations Specialist. The CBA covers the period of June 1, 2017, through May 31, 2022.

The Petitioner, IBEW, Local 1483 represents approximately 380 employees (22:8-12). The Union represents a wide variety of employees, such as chemists, production planners, security, and other professional, technical, and administrative jobs (23:9-24:4). IBEW, Local 1483 members staff OPPD's Customer Service Centers and corporate offices performing clerical and customer service type jobs (Exhibits 1 and 502, 25:2-6). The CBA details scores of classification titles in 22 divisions. (Exhibit 505, 21:21-25). Both the Account Executives and the Distribution Systems Operators that the Union seeks to add to the bargaining unit are exempt salaried employees (72:13-24). "Exempt" means employees under the Fair Labor Standards Act ("FLSA") who are not paid by the hour and are not entitled to overtime pay. IBEW, Local 1483 does not represent any salaried or FLSA exempt employees (72:13-24).

There has not been any attempt to include either the Account Executive or Distribution Systems Operator positions in the bargaining unit prior to the current CBA (204:21-205:4). Mark Salerno, President and Business Manager of the Union (20:14-15) testified that he believed that negotiations did not occur and that, in fact, after agreeing to do so, he was given a presentation regarding the duties and responsibilities of the Account Executives and Senior Account Executives (40:19-21, 206:24-207:5). Labor Relations Director, Steve Kerrigan, testified the purpose of the meeting was to discuss how the responsibilities of the Account Executives and Senior Account Executives would remain separate and distinct from the duties and responsibilities of the Electric Service Designers (208:7-10). The parties never submitted any written proposals regarding terms and conditions for Account Executives (192:6-15).

The Union has petitioned the Commission to clarify the existing unit to include Distribution Systems Operators (Exhibits 5 and 504) and Account Executives (Exhibits 4 and 502) to the existing IBEW, Local 1483 bargaining unit. There are three (3) Account Executives (196:14) and approximately nine (9) Distribution Systems Operators (71 :20-22) that the Union seeks to include in the unit.

JURISDICTION

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. The Commission can amend bargaining units based on the implied authority to determine questions of representation under NEB. REV. STAT. § 48-838. Petitioner is seeking to amend the bargaining unit by adding the above-listed job classifications, alleging that these classifications share a community of interest with the other classifications within the bargaining unit.

DISCUSSION

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). In *Marcy Delperdang v. United Electrical Radio and Machine Workers of America*, 13 CIR 400 (2001), the Commission 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 follow 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). The statute provides that "the Commission shall consider established bargaining units and established policies of the employer." NEB. REV. STAT. § 48-838(2). In analyzing § 48-838, the Nebraska Supreme Court determined the requirements in the statute are not exclusive, and that the Commission may consider additional relevant factors when determining the appropriateness of a proposed bargaining unit. *AFSCME v. Counties of Douglas and Lancaster*, 201 Neb. 295, 267 N.W.2d 736 (1978). 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. *Sheldon Station Employees Association v. Nebraska Public Power District*, 202 Neb. 391, 275 N.W.2d 816 (Neb. 1979); *International Brotherhood of Electrical Workers Local 1536 v. Lincoln Electrical System*, 215 Neb. 840, 842, 341 N.W.2d 340, 341-342 (1983).

The Commission also carefully considers the public policy surrounding collective bargaining agreements. In Nebraska, the public policy as expressed in § 48-802 is "the continuous, uninterrupted and proper functioning and operation of the governmental service..." This public policy underpins the Commission's desire to preserve a bargaining unit's stability and continuity, absent a reason for disruption or alteration of the status quo. *Marcy Delperdang v. United Electrical, Radio, and Machine Workers of America*, 13 CIR 400 (2001). When determining the appropriateness of an existing collective bargaining unit, the Commission must give due regard to this public policy while considering all the evidence presented.

The party seeking modification of an existing collective bargaining unit has the burden to prove by preponderance of the evidence that it is entitled to the modification sought. *Kimball Educ. Ass'n v. Kimball Public Schools*, 14 CIR 242 (2003).

Mandatory v. Permissive Subject of Bargaining

There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Of the three categories, the Industrial Relations Act only requires parties to bargain over mandatory subjects. *Fraternal Order of Police Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). Permissive bargaining subjects are legal subjects of bargaining which do not fit within the definition of mandatory. Either party may raise a permissive subject during bargaining, but the non-raising party is not required to bargain over permissive subjects. *Id.*

The Commission has previously decided changes to the scope of a bargaining unit are permissive subjects of bargaining, whether the bargaining unit has been certified or voluntarily recognized. *Fraternal Order of Police, Lodge 41 v. County of Scotts Bluff*, 13 CIR 270 (2000). In *Lodge 41*, the Commission ruled that an employer or bargaining unit representative must obtain the agreement of the other party or file a petition with the Commission pursuant to Commission Rule 12 to change the scope of the unit, if they wish to have that unit changed. While *Lodge 41* does not specifically answer the question whether a party can resort to filing a petition without first seeking the other party's agreement, amending the scope of a bargaining unit is a permissive

subject of bargaining. As such, bargaining prior to filing a petition with the Commission for a change in the unit is not required.

Community of Interest

The threshold inquiry in bargaining unit determinations is whether a community of interest exists among the employees, that is sufficiently strong to warrant their inclusion in a single unit. When determining community of interest, the Commission analyzes which factors should be considered and the weight each factor receives. The generally recognized factors in determining an appropriate bargaining unit have been identified as including:

1. The mutuality of interest in wages, hours and working conditions;
2. Duties and skills of employees;
3. Extent of union organization among employees;
4. The desires of the employees;
5. A policy against fragmentation of the units;
6. The established policies of the employer;
7. The extent of interchange of employees in the proposed bargaining unit; and
8. The statutory mandate to ensure proper functioning and operation of governmental service.

Sheldon Station Employees Association v. NPPD, 202 Neb. 391, 275 N.W.2d 816 (1979). *Sheldon Station* involved the question of whether an employee group should be recognized as a bargaining unit. Where there is an effort to modify an existing long-standing bargaining unit, there are additional considerations. The case of *Kimball Education Association v. Kimball County School Dist.*, 14 CIR 242 (2003), involved a bargaining unit that represented 58 employees, including teachers, counselors and the school nurse. The unit had been recognized for 16 years and there was no evidence that there had been problems for either the school district or the association in negotiating on behalf of the school nurse and the counselors as part of the bargaining unit with the teachers. This history of bargaining was discussed as a relevant factor to be considered.

The listed factors are not necessarily the only factors to be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in the case.

In the present case, Petitioner attempted to establish the Account Executive position is similar to the Electrical Service Designer position and the Distribution Systems Operator position is similar to the Systems Operations Specialist position. Respondent argues that in order to satisfy its burden, Petitioner must establish more than that these positions share a community of interest with a single position in the unit. The subject positions must share a community of interest with all other classifications within the bargaining unit. *County of Lancaster v. AFSCME, Local 2468*, 17 CIR 262 (2012). The Commission finds that the Petitioner failed in its burden to prove that these subject positions shared a community of interest with other existing positions in the bargaining unit. With respect to the Account Executive position, there is limited to no functional integration with the Electric Service Designer position. Those positions do not share any significant mutuality of interest in wages, hours, and working conditions. Of significance, the Account Executive position has different qualifications, functions and customer service strategies than that of the Electric Service Designer position, among other distinguishing factors. As to the Distribution System Operator position, there is some connection with the System Operator Specialists in that those employees work in the same physical area and perform communication functions with crews. However, the duties of a Distribution System Operator are different and distinct from a System Operator Specialist and there is little to no interchangeability. Those differences, among other distinctions between the two positions, weigh against a finding of community of interest. Therefore, on the record before the Commission, we cannot justify accretion of the Distribution System Operator position into the bargaining unit. Finally, both sought after positions are exempt salaried positions. That pay structure also weighs against any mutuality of interest in wages, hours and working conditions with the positions in the collective bargaining unit.

We do not intend to say that a party must fully detail every position in the bargaining unit in order to meet its burden to amend an existing bargaining unit. In this case, given the size and scope of the entire bargaining unit we find that insufficient evidence was adduced to warrant the

inclusion of the Account Executive and Distribution Systems Operator position in the existing bargaining unit. That is not to say that inclusion of the two positions would be improper if voluntarily included by Respondent.

CONCLUSION

We find the Petitioner failed to meet their burden in this case and that its Petition should be dismissed.

IT IS THEREFORE ORDERED that the Petition for Unit Clarification is hereby dismissed.

All Panel Commissioners join in the entry of this Order.

Entered January 3 2022.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

Joel E. Carlson, Commissioner