NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

THE NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES/AFSCME LOCAL 61, Petitioner,	)	Case No. 1536
v.	)	FINDINGS OF FACT AND ORDER
COUNTY OF RICHARDSON, Respondent.	)	

NEBRASKA COMMISSION
OF INDUSTRIAL RELATIONS
FILED

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CLERK

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Before Commissioners Blake, Jones and Vannoy

NATURE OF THE CASE

This matter comes before the Commission upon the Prohibited Practice Petition filed by Petitioner, Nebraska Association of Public Employees of the American Federation of State, County and Municipal Employees Local 61 ("Union"). Petitioner specifically alleges that actions of the Respondent, the County of Richardson, Nebraska, were in violation of Neb. Rev. Stat. §§ 48-824(1), 48-824(2)(a), (b), (c), and (e). A trial was held on April 13, 2023 to hear arguments and receive evidence. Both parties filed simultaneous post trial briefs on May 30, 2023 and reply briefs on June 6, 2023.

FINDINGS OF FACT

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 as that term is defined in Neb. Rev. Stat. § 48-801. Petitioner is the exclusive certified bargaining agent for the Richardson County Roads/Highway Department bargaining unit established by the Industrial Relations Act, Neb. Rev. Stat. §§ 48-801 et seq. The Richardson County Roads/Highway Department bargaining unit represents employees of Richardson County Roads Department that occupy the classifications Mechanic, Welder, Equipment Operator, Maintainer Operator, Operator, Dragline Operator, Truck Driver, Laborer. and Sign Employee.

Respondent is a public employer as that term is defined in Neb. Rev. Stat. § 48-801(12) and is subject to the jurisdiction of the Nebraska Commission of Industrial Relations. Petitioner and Respondent have been covered by a collective bargaining agreement between the Petitioner and the Respondent covering wages, hours and conditions of employment for the Richardson County Roads/Highway Department bargaining unit, and covers the period July 1, 2020, through June 30, 2023 ("Agreement'" or "CBA"). The CBA provides in relevant part:

> 1.4 BARGAINING: The employer agrees that prior to making any change in terms and conditions of employment. which are mandatory subjects of bargaining covered by this contract, to meet and bargain with the Union in an attempt to reach an agreement.
>
> 2.1 BARGAINING UNIT: The Employer recognizes the Union as the exclusive collective bargaining agent for employees as certified by the Nebraska Commission of Industrial Relations (CIR) as set forth in Appendix A. The employer will not during the life of this Agreement bargain with any group of employees or with any other employee organization with respect to terms and conditions of employment for employees covered by this Agreement, which are considered to be mandatory subjects of collective bargaining.

2.3 UNION MEMBERSHIP: In accordance with Section 48-837 of the Nebraska State Statutes, employees shall have the rights to join and participate in, or to refrain from joining and participating in the Union. There shall be no interference, restrain [sic], or coercion by the Employer or the Union against any employee because of membership or non-membership in the Union, or for exercising their rights under this Contract.

11.4 VACATION LEAVE: Earning of vacation leave by bargaining unit Employees begins immediately upon employment. A vacation day is defined as eight (8) hours, for bargaining unit employees.
Full-time employees earn vacation leave according to the following schedule:

After 1 year of employment....................................... 5 days
After 2 years of employment .... 10 days
After 5 years of employment .... 11 days
After 6 years of employment .... 12 days
After 7 years of employment .... 13 days
After 8 years of employment .... 14 days
After 9 years of employment .... 15 days
After l0 years of employment .... 16 days
After 11 years of employment .... 17 days
After 12 years of employment .... 18 days
After 13 years of employment .... 19 days
After 14 years of employment .... 20 days
After 20 years of employment .... 21 days
After 30 years of employment .... 22 days

11.21 ADVANCEMENT OF VACATION AND PAID TIME OFF: The Employer may advance vacation and paid time off to employees in an amount not to exceed a total of eighty (80) hours (pro-rated for part-time employees), Employees shall reimburse the County for all used unearned and paid time off upon separation or transfer.

(Ex. 1).

In March 2022, the County included the accumulated balances of the employees' vacation on the new payroll system, MIPS, adding the new vacation they earned as of their hire date. (Exs. 500, 501, and 502). Controversy commenced when Stacey Bailey, Deputy County Clerk presented information regarding the County's new payroll system to the employees. On April 4, 2022, Bailey met with the County Roads Department employees to explain the County's time and attendance

program, and what the new payroll system did and what it would show the employees. (Ex. 500; 155: 19-156:25). Mary Eickhoff, County Clerk for Richardson County for thirty-seven years testified that the Road Department Secretary had been posting "vacation on the first of January for everyone, whether they had earned it or not." (182:8-15; 186:11-15). Vacation is not earned based on the calendar year, but on the employees hire anniversary date pursuant to the CBA. The new system adds earned vacation based on the employee's hire date, incrementally each pay period rather than the Road Department Secretary manually adding an employee's annual vacation accrual once a year in January, regardless of whether it had been earned yet. Eickhoff testified that even though the Road Department Secretary would post vacation on January 1, she would not pay out all these hours if they had not yet been earned when an employee left employment. (205:7-15). The Road Department Secretary would calculate a pro rata on the vacation based on hire date. (Id.). There was not a change to the CBA, as employees vacation accrual did not change. Implementation of the payroll system simply corrected the previous manual once-a year entry of vacation time which did not accurately reflect an employee's earned vacation based on their years of service as provided in the CBA. No one lost any vacation hours with the change in posting by the Road Department Secretary on January 1 to the hire anniversary date. (195:4-10). Nor was vacation time accrued differently due to the implementation of MIPS. The County was willing to work with any employee who had a scheduled time off and would go-negative on their vacation leave balance due to this correction. (195:11-20). The CBA does provide for advancement of up to eighty hours of vacation. (Ex. 1, p. 28).

Although there were no actual changes to employees' leave accrual, the correction made by the implementation of MIPS created confusion and misunderstanding. On June 10, 2022, Justin Hubly, Executive Director for the Union, called Jerry Pigsley, attorney for Respondent, regarding

a proposed Union Memorandum of Understanding ("MOU""). (Petition ¶17 and Answer ¶17). Mr. Hubly told Mr. Pigsley that the Roads Department employees wanted to revisit vacation pay as set forth in the current CBA and Mr. Hubly suggested he could draft a MOU for consideration by the County Commissioners. (Answer ¶18). On June 15, 2022, Mr. Hubly sent Mr. Pigsley a draft MOU. (Petition ¶19 and Answer ¶19). On July 18, 2022, Mr. Pigsley responded to the draft MOU. (Petition ¶20 and Answer ¶20). In his response, Mr. Pigsley stated the "Richardson Board of Commissioners ("County Board") does not agree to the proposed Memorandum of Understanding you sent me on June 15 regarding vacation leave and paying for unused vacation time. (Ex. 505; 24:22-25; 26:10-20; 28:17-22). The County Board does not agree that there is a need to modify the current contract between the parties." (Id.).

In June, County Commissioner David Sickel told the Union Vice President and Steward, James Coonce, that the County wanted to give the Roads employees a raise and that the Union needed to send a letter to the County Board requesting the raise. (Petition ¶27 and Answer ¶27; 105:12-25, 140:21-23). On July 26, 2022, Highway Superintendent Steve Darveau told Matt Bletscher that the Commissioners were willing to give Highway employees a 10% raise, and that he needed to send a Union representative, Mr. Coonce, to attend a Commissioners meeting on behalf of the Union. (140:4-24). Mr. Coonce went to the meeting as a formal representative of the Union. (107:5-14). Commissioner Sickel told Mr. Coonce that he did not know why he was there and that the County Commissioners thought there was nothing wrong with the CBA as it was written. (107:18-23). Later that day Highway Superintendent Mr. Darveau told Union members that the County Commissioners had informed him that the Union had declined an offer from the Commissioners of a 10% raise. (Answer ¶28). Mr. Darveau told Mr. Coonce that if there was no

union, the employees would get a 10% raise as the Commissioners had agreed to the raise but were just waiting for a letter from the Union. (151:19-152:15).

Later that week, Mr. Darveau asked Union Steward Randy Gilsdorf what was discussed at the Union meeting on July 27. (Petition ¶41 and Answer ¶41; 127:21-128:10; 130:5-11; 148:9-19). Commissioner Karas commented to Union President Dettmenn that he "didn't think it should take an act of Congress to get someone a raise. but it must with a Union." (82:21-25; 225:14-16; 227:7-13). On August 11, 2022, Commissioner Karas stopped by the Dawson Road Shop to see Mr. Dettmann. (Petition ¶48 and Answer ¶48). Commissioner Karas asked Mr. Dettmann for a letter from the Union asking for a wage increase so the County could open the Agreement and get the employees a raise. (225:4-25). Several times in this process county board members told Union members that the Union must send a letter asking the board for the raise. The Union responded that the County Board could get the ball rolling by sending a letter offering a raise. Neither party sent a letter.

DISCUSSION

Jurisdiction

The Commission has jurisdiction to adjudicate alleged violations of the Industrial Relations Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. The Commission has the power and authority to make such findings and to enter such temporary or permanent orders as the Commission may find necessary to provide adequate remedies, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute. (Neb. Rev. Stat. § 48–819.01).

Prohibited Practice Allegations

Neb. Rev. Stat. §48-824 provides in relevant part:

(1) It is a prohibited practice for any public employer, public employee, public employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
(2) It is a prohibited practice for any public employer or the public employer's negotiator to:
    (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;
    (b) Dominate or interfere in the administration of any public employee organization;
    (c) Encourage or discourage membership in any public employee organization, committee, or association by discrimination in hiring, tenure, or other terms or conditions of employment; . . .
    (e) Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act; . . . .

(Neb. Rev. Stat. §48-824).

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). However, if a mandatory subject of bargaining is "covered by" the CBA, no further bargaining is required. The Nebraska Supreme Court, in *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, (2012), 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. While vacation pay is a mandatory subject of bargaining, there was no change to negotiate, but just a misunderstanding of the past practice and the agreement. We find the Respondent did not violate Neb. Rev. Stat. §48-824(1) by not reopening the current contract regarding the Union's proposed MOU as the issue was covered by the current CBA. (Exs. 2 & 505).

Once a union has notice of a proposed change in a mandatory bargaining subject, it must make a timely request to bargain. "A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table." *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 321 (8th Cir. 1966). "It is settled Board law that `[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.' " *Fraternal Order of Police, Lodge No. 21 v. City of Ralston,* 12 CIR 59 (1994) (citing *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790, 136 LRRM 1190, 1192 (1990)). Notice of the proposed change does not have to be formally given from the employer. *Id.* (citing *W. W. Grainger, Inc. v NLRB*, 860 F.2d 244 (7th Cir. 1988)). The evidence and testimony show that the Union was on notice of the County Board's desire to offer raises to Union employees and was specifically requested to send a letter to begin negotiations. Union Executive Director Hubly failed to make that request. The subsequent frustration can be seen in the various comments made by County Board members and Mr. Darveau. Some of the comments made to Union members and representatives were unwise, unnecessary, and made out of frustration, but that does not mean they were in violation of Neb. Rev. Stat. §48-824. It is troubling, and any management employee should be trained to not make such statements that may be construed as anti-union. However, in this context the comments made are not seen as an attempt to bust the union and it had no such anti-union source or result. We also note that the testimony shows that there is an air of collegiality in the County Road Department. The workers affectionately call their supervisor, Mr. Darveau, 'Stevie Joe', and Mr. Darveau obviously feels comfortable voicing his frustrations and concerns to the employees. We find that the Respondent did not violate Neb. Rev. Stat. §§48-824(2)(a), (b), (c), or (e).

"It is for the trier of facts to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses". *Joyner v. Steenson*, 227 Neb. 766, 769, (1988). When a party claims a statement was made, and the other party denies that it was made, we must weigh the evidence itself and also the demeanor of the witnesses. "The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit". *Fredericks Peebles & Morgan LLP v. Assam*, 300 Neb. 670, 686–87 (2018).

There are other allegations of fact in the Petition that could prove to be troublesome, but they were not substantiated by the testimony and evidence. The Respondent acknowledges Mr. Darveau stated that the Union rejected an offer for a pay increase, but Darveau was not correct that an offer was ever made or rejected. The testimony of the Union members combined with the testimony of the Commissioners, and lack of documentary evidence from the Board through meeting minutes or resolutions, solidifies that no offer was made or rejected by either party. There is also no evidence of an ultimatum by the Board that offered a raise but removed it from the table unless the Union dropped its request to negotiate over the vacation calculations. There is no evidence that the County Board offered a 10% raise on the condition that the members dissolve the union. These would be obvious violations of the Act, but there is no evidence that these things happened.

Communication is often at the heart of these problems, and it is certainly the source of the problem here. Open communication is often avoided for fear of saying the wrong thing or just not feeling like it is required. Mr. Darveau's comments fit well into the category of saying the wrong thing, or not saying it in the best way. The County Board's refusal to initiate salary negotiations

could perhaps not have created such a problem had they communicated more effectively with the Union. Similarly, Mr. Hubly could have acquiesced when the Respondent's representatives asked for a letter requesting salary negotiations. The labor relations far too often are strained due to poor communication and the lack of trust it inevitably engenders and the rumors and misunderstandings that follow. This does not mean that every misstatement or lack of communication is a prohibited practice.

CONCLUSION

We find the evidence fails to establish a prohibited practice occurred. The Petitioner failed to meet its burden in this case and its Petition should be dismissed.

IT IS THEREFORE ORDERED that the Petition is dismissed.

All Panel Commissioners join in the entry of this Order.

Entered November 2 2023.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

William G. Blake, Commissioner