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BEFORE THE

Commission of Industrial Relations of the State of Nebraska

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COMMISSION OF INDUSTRIAL RELATIONS

STATE OF NEBRASKA

William G. Blake, Presiding Commissioner
Cornhusker Plaza
301 South 13th Street, Suite 101
Lincoln, Nebraska

Joel E. Carlson
200 West Benjamin Avenue
Norfolk, NE 68702-0888

Dallas D. Jones
1248 "O" Street, Suite 600
Lincoln, NE 68508

Patricia L. Vannoy
134 South 13th Street, Suite 1200
Lincoln, NE 68508

Gregory M. Neuhaus
205 South Cedar Street, Suite 150
Grand Island, NE 68801

Ashlea R. Whitney
Clerk/Administrator/Legal Counsel

301 Centennial Mall South
P. O. Box 94864
Lincoln, NE 68509-4864
(402) 471-2934
(402) 471-6597 (Fax)
industrial.relations@nebraska.gov (E-mail)
www.ncir.nebraska.gov (Website)

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA PROTECTIVE SERVICES UNIT, INC., d/b/a FRATERNAL ORDER OF POLICE LODGE #88,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent,
and

THE NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (NAPE/AFSCME),

Respondent.

Case No. 1435
Rep. Case No. 526

OPINION AND ORDER

Filed July 31, 2017

APPEARANCES:

For Petitioner: Gary L. Young
Keating, O'Gara, Nedved & Peter, PC, LLO
530 South 13th Street, Suite 100
Lincoln, NE 68508

For Respondent: State of Nebraska: Mark A. Fahleson
Rembolt Ludtke LLP
3 Landmark Centre
1128 Lincoln Mall, Suite 300
Lincoln, NE 68508

For Respondent: NAPE/AFSCME: Dalton W. Tietjen
Tietjen, Simon & Boyle
1023 Lincoln Mall, Suite 202
Lincoln, NE 68508

Before Commissioners Pillen, Carlson, and Blake

PILLEN, Commissioner

NATURE OF THE CASE

On March 3, 2017, the Nebraska Protective Services Unit, Inc., d/b/a/ Fraternal Order of Police Lodge #88 ("Petitioner") filed this action with the Commission, requesting that the Commission issue an order directing a combination election be held to choose whether Respondent NAPE/AFSCME should continue as the exclusive bargaining representative for the Protective Services Bargaining Unit ("Unit"). Further, if the majority of those voting chose to decertify the existing bargaining representative, that the Petitioner be certified to be the exclusive bargaining representative.

On March 17, 2017, the Commission issued the Clerk's Report to the Commission verifying that the Petitioner provided a sufficient showing of interest for an election to be held. Respondent NAPE/AFSCME filed its Answer on March 24, 2017, in which it raised a number of defenses to the Petition. On March 28, 2017, Petitioner filed a Motion for Leave to File Discovery and Request for Hearing. Commissioner Sarah S. Pillen presided over a trial on May 25, 2017. The parties have submitted both pretrial and post-trial briefs.

FACTS:

Respondent NAPE/AFSCME is currently the exclusive bargaining representative of those members of the Protective Services Bargaining Unit established by Neb. Rev. Stat. § 81-1373(1)(f). The Unit consists of employees of the State of Nebraska that serve in the following job classifications:

A. Corrections Officer
B. Corrections Corporal
C. Corrections Sergeant
D. Corrections Unit Caseworker
E. Developmental Disabilities Safety and Habilitation Specialist
F. Mental Health Security Specialist I
G. Mental Health Security Specialist II
H. Mental Health Security Specialist III
I. Military Security Specialist
J. Security Communications Specialist
K. Security Guard

L. Youth Security Specialist I
M. Youth Security Specialist II

At the time of the trial in this matter the Unit employees were covered by a collective bargaining agreement between the Respondent State of Nebraska and the Unit with an expiration date of June 30, 2017. (Ex. 6). Neb. Rev. Stat. §81-1379 requires that negotiations begin for a replacement agreement by the second Wednesday of September in the year preceding the expiration of an active agreement. Pursuant to Neb. Rev. Stat. §81-1379, Respondent NAPE/AFSCME and Respondent State of Nebraska began negotiations at the appointed time in September 2016 for a 2017-2019 agreement. Negotiations were completed in January 2017, and the contract was ratified by a vote of the bargaining unit and signed by representatives of both parties. There is now a fully executed contract with an effective date of July 1, 2017. (Ex. 500).

On October 21, 2016, Petitioner Nebraska Protective Services Unit, Inc. filed its Articles of Incorporation with the Nebraska Secretary of State. (Ex. 1). Nebraska Protective Services Unit, Inc. has affiliated itself with the Fraternal Order of Police (FOP) as Lodge #88. There was no evidence presented that local FOP lodges have any authority over each other. There was also no evidence presented that the State or National FOP has the authority and power to exercise control over the locals or that they are exercising such control. On the contrary, there was substantial evidence presented through the testimonies of Jim Maguire, John Francavilla, and Michael Chipman that local lodges retain their own separate identities and control their own internal business, including collective bargaining.

Petitioner decided to attempt to decertify NAPE in late August of 2016. Informational meetings were held at facilities across the state in November 2016. Those participating were instructed on the rules for collecting signatures. Collection of signatures began on December 5, 2016. (Tr. 90:6-92:19). In February 2017, Corporal Hardy conducted a security audit at the Community Correction Center in Lincoln. Richard Kahm saw Mr. Hardy hand out approximately seven or eight signature cards as employees were gathered for shift roll-call. (Tr. 22:22-29:18). There was no evidence presented that those cards were signed or returned to Mr. Hardy on the premises or during work time. There was no evidence of any other improper collection of signature cards during the Petitioner's campaign. Over a period of three months, over 25 people participated in many signature gathering events properly held by the Petitioner which resulted in 683 signatures being collected. (Tr. 97:5-99:10).

On February 10, 2017, Dawn Renee Smith, Communications Director of the Nebraska Department of Correctional Services, sent without comment, a link to an Omaha World-Herald article. (Ex. 502). There was no evidence produced as to which employees were included in the "All" group that were allegedly sent the email. In fact, the exhibit itself shows only "From: Smith, Dawn Renee; Sent: Friday, February 10, 2017 5:05 PM; Subject: News of Interest"; there is no indication of the recipients at all. Further, testimony was given that at least in Nebraska State Penitentiary, officers and corporals are not allowed to have e-mail (Transcript pg. 100, line 1:9). It is clear from testimony that Ms. Smith may send several news articles a day that pertain to the Department. No evidence was presented regarding the criteria or process used by Ms. Smith in deciding what information to pass along and to whom that information is sent. There was no evidence that Ms. Smith, the Department of Corrections, or Respondent State of Nebraska took a position regarding the FOP's efforts to decertify the Respondent NAPE/AFSCME.

The Petition in this matter was filed on March 3, 2017. There were approximately 1604 members of the Unit as of March 17, 2017. (Ex. 10). The Clerk verified that the Petitioner provided 683 proper signatures of members of the bargaining unit supporting the request for an election for decertification of the Respondent NAPE/AFSCME and certification of the Petitioner, i.e. 43% of the Unit.

DISCUSSION

The issue at hand is whether or not an election should be held to allow the Unit to vote whether to decertify NAPE/AFSCME as the exclusive bargaining representative for the Unit and to certify the Petitioner as the new exclusive bargaining representative for the Unit. Respondent NAPE/AFSCME asserts that the Petition in this matter should dismissed. Respondent NAPE/AFSCME alleges that the Petitioner failed to file its Petition in a timely manner. Respondent NAPE/AFSCME alleges that Petitioner and Respondent State of Nebraska engaged in activities that fatally tainted the process of collecting a showing of interest to support holding an election and also tainted any subsequent election. Respondent NAPE/AFSCME also alleges that the Fraternal Order of Police (FOP) should be barred from representing the Nebraska Protective Services Unit due to a conflict of interest.

Jurisdiction

> "The commission shall determine questions of representation for purposes of collective bargaining for and on behalf of

> public employees and shall make rules and regulations for the conduct of elections to determine the exclusive collective-bargaining agent for public employees...the commission shall certify the exclusive collective-bargaining agent for employees affected by the Industrial Relations Act following an election by secret ballot, which election shall be conducted according to rules and regulations established by the commission."

Neb. Rev. Stat. §48-838(1)

The Commission has established rules which govern the process of conducting elections to certify an exclusive bargaining representative for a bargaining unit. Under CIR Rule 6, Rule 9 and Rule 10, a labor organization wishing to seek an election for the decertification of a bargaining representative for an established bargaining unit and for an election to be certified as the exclusive bargaining representative of the unit is entitled to such an election if it complies with two basic procedural steps: (1) it provides a showing interest from the members of the bargaining unit that is supported by 30% of the members of the bargaining unit; and (2) that it files the request for an election within the proper filing period.

Collection of Showing of Interest

Respondent alleges that Petitioner FOP and Respondent State of Nebraska engaged in activities that have fatally tainted the process of collecting a showing of interest to support holding an election and also tainted any subsequent election.

Corporal Hardy handed out only seven or eight cards at a time when bargaining unit members were on company premises either at or immediately prior to work time. There was no evidence presented that the cards were completed at that time, nor that the individuals that were improperly given cards were among the individuals who completed showing of interest cards. Further, the actions of Mr. Hardy were taken on his own and were against the training and instructions given by the Petitioner. The Commission finds there was insufficient evidence presented to find that the Petitioner, through Mr. Hardy, tainted the process of collecting the showing of interest.

The Respondent asserts that the Respondent State of Nebraska improperly supported the Petitioner's efforts by sending an email that described the decertification in only positive terms.

The email complained of by the Respondent NAPE/AFSCME included only a hyperlink to a publicly accessible Omaha World-Herald article, sent with no further comment by the Department's Communications Director. As to the assertion that no counterpoint was ever distributed, there was no evidence presented that there was such an article published; let alone that it was not passed along to the unknown recipients of the February 10, 2016 email. The Commission finds there is insufficient evidence to support the claim that the Respondent State of Nebraska, through its Communication Director, took a position either for or against the possible decertification of the Respondent NAPE/AFSCME.

Timeliness

Petitioner asserts that CIR Rule 9 provides two options for a party wishing to file a petition for decertification. Respondent alleges that the Petition was not filed in a timely manner. CIR Rule 9 establishes when petitions for decertification may be properly filed. CIR Rule 9(II)(C)(1) states that a petition for decertification may only be filed between the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding either;

> a. Termination of an existing agreement, contract or understanding, or
>
> b. Preceding commencement of a statutorily required bargaining period, whichever is earlier.

On December 29, 1999, the Commission issued a memorandum regarding rule changes. This memorandum included a "brief explanation of the reason for the change or addition". Relevant to this proceeding is the following:

> "Rules 9C and 9G have been amended to allow entities that have statutorily required bargaining periods the option to file a petition for decertification, whether it be by the employer or by an employee, employees, or a labor organization, in a time period between the 120th and 60th day preceding the commencement of that statutorily required bargaining period."

Exhibit 2, page 1

> "All contracts involving state employees and negotiated pursuant to the Industrial Relations Act or the State Employees Collective Bargaining Act shall cover a two-year period coin-

> ciding with the biennial state budget, except that the first contract entered into by a bargaining unit may cover only the second fiscal year of the biennium."

Neb. Rev. Stat. §81-1377(4)

There is dispute about both the weight and meaning of the Commission's use of the word "option" in the above memorandum. However, the result of practical application and plain meaning of CIR Rule 9 itself does not depend on an option. The current statutorily required bargaining timelines and statutorily defined contract periods for entities under the State Employees Collective Bargaining Act result in the commencement of a statutorily required bargaining period always being earlier than the termination of the existing contract. In effect, the phrase "whichever is earlier" leaves only one possibility for entities that have statutorily required bargaining periods.

In this case, the commencement of the statutorily required bargaining period was September 14, 2016 and the expiration of the then existing contract was June 30, 2017. Therefore the appropriate window for filing the request for election would have been between the one-hundred twentieth (120th) day and the sixtieth (60th) day preceding September 14, 2016. The next available window for Petitioner to seek an election would be between the one-hundred twentieth (120th) day and the sixtieth (60th) days preceding the commencement of the next statutorily required bargaining period. The Commission finds that the Petitioner did not file within the appropriate window under CIR Rule 9(II)(C)(1).

Conflict of Interest

Respondent NAPE/AFSCME alleges that the Fraternal Order of Police (FOP) should be barred from representing the Nebraska Protective Services Unit due to a conflict of interest. Respondent NAPE/AFSCME asserts there would be a guard/nonguard conflict of interest, in that sworn law enforcement officers that would be called to enforce the law against Protective Services Bargaining Unit members in the event of a strike or other illegal job action would also be represented by the same union as the Protective Services employees, although they would be members of different lodges.

The Commission has previously held that employees in the Protective Services Bargaining Unit are guards. *Communication Workers of America, AFL-CIO v. Hall County, Nebraska,* 12 CIR 53 (1994). There was insufficient evidence presented by Respondent NAPE/AFSCME for the Commission to now find otherwise. Nebraska law states that *bargaining units* may

not include both guard and nonguard employees, nor may unions admitting guards into membership also represent *for purposes of collective bargaining* nonguard employees. *Lincoln City Emps. Union, Nat'l Asso. of Gov't Emps. v. Lincoln,* 210 Neb. 751, 755, 317 N.W.2d 63, 66 (1982) citing *Univ. Police Officers Union, etc. v. Univ. of Neb.,* 203 Neb. 4, 277 N.W.2d 529 (1979). (Emphasis added). In the present case, the dispute is not related to the composition of the bargaining unit. Therefore, if there was guard/nonguard conflict within the Unit, it would exist currently, even while the Unit is represented by NAPE/AFSCME. Of course, that allegation was not made. Further, there was substantial evidence presented that the Nebraska Protective Services Unit, Inc. would be conducting its own collective bargaining separate from all other local lodges, the State FOP, or the National FOP.

The Nebraska Supreme Court has held that in order for a bargaining unit's representative to be found to be improper due to its affiliation with a national or international union, there must be actual evidence that - by its affiliation with the National - the new local can exercise actual control over a different local union in a manner that prevents the law enforcement function to continue properly. See *Lincoln City Employees Union v. Lincoln,* 210 Neb. 751 (1982). There was no evidence of actual control by the other local lodges, the State FOP, or National FOP over the Petitioner or other local lodges. In fact, there was substantial evidence to the contrary. The Commission finds there is not a conflict of interest created by the Petitioner's affiliation with the Fraternal Order of Police.

ORDER

The Petitioner provided a proper and sufficient showing of interest for an election to be held. However, the Petition was filed outside of the proper window and therefore an election will not be held.

IT IS THEREFORE ORDERED that Petition in this matter is dismissed.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO) LOCAL 226, Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	))))))))))))	Case No. 1440 FINDINGS OF FACT AND ORDER

Filed November 8, 2017

APPEARANCES:

For Petitioner: Timothy S. Dowd
Dowd, Howard & Corrigan, LLC
1411 Harney Street, Suite 100
Omaha, NE 68102

For Respondent: David J. Kramer
Baird Holm LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102

Before Commissioners Carlson, Jones, and Pillen

CARLSON, Commissioner

NATURE OF THE CASE

On March 27, 2017, the Service Employees International Union, (AFL-CIO) Local 226 ("Union" or "Petitioner") filed this action with the Commission, alleging that Douglas County School District 001 ("Respondent") committed a prohibited practice in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. § 48-824(1) when Respondent subcontracted bargaining unit work, specifically snow removal, which is a unilateral change of the terms and conditions of employment. Commissioner Joel E. Carlson presided over a trial on June 20, 2017. The parties have submitted post-trial briefs.

FACTS

Petitioner is a labor organization as defined in Nebraska Revised Statute §48-801(6), and is the duly recognized collective bargaining representative for the full-time employees in the Maintenance and Operations Division of the Douglas County School District. The Petitioner has in force and effect a Collective Bargaining Agreement ("CBA") with Respondent covering such collective bargaining units (Ex. 1). Respondent is an employer within the meaning of Nebraska Revised Statute §48-801(4) with its principal office located at 3215 Cuming Street, Omaha, NE 68131.

The work of the bargaining unit employees represented by the Petitioner includes snow removal and maintenance of Respondent's properties. The above-described bargaining unit work has generally been exclusively performed by the bargaining unit employees represented by Petitioner. Snow removal around the buildings is performed by the custodians. Snow removal in parking lots is performed by truck drivers and relief engineers. (Tr. 33:12-34:21).

The Respondent decided to rebuild two (2) of their existing elementary schools, or more specifically Western Hills Elementary and Belle Ryan Elementary schools. (Tr. 36:24-38:2). While being rebuilt, these two existing elementary schools were combined temporarily at another property of the Respondent located on 60th & L Streets. This is not a permanent relocation. The 60th & L Street location is not the construction of a new school. It is a temporary swing site used to house both of the schools being rebuilt, which includes placement of all of the bargaining unit work from those schools in the temporary swing site location. (Tr. 192:7-193:21) The Respondent has used temporary swing sites on several occasions over the last fifty (50) years (Tr. 209:20-210:13). Petitioner's members were assigned to the temporary swing sites to perform the maintenance duties they performed previously at Western Hills Elementary and Belle Ryan Elementary.

Petitioner became aware that Respondent had subcontracted out some snow removal work. On March 7, 2017, Petitioner requested that Respondent cease and desist from subcontracting out bargaining unit work (Ex. 18). There was only one meeting between the parties in which snow removal was even mentioned. This occurred on August 11, 2016 (Ex. 2). The primary purpose of that meeting was to discuss the prohibited practice petition in CIR Case 1422 filed on July 11, 2016. At that meeting, there were no substantive discussions about snow removal (Tr. 134:19-21; 134:4-21). There were no substantive discussions over the impact and effects of subcontracting the snow removal work (Tr. 24:7-11). There were no other

meetings between the parties (Tr. 40:11-19). Local 226 did not declare an impasse on the subcontracting of snow removal at the conclusion of that meeting (Tr. 24:22-26:4; 135:3-8; 149:23-150:5; 181: 14-25). Local 226 was going to consider the Respondent's suggestion that subcontracting snow removal may be necessary (Tr. 303:12-15). The parties did not reach an impasse.

DISCUSSION

Respondent subcontracted some of the above-described bargaining unit work to non-bargaining unit employees and companies for certain newly acquired properties. Respondent failed to negotiate the decision to subcontract out the above-mentioned bargaining unit work to impasse prior to subcontracting it. Respondent's failure to negotiate in good faith regarding the subcontracting of that bargaining unit work to non-bargaining unit employees and companies constituted a change in terms and conditions of employment with respect to a mandatory subject of collective bargaining, and as such, constituted a prohibited practice in violation of Nebraska Revised Statute §48-824(1).

Jurisdiction

The Commission has been given jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. The facts in this case constitute a viable prohibited practice claim, over which this Commission has jurisdiction by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. See *Nebraska Ass'n of Public Employees, Local 61 v. State of Nebraska Dep't of Correctional Services,* 19 CIR 13 (2014), *South Sioux City Educ. Ass'n v. South Sioux City Public Schools,* 16 CIR 12 (2008), aff'd 278 Neb. 572 (2009); *Ewing Educ. Ass'n v. Ewing Public Schools,* 12 CIR 242 (1996). Petitioner has successfully invoked the jurisdiction of the Commission.

Prohibited Practice Allegations

Neb. Rev. Stat. § 48-824)(1) states:

(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.

Neb. Rev. Stat. § 48-824

The Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Mandatory subjects are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County,* 16 CIR 401 (2010).

In order to establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Education Ass'n* set forth the following test:

> "A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining."

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (Neb. 1979).

Neb. Rev. Stat. § 48-816(1)(a) defines good faith bargaining as the "performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment…". The Act does not require parties to agree to any proposals put forth in negotiations, only that the parties "confer in good faith" about those subjects which are mandatory subjects of bargaining. Section 48-824(1) states that it is a prohibited practice for any public employer to refuse to negotiate in good faith with respect to a mandatory subject of bargaining. In NLRB v. Katz, 369 U.S. 736, 737 (1962), the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. In *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska,* 15 CIR 95 (2005), the Commission held that

> "an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

See also *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001,* 286 Neb. 755 (2013).

Further, a topic can be established as a subject of bargaining if it has been a past practice between the parties. "An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz,* 369 U.S. 736, 745-747 (1962). To establish past practice, the practice must have occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.,* 349 N.L.R.B. 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.,* 340 N.L.R.B. 349, 353 (2003), enfd. Mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

Both parties cite to *Service Employees International Union Local 226 v. School District No. 17 of Douglas County, Nebraska,* 10 CIR 140 (1989) as authority in this matter but argue that the decision impacts the present case in different manners. In *SEIU Local 226 v. School District No. 17,* the Local 226 bargaining unit petitioned for a ruling that the School District had engaged in bad faith bargaining when it entered into a subcontract for custodial services at a new middle school. The Commission ruled the School District had not violated its statutory bargaining obligations.

That decision has instructive principles for the present case but the facts and application of facts are distinguishable from the present case. In *SEIU Local 226 v. School District No. 17,* the School District subcontracted work for a new middle school. Here, there were two elementary schools temporarily displaced to a swing site. The staff assigned to do snow removal at the two elementary schools continued their duties at the swing site. While there may not be a replacement of employees at the swing site, there is a loss of bargaining unit work at the swing site.

In *SEIU Local 226 v. School District No. 17,* there were economic considerations driving the need to subcontract for custodial work at the new middle school. In the present case, there was a lack of economic considerations demonstrated which led to a lack of bargaining over whether the Petitioner could meet any perceived staffing problems to conduct the snow removal work. The meeting held on August 11, 2016 was primarily focused on other Local 226 work. Snow removal work was mentioned in passing. Snow removal work was not substantively bargained, nor did impasse occur.

The Commission finds that subcontracting bargaining unit work would "vitally affect" the terms and conditions of employment. As such, the subcontracting of snow removal by Respondent is a mandatory subject of bargaining. Additionally, Petitioners have established that the transfer of bargaining unit work to temporary swing sites is an established past practice that the employees could reasonably expect to continue. Respondent had a duty to bargain in good faith with Petitioner regarding the subcontracting of bargaining unit work and failed to do so. Respondent took the position that Petitioner does not want to allow subcontracting of its work and that excuses the Respondent from engaging in substantive negotiations with the Petitioner. In the present case, substantive negotiations did not occur. As such, the Commission rejects the Respondents' assertions that negotiations were at impasse simply because the Petitioner would prefer not to subcontract work. Therefore, Respondent's failure to bargain with Petitioner regarding the subcontracting of bargaining unit work is a per se violation of the Industrial Relations Act and a prohibited practice. The Commission notes that the Respondent previously stipulated to a very similar finding regarding the subcontracting of bargaining unit work in CIR Case 1422. (Ex. 5).

REMEDIAL AUTHORITY:

The Commission has the authority to issue cease and desist orders following findings of prohibited practices and has done so in the past. See *Local Union 571 International Union of Operating Engineers v. County of Douglas,* 15 CIR 75 (2005); *Ewing Education Ass'n v. Holt County School District No. 29,* 12 CIR 242 (1996)(en banc). In the present case, the Commission finds that the Respondent has committed a prohibited practice under the Nebraska Industrial Relations Act. Therefore, an order requiring that the Respondent cease and desist from committing the prohibited practice is clearly within the authority of the Commission and will be ordered.

IT IS THEREFORE ORDERED that Respondent shall:

1. Cease and desist from failing to bargain in good faith with the Service Employees International Union, (AFL-CIO) Local 226 regarding mandatory subjects of bargaining, specifically snow removal.
2. 2. Cease and desist from subcontracting bargaining unit work, specifically snow removal, without first bargaining to impasse.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,	)	Case No. 1442
Petitioner,	)	FINDINGS AND ORDER
v.	)	
THE STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,	)	
Respondents.	)	

Filed April 12, 2018

APPEARANCES:

For Petitioner
Dalton W. Tietjen
Tietjen, Simon & Boyle
1023 Lincoln Mall, Suite 202
Lincoln, NE 68508

For Respondent
Mark A. Fahleson
Rembolt Ludtke LLP
3 Landmark Centre
1128 Lincoln Mall, Suite 300
Lincoln, NE 68508

Before Commissioners Partsch, Blake and Carlson

PARTSCH, Commissioner

NATURE OF THE CASE

This case involves the work shifts of certain employees and the collective bargaining process at play between labor and management in determining whether these employees should be working 8-hour shifts or 12-hour shifts. While the Commission has no role in determining the most appropriate length of work shifts, it does have a role in ensuring the collective bargaining process is carried out pursuant to the State Employees Collective Bargaining Act ("Act"). The Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees ("Union") alleges that the Department of Correctional Services of the State of Nebraska ("Department") has refused to negotiate in good faith with respect to mandatory topics of bargaining, thereby committing a prohibited practice in violation of the Act. The Department, through its Director Scott Frakes, entered into two signed agreements in which the Director agreed to submit the issue of 8-hour shifts versus 12-hour shifts to a vote of the bargaining unit members, and return to 8-hour shifts within 30 days after the vote if that was the will of a majority of the members. The parties further agreed to then attempt further negotiations on the topic of 12-hour shifts. Twice the members voted in favor of 8-hour shifts, and twice the Department has ignored the vote and not taken any action to change from 12-hour shifts to eights. At the time of trial, no further negotiations had been conducted on the issue. Commissioner David J. Partsch presided over a trial on the merits of the bad faith bargaining claim, and the parties have submitted post-trial briefs.

FINDINGS OF FACT

The Union represents the front-line custody staff at Tecumseh State Correctional Institution ("TSCI"), a maximum-security penal facility run by the Department. The parties have a long history of collective bargaining agreements ("CBAs") covering the terms and conditions of employment of bargaining unit members. The Union and the Department were parties to a CBA covering the period July 1, 2015 through June 30, 2017. (Ex. 1) The current CBA went into effect July 1, 2017 and is effective until June 30, 2019. (Ex 2) Both CBAs cover nine bargaining units of State employees that are represented by the Union. The agreements also have appendices that were negotiated to cover specific groups of employees with unique work situations and/or specific agency employers. Appendix M deals

specifically with employees of the Department. Appendix M, section M.3.1 has long stated that the employees' scheduled workdays shall ordinarily be eight hours.

In May 2015, there was an inmate riot at TSCI that resulted in the Director changing nearly all the TSCI custody employees' scheduled work shifts to 12-hour shifts. The Union responded by filing a prohibited practice case with this Commission, *NAPE/AFSCME v. Nebraska Department of Correctional Services*, 19 CIR 157 (2016), alleging that the Department failed to negotiate the shift change with the Union. In that case, the Commission found that the topic of duration of work shifts and the process for schedule changes in an emergency were covered by the CBA. The Commission further found that the Department was under no duty to bargain (again) about whether or how temporary schedule changes should be implemented, as the parties had already bargained in the CBA to give the Director broad discretion to declare when an emergency exists. The Commission concluded that there was no prohibited practice when the Department temporarily changed from 8-hour shifts to twelves because the Director had declared an emergency under section M.1.4, and that the change was therefore permissible without negotiation under section M.3.3. (Ex. 6)

The 12-hour shifts that began in May 2015, as a result of the declaration of emergency by Director Frakes have continued since that time. In the fall of 2016, the parties met to negotiate a new collective bargaining agreement, including the appendices. As part of those negotiations, the Department made a proposal to change several parts of Appendix M, including M.3.1.1. The parties agreed, along with other changes, to change M.3.1.1 to include mandatory future negotiations to address 12-hour shifts at TSCI. (Tr. 47:1 – 48:22) Section M.3.1.1 reads as follows:

> Labor and management agree to establish a TSCI only Labor Management Committee to meet and discuss alternative work shifts at TSCI only. The Union and Management shall select five (5) representatives each from their respective sides with at least two (2) members from each side from TSCI to form this committee. The Labor Management Committee will report its finding and recommendations any time prior to March 1, 2017 to the executive director of the Union. If an agreement of the parties is reached, final acceptance shall be determined by a vote of the Union members of the bargaining unit within the facility only. If the vote is to accept, the implementation shall take place in thirty (30) days from the date of

> the vote. The approved language shall be placed into the labor agreement within its own section under the heading "THE FOLLOWING SECTIONS ARE FACILITY SPECIFIC AND APPLY ONLY TO THE SPECIFIC FACILITY INDICATED AND SHALL NOT APPLY TO ANY OTHER FACILITY". The NAPE/AFSCME, Local 61, Board of Directors agrees to recommend the proposal developed by the Labor/Management Committee for ratification, and agrees to make every effort to assist and facilitate in the ratification process. If ratification fails, the committee and the NAPEAFSCME, Local 61, Board of Directors, agrees to continue the process and further ratification voting will continue.

(Ex. 2, p. 100)

Pursuant to section M.3.1.1, the parties chose members to represent them in the specified negotiations. Negotiations occurred on February 17, 2017 and March 31, 2017. Director Frakes was one of the parties representing management in the negotiations, and he was present at both sessions. An agreement was reached on February 17, 2017, and it was signed by representatives of both sides. Director Frakes signed on behalf of the Department. (Ex. 14) The agreement provided for the use of both 12-hour shifts and 8-hour shifts at TSCI, with all details of choosing shift preferences and scheduling laid out. It provided for a ratification vote by the union-member employees at TSCI. The agreement stated that if the ratification vote failed,

> "the parties agree to meet and put only 1 (one) more proposal to a vote and this vote shall be final. This second vote shall be within 30 calendar days of the first vote. The outcome shall be viewed as a successful ratification and the parties agree to follow the outcome of the vote to be implemented thirty (30) calendar days from the vote."
>
> (Ex. 14, p. 4)

The agreement went on to say that the ballots on the second vote, if needed, would contain two options for voters: "Accept proposal" and "Accept current contract language and work only 8 hours [sic] shifts". (Ex. 14, p. 4)

A vote was held pursuant to the February 17, 2017 agreement, and the proposal failed. The parties met again on March 31, 2017. The parties made changes to the February proposal and reached an agreement that would be

put to a vote of the employees. (Ex. 15) Once again, the agreement specified the alternatives that would be placed on the ballot: "Accept" or "Reject (Which shall mean to accept current contract language and return to 8 hours [sic] shifts". The agreement also stated that "regardless of the outcome, the committee shall continue to meet and discuss alternative work shifts and other opportunities." (Ex. 15, p. 4) Director Frakes signed this agreement for the Department.

A vote of the TSCI bargaining unit members was held on April 13, and the proposal was rejected. Jerry Sonnek, the head of the Union committee members, sent an email to Director Frakes informing him of the result on that date. (Ex. 18) Despite subsequent contact by Union Executive Director Mike Marvin requesting that the result of the vote be honored by the Department, Director Frakes issued a memorandum to TSCI employees on May 5, 2017, stating that 12-hour shifts would continue until further notice. (Ex. 3) No explanation was given. At the time of trial, TSCI had not returned to 8-hour shifts pursuant to the February 17, 2017 and March 31, 2017 agreements and subsequent votes, nor have further negotiations occurred.

JURISDICTION

The Commission has jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 81-1386 and 81-1387. Petitioner has successfully invoked the jurisdiction of the Commission.

DISCUSSION

The Union alleges that the Department's actions constitute prohibited practices as outlined in Neb. Rev. Stat. § 81-1386(1). Specifically, the Union alleges the actions of the employer constitute a "refus[al] to negotiate in good faith with respect to mandatory topics of bargaining". The Department, through Director Frakes, entered into two signed agreements in which he agreed to respect the vote of the bargaining unit members and return to 8-hour shifts within 30 days if the negotiated agreements were rejected, and then to attempt further negotiations on the topic. More than 30 days have expired since the rejection of the agreements by those who voted, and there has been no return to 8-hour shifts and no further negotiations.

The Department argues that this Commission's order in *NAPE/AFSCME v. Nebraska Department of Correctional Services*, 19 CIR 157 (2016), precludes a finding of a prohibited practice in this case. Respondent also states that the Union has not met its burden of proving the Department engaged in bad faith bargaining based on the totality of circumstances.

Neb. Rev. Stat. § 81-1386(1) states: "It shall be a prohibited practice for any employer, employee, employee organization, or exclusive collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining." The Commission will consider the totality of circumstances reflecting the parties' bargaining intent to determine if the parties are in fact bargaining in good faith. A party violates its duty to bargain in good faith by engaging in surface bargaining - negotiating under the pretense of bargaining while never intending to reach an agreement. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.,* 17 CIR 240 (2012), *see Continental Ins. Co. v. NLRB,* 495 F.2d 44 (2nd Cir. 1974). Following its own decisions and the decisions of the NLRB, the Commission has offered seven activities to serve as guideposts in determining whether an employer has engaged in hard but lawful bargaining or surface bargaining: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.,* 17 CIR 240 (2012), *County of Hall v. UFSW Local 22,* 15 CIR 167 (2006), citing *Atlanta Hilton & Tower,* 271 NLRB 1600 (1984). However, these guideposts are not an exhaustive list.

> "The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence, *NLRB v. Patent Trader,* 415 F.2d 190 (2d Cir. 1969). Certain specific conduct, such as the Company's unilateral changing of working conditions during bargaining, may constitute per se violations of the duty to bargain in good faith since they in effect constitute a 'refusal to negotiate in fact,' *NLRB v. Katz,* 369 U.S. 736, 743, (1962). Absent such evidence, however, the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic. *NLRB v. General Electric Co.,* 418 F.2d 736, 756 (2d Cir. 1969). Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith."

Continental Ins. Co. v. NLRB, 495 F.2d 44, 48. (2nd Cir. 1974).

NAPE/AFSCME v. Nebraska Department of Correctional Services, 19 CIR 157, is distinguishable from the instant case. In the prior case, the parties' existing agreement granted the Director the discretion to declare an emergency, and *temporarily* alter work schedules in an emergency (emphasis added). There we also noted that the chronic staff shortage at TSCI was not in itself an "unusual situation", as parties agreed upon definition of "Emergency" requires. (Ex. 2, p. 99) The definition also specifically lists "riot", which was the impetus for that May 2015 emergency. In the instant case, the parties met to bargain specifically regarding the addition of 12-hour shifts as an employee's ordinarily scheduled work day, in addition to the 8-hour shifts already provided for in the CBA, Section M.3.1 (Ex. 2, p. 100) and how they could be implemented. The parties also reached a signed agreement. The question we are called to answer here is whether that bargaining was done in good faith.

Applying the seven guideposts listed above, we can quickly eliminate delaying tactics, unreasonable bargaining demands, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, and arbitrary scheduling of meetings as indicia of bad faith bargaining in this case. The parties met twice, reached an agreement on the process and outcome of votes. The Director himself participated in bargaining meetings. Further, there were no allegations of unreasonable bargaining demands, or efforts to bypass the Union. On the surface, the Department by all accounts appeared to be negotiating in good faith. In fact, these negotiations lead to a successful outcome of a signed agreement, contingent only upon a final vote of the employees.

While a signed agreement was reached in this case, the Department's failure to follow through after the final vote and failure to continue negotiations are tantamount to a withdrawal of already agreed-upon provisions during negotiations. On May 5, 2017, the Director simply issued a memo to staff and Union representatives stating the facility was going to continue using 12-hour shifts, which is not at all what the parties had agreed upon.

The final guidepost is unilateral changes in mandatory subjects of bargaining. Mandatory subjects of bargaining are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a), see also Neb. Rev. Stat. § 81-1371(9). In *NLRB v. Katz,* 369 U.S. 736, 737 (1962), the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. In implementing this per se rule, the Commission has held:

> "[A]n employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission. If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

Communication Workers of America, AFL-CIO v. County of Hall, Nebraska, 15 CIR 95 (2005) (internal citations omitted). See also *Service Employees International Union (AFL-CIO) Local 226 v. Douglas County School District 001,* 286 Neb. 755 (2013).

The continuation of 12-hour shifts is a unilateral change from the parties' bargained for agreement which they had agreed to implement. As such, it is a per se prohibited practice.

In addition to the factors considered above, the Commission is to analyze the totality of circumstances reflecting the parties' bargaining frame of mind to determine if the parties are in fact bargaining in good faith. At no time during the bargaining meetings did the Department state that it would not be able to abide by the agreement if the vote resulted in the 8-hour shifts (111:20-112:12). Nor did Director Frakes state that he was still planning to operate under the emergency status from May 2015 regardless of the result of the vote. His trial testimony alluded to possible operational or management reasons for not bringing up the continuation of "emergency" 12-hour shifts.

> Q: Would it make sense from an operational standpoint to make a big announcement that you were no longer on emergency status?
>
> A. No. Nor would it make good sense in prison management to make that announcement on the front end.

(82:20-25)

When directly asked if an emergency still exists at TSCI, the Director responded, "We are still at a point of time where emergency staffing is required." (83:1-3) It is unclear from the Directors' testimony whether he be-

lieved even at the time of bargaining, that the staffing levels were adequate to safely accommodate the return to 8-hour shifts. While we cannot fully ascertain the Director's state of mind, it is the Director's opinion that many staff actually preferred the 12-hour shifts. (92:14-16) Perhaps it seemed unlikely that the vote would result in the agreed upon change back to 8-hour shifts.

The Director's own description of the purpose of meeting with the Labor-Management Committee was to discuss an implementation of 12-hour shifts that was acceptable to both management and the Union. (89:2-17) Whether he believed he would not be required to go back to 8-hour shifts under "emergency" status or that the vote for 12-hour shifts would be successful, it seems that the Director had no intention of going back to 8-hour shifts on the timeline he had agreed upon with the Union. The Director had the opportunity to make his position on the feasibility of 8-hour shifts known during bargaining, but he failed to do so. Even in his memo following the votes, he set forth zero explanation of why the Department would not be implementing the agreed upon terms.

The Commission finds that the Department did engage in surface bargaining. By all appearances, the negotiations seemed to be going well, up until the final point when the Department was faced with actually having to implement the 8-hour shifts as it had agreed to do if the voters so determined. When faced with the consequences of its own bargaining, the Department fell short. We cannot conclude that one bargained in good faith in a situation where it refuses to implement the terms resulting from its own negotiations.

Lack of adequate staffing is a chronic issue at TSCI which alone cannot justify the Department's lack of implementation of the agreement resulting from its own negotiations. We find that the Department is obligated to bargain in good faith with the Union regarding the shift hours at TSCI. Further, while the parties are permitted to engage in hard bargaining, they are not permitted to agree to provisions they cannot or will not implement. This is a clear indication of the lack of good faith.

REMEDIAL AUTHORITY

The Union requests that the Commission find that the Department has committed prohibited practices and order the Department to cease and desist such actions, honor its negotiated agreements by returning to 8-hour shifts for covered positions, and to resume negotiations to attain further agreement. The Union also requests attorney fees and such other relief as may be deemed appropriate by the Commission.

If the Commission finds that an accused party has committed a prohibited practice, under Neb. Rev. Stat. § 48-825(2), it has the authority to enter an appropriate remedy and such authority is to be liberally construed to effectuate the public policy enunciated Neb. Rev. Stat. § 48-802. *Operating Engrs. Local 571 v. City of Plattsmouth,* 265 Neb. 817 (2003). Neb. Rev. Stat. § 81-1387(2) is identical to Neb. Rev. Stat. § 48-825(2).

> The State Employees Collective Bargaining Act shall be deemed controlling for state employees and state employers covered by such act and is supplementary to the Industrial Relations Act except when otherwise specifically provided or when inconsistent with the Industrial Relations Act, in which case the State Employees Collective Bargaining Act shall prevail.
>
> The State of Nebraska, its employees, employee organizations, and exclusive collective-bargaining agents shall have all the rights and responsibilities afforded employers, employees, employee organizations, and exclusive collective-bargaining agents pursuant to the Industrial Relations Act to the extent that such act is not inconsistent with the State Employees Collective Bargaining Act.

Neb. Rev. Stat. § 81-1732.

The Commission finds that the Department has committed a prohibited practice, however we cannot ignore the public safety implications of an immediate change in shift hours. Neb. Rev. Stat. § 48-802. Director Frakes testified that an immediate return to 8-hour shifts would negatively impact the safety of employees and inmates. (91:24-92:25) As a matter of public policy, we decline to order an immediate return to 8-hour shifts even as we find the Department bargained in bad faith. The safety of the employees and inmates must be of paramount concern, and the Commission is not positioned to be able to second-guess Director Frakes' safety determinations on the effects of 8-hour shifts versus 12-hour shifts. His willingness to agree to a return to 8-hour shifts indicates that the change is possible to implement safely. While conditions may never be ideal, the Labor Management Committee is an appropriate vehicle for the Director to utilize to make sure the change is implemented in a manner and at a pace that maximizes the safety of the facility.

Pursuant to CIR Rule 42, the Commission has authority to award attorney's fees when there has been a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. The Commission has found it to

be an appropriate remedy in cases where an employer's misconduct was flagrant, aggravated, persistent, and pervasive. *See Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.,* 16 CIR 401 (2010). At this time, the Commission finds that while the Department bargained in bad faith, the evidence does not show a willful pattern or practice of such behavior. As such, the Department's actions in this case do not rise to the level deemed appropriate for the award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

IT IS THEREFORE ORDERED that the Department shall:

1. Cease and desist from failing to bargain in good faith with the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees regarding mandatory subjects of bargaining.

2. Commence bargaining forthwith with Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees regarding the timing and manner of implementation of 8-hour shifts at TSCI.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,	)	Case No. 1448
Petitioner,	)	FINDINGS OF FACT AND ORDER
v.	)	
THE STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,	)	

Respondents.)

Filed October 26, 2018

APPEARANCES:

For Petitione:r Dalton W. Tietjen
Tietjen, Simon & Boyle
1023 Lincoln Mall, Suite 202
Lincoln, NE 68508

For Respondent: Mark A. Fahleson
Tara Tesmer Paulson
Rembolt Ludtke LLP
3 Landmark Centre
1128 Lincoln Mall, Suite 300
Lincoln, NE 68508

Before Commissioners Jones, Partsch and Blake

JONES, Commissioner

NATURE OF THE CASE

On September 12, 2017, the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees ("Union" or "Petitioner") filed this action with the Commission, alleging that the Department of Correctional Services of the State of Nebraska ("Department" or "Respondents") committed prohibited practices in violation of the State Employees Collective Bargaining Act ("SECBA"), Neb. Rev. Stat. §81-1386(1) and §§81-1386(2)(e) and (f) by unilaterally implementing the use of body-worn cameras and by refusing to bargain over the same. Commissioner Dallas D. Jones presided over a trial on December 21, 2017. The parties have submitted post-trial briefs.

FACTS

The parties stipulate to the following facts pursuant to Exhibit 20. 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; it is a labor organization as that term is defined in Neb. Rev. Stat. § 48-801 and within the meaning of that statutory clause. Petitioner is the exclusive collective bargaining agent for

the Protective Service bargaining unit established by the State Employees Collective Bargaining Act, Neb. Rev. Stat. § 81-1369, et. seq. The Respondents, State of Nebraska and Department of Correctional Services, are employers as that term is defined in Neb. Rev. Stat. § 81-1371(5).

At all times relevant to this matter, the parties have been covered by collective bargaining agreements between Petitioner and Respondents covering wages, hours and conditions of employment, which agreements applied to the Protective Services bargaining unit for the periods of July 1, 2015 through June 30, 2017 and July 1, 2017 through June 30, 2019. Exhibit 1 is the 2017-2019 Collective Bargaining Agreement between NAPE/AFSCME and the State of Nebraska ("2017-2019 CBA"). Appendix M of Exhibit 1 specifically deals with the Department of Correctional Services Protective Services Bargaining Unit employees. There is also a 2015-2017 Collective Bargaining Agreement between NAPE/AFSCME and the State of Nebraska ("2015-2017 CBA"). There is no material difference between the 2017-2019 CBA and the 2015-2017 CBA relevant to this proceeding so the 2015-2017 CBA was not offered as an exhibit. Article 1 – Preamble, Sections 1.3 and 1.4 of the 2017-2019 CBA read in relevant part as follows:

> 1.3 The parties acknowledge that during the negotiations which resulted in this Contract, each had the right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Contract. Therefore, the Employer and the Union, for the duration of this Contract, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered in this Contract. This Contract may only be amended during its term by the parties' mutual agreement in writing.
>
> 1.4 The Employer agrees that prior to making any change in terms and conditions of employment which are mandatory subjects of bargaining and not otherwise covered by this Contract, to meet and bargain with the Union in an attempt to reach an agreement. If no agreement is reached, the terms and conditions of employment shall not be altered, unless the Employer has a compelling need to change a term or condition of employment. When the Employer has a compelling need to

> change a term or condition of employment and no agreement has been reached through bargaining, the Employer may implement the change and the unresolved issue may by mutual agreement, at the time of the dispute, of the parties be submitted to final and binding arbitration. The losing party shall bear the cost of arbitration. Notwithstanding the above, the Union and the Employer reserve their rights to enforce this and any provision of the contract through the courts.

Article 3 – Management Rights of the 2017-2019 CBA read in relevant part as follows:

> 3.1 It is understood and agreed that the Employer possesses the right to operate and direct the employees of the State and its various agencies to the extent that such rights do not violate its legal authority, and to the extent that such rights are not modified by this Contract. These rights include, but are not limited to:
>
> 3.3 The right to manage and supervise all operations and functions of the State.
>
> 3.12 The right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures, or policies.
>
> 3.14 The right to introduce new or improved methods, equipment, technology, or facilities.

(Ex. 1).

No proposal regarding use of body-worn cameras at Tecumseh State Correctional Institution ("TSCI"), or any other correctional institution in Nebraska, was presented to the Union by Respondents. The parties agree that this proceeding covers use of body-worn cameras at all Department of Corrections facilities.

In addition to the facts stipulated to by the parties, the Commission adopts the following facts. On August 25, 2017, James Jansen, a Major at TSCI, issued a memorandum to TSCI staff. (Ex. 2). This memorandum gave notice that effective August 28, 2017, body-worn cameras would be used in three locations at TSCI, and also stated that other housing units would be provided body-worn cameras at a later time. The Respondents had made the decision to begin this usage of body-worn cameras without

making any proposals to the Union, and without engaging in any negotiations with the Union. (Ex. 20, #7) The Department had also developed rules and guidelines regarding the usage of the cameras without consulting or negotiating with the Union. (36:21-37:5; 38:13-18; 99:12-101:11; 125:25-126:3; 127:11-19; 128:15-129:22). The body-worn cameras went into use by bargaining unit employees either on the date listed in the memorandum or soon thereafter.

On September 1, 2017, John Antonich, the Executive Director of the Union, sent two emails on behalf of the Union to Scott Frakes, the Director of the Department of Correctional Services. (Ex. 12 & 13). In those emails, he requested that the use of body-worn cameras by bargaining unit employees stop immediately and that the Department bargain with the Union over the issue. Director Frakes refused to negotiate regarding the issue, and no negotiations have taken place since that time. (43:20-22). The Union does not oppose the use of body-worn cameras, but rather is concerned with the impact of the usage of the body-worn cameras on bargaining unit members and wishes to bargain those issues.

DISCUSSION

Petitioner alleges that Respondent committed a prohibited practice when it unilaterally implemented the usage of body-worn cameras at TSCI. Further, Petitioner alleges that Respondent committed a prohibited practice by refusing to bargain in good faith over a mandatory subject of bargaining. Respondents argue that the implementation of body-worn cameras is not a mandatory subject of bargaining. In the alternative, if found to be a mandatory subject of bargaining, Respondents argue it was "covered by" the CBA and there was no further obligation to bargain.

Jurisdiction

Under Nebraska's Industrial Relations Act, the Commission has the authority to decide industrial disputes (Neb. Rev. Stat. § 48–819.01 (Reissue 2010)) and to determine whether any party to an agreement has committed a prohibited practice.

> The State Employees Collective Bargaining Act shall be deemed controlling for state employees and state employers covered by such act and is supplementary to the Industrial Relations Act except when otherwise specifically provided or when inconsistent with the Industrial Relations Act, in which case the State Employees Collective Bargaining Act shall prevail.

> The State of Nebraska, its employees, employee organizations, and exclusive collective-bargaining agents shall have all the rights and responsibilities afforded employers, employees, employee organizations, and exclusive collective-bargaining agents pursuant to the Industrial Relations Act to the extent that such act is not inconsistent with the State Employees Collective Bargaining Act.

Neb. Rev. Stat. § 81-1732.

The Commission finds that it has jurisdiction to determine whether the Respondent has committed a prohibited practice. Respondent contends that it had no obligation to negotiate. Respondent also states that if the body-worn cameras are found to be a mandatory subject of bargaining, then the Commission lacks jurisdiction to hear this case, as it requires the Commission to interpret the terms and conditions of an existing CBA. The facts in this case constitute a viable prohibited practice claim; which this Commission has been given jurisdiction to adjudicate by virtue of Neb. Rev. Stat. §§ 81-1386 and 81-1387. See *Nebraska Ass'n of Public Employees, Local 61 v. State of Nebraska Dep't of Correctional Services,* 19 CIR 13 (2014), *South Sioux City Educ. Ass'n v. South Sioux City Public Schools,* 16 CIR 12 (2008), aff'd 278 Neb. 572 (2009); *Ewing Educ. Ass'n v. Ewing Public Schools,* 12 CIR 242 (1996).

Prohibited Practice Allegations

Neb. Rev. Stat. § 81-1386 provides in relevant part:

"(1) It shall be a prohibited practice for any employer, employee, employee organization, or exclusive collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.

(2) It shall be a prohibited practice for any employer or the employer's negotiator to:

(e) Refuse to negotiate collectively with representatives of exclusive collective-bargaining agents as required in the Industrial Relations Act and the State Employees Collective Bargaining Act;

(f) Deny the rights accompanying certification or exclusive recognition granted in the Industrial Relations Act or the State Employees Collective Bargaining Act;"

Mandatory Subject of Bargaining

Parties are only required to bargain over mandatory subjects of bargaining. Under SECBA, mandatory subjects of bargaining are those subjects of negotiation that employers must negotiate pursuant to the Industrial Relations Act ("Act"). Neb. Rev. Stat § 81-1371(9). Mandatory subjects are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat § 48-816(1)(a). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County,* 16 CIR 401 (2010). 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). Failure to bargain for any changes to these items is a per se violation of the Act and a prohibited practice.

In order to establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Education Ass'n* set forth the following test:

> "A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining."

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (1979).

The Commission has 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." *See Coleridge*

Educ. Ass 'n v. Cedar County School Dist. No. 1-1-0541. a/k/a Coleridge Community Schools, 13 CIR 376 (2001).

In this case, the parties disagree as to whether the introduction and use of body-worn cameras is a mandatory topic of bargaining. This is a case of first impression for the Commission regarding body-worn cameras. There is limited case law regarding whether body-worn cameras are a mandatory subject of bargaining. However, NLRB cases regarding surveillance cameras generally provide some instruction. In *Colgate-Palmolive Co.,* 323 N.L.R.B. 515 (1997), the NLRB found that the "installation of surveillance cameras is analogous to physical examinations, drug/alcohol testing requirements, and polygraph testing, all of which the Board has found to be mandatory subjects of bargaining. They are all investigatory tools or methods used by an employer to ascertain whether any of its employees have engaged in misconduct." *Id. In National Steel Corp. v. N.L.R.B.,* 324 F.2d 928 (7th Cir. 2003), the Seventh Circuit Court of Appeals considered a situation where a company refused to negotiate over installation and use of surveillance cameras. The court held that the use of the cameras was clearly a mandatory topic of bargaining, relying heavily upon *Colgate-Palmolive* and its language regarding privacy and disciplinary concerns. 324 F.2d at 932. These cases obviously differ from the instant case in that they deal with hidden cameras, which had the investigatory purpose of watching for employee wrongdoing.

The Respondents' stated purpose for implementing body worn- cameras is safety, and for use in controlling inmates and recording interactions with inmates. (133:11-18). There is no dispute that is true. That does not mean that they could not also be used for other purposes, like employee discipline. TSCI Warden Hansen testified that the recordings from the cameras could and would be used to support disciplinary action against employees. (97:12-98:8; 104:17-105:8) NAPE/AFSCME Executive Director Antonich testified, discipline is one of the absolute core issues about which there must be negotiations. (46:4-11).

We also note that the Florida Public Employee Relations Commission has recently found in a similar case that:

> "a public employer's initial decision on whether to implement BWCs is a management right under Section 447.209, Florida Statutes. Therefore, the decision itself is not a mandatory subject of bargaining. Nevertheless, given the substantial effects that this decision would likely have on the terms and conditions of employment, there will clearly be some aspects

of implementation that are mandatorily negotiable, such as how the recordings will be used in disciplining officers and when the BWCs must be activated."

Jacksonville Consolidated Lodge 5-30, Inc. Fraternal Order of Police v. City of Jacksonville, CA-2017-012 (2017).

Respondents argue that the body-worn cameras are simply an extension of the fixed cameras at the facility that already record inmate interactions and therefore are not a mandatory subject of bargaining. We disagree. The Commission finds that the usage of body-worn cameras unilaterally implemented by Respondents would "vitally affect" the terms and conditions of employment. Therefore, the Commission agrees with the Petitioner that the implementation of body-worn cameras is a mandatory subject of bargaining.

"Covered by" the CBA

If a mandatory subject of bargaining is "covered by" the CBA, no further bargaining is required. The Nebraska Supreme Court 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. To determine whether an alleged prohibited act is "covered by" the CBA, we must examine whether the CBA "fully defines the parties' rights". *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.,* 284 Neb. 109, 117 (2012) To "fully define the parties' rights" does not, however, require that the CBA address the "full range of impact and implementation issues" of the alleged prohibited act. To require such, would be "both unrealistic and impermissible", as a tacit application of the "waiver" standard, a standard which is "antithetical to the contract coverage principles" applicable when assessing whether a practice is "covered by" a CBA. Id.

Turning to the facts of this case, section 3.14 of the CBA provides that the Respondent and Petitioner negotiated and agreed that the Respondent has "[t]he right to introduce new or improved methods, equipment, technology or facilities." (E1, P.7) We are mindful that "[w]hen parties bargain about a subject and memorialize the result of their negotiations in a collective bargaining agreement, they create a new set of enforceable rules—a new code of conduct for themselves—on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is

beyond the competence of . . . the courts to interfere with the parties' choice." *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.,* 284 Neb. 109, 116 (2012) (citing Dep't of Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992)). The Petitioner was under no obligation to agree to the language of section 3.14 of the CBA, but it did. There can be little debate that body-worn cameras are "equipment", and they either are, or incorporate, "technology". As compared to the existing stationary surveillance cameras in use by the Respondent, body-worn cameras may be "improved" technology or equipment. Since they were only in use at the time of bargaining on a limited, trial basis and had not been broadly and permanently implemented, they are somewhat "new" to the parties. On the other hand, body-worn cameras are not new technology. They have been in existence for some time, and they were familiar to the parties at the time bargaining between the parties resulted in the CBA. They were not just known to the parties, but they were being used on a trial basis during the time that negotiations for the CBA were occurring.

Based on a literal reading of section 3.14 of the CBA, we could conclude that under the language of the CBA, body-worn cameras constitute "new or improved ... equipment [or] technology". However, we could also just as easily conclude that the use of such cameras is a decision to implement a different use of existing technology and equipment, and involves nothing new or improved. This ambiguity illustrates the need to interpret the contract to determine whether this issue is "covered by" the CBA. While the Commission can look at a contract to determine whether a unilateral change in a condition of employment contained in a collective bargaining agreement is also a prohibited practice, we lack the jurisdiction to interpret the contract. It is for the district court to interpret an ambiguous contract and declare the rights under the same. *Lamb v. Fraternal Order of Police Lodge No. 36, 293 Neb. 138 (2016); South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.,* 278 Neb. 572 (2009).

Collective bargaining is a skill which employers and unions must practice carefully and with precision. Contracts are made to clearly define the expectations of each stakeholder. Lay persons may criticize lawyers for being too detailed, but conflict arises when words subject to different interpretations are not clarified and agreed upon in advance. Section 3.14 of the CBA is ambiguous and from its vagueness conflict has emerged.

While the Commission is one forum parties may turn to in order to resolve industrial disputes, it is a forum of limited scope and authority. The Commission only has those powers granted to it specifically by the legislature, as interpreted by the Nebraska appellate courts. The Commission lacks jurisdiction to interpret the ambiguity in the parties' contract; there-

fore, the Petitioner's petition before this Commission must be, and hereby is, dismissed.

IT IS SO ORDERED.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SERVICE EMPLOYEES INTERNATIONAL UNION, (AFL-CIO) LOCAL 226, (OFFICE PERSONNEL) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	)))))))))))	CASE NO. 1466 FINDINGS OF FACT AND ORDER
SERVICE EMPLOYEES INTERNATIONAL UNION, (AFL-CIO) LOCAL 226, (EDUCATIONAL PARAPROFESSIONALS) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	))))))))))))	CASE NO. 1467
SERVICE EMPLOYEES INTERNATIONAL UNION, (AFL-CIO) LOCAL 226, (TRANSPORTATION DIVISION)	))))	CASE NO. 1468

Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	
SERVICE EMPLOYEES INTERNATIONAL UNION, (AFL-CIO) LOCAL 226, (NUTRITION SERVICES DIVISION) Petitioner, v. DOUGLAS COUNTY SCHOOL DISTRICT 001, Respondent.	CASE NO. 1469

Filed September 25, 2019

APPEARANCES:

For Petitioner: Timothy S. Dowd
DOWD & CORRIGAN, L.L.C.
1411 Harney Street, Suite 100
Omaha, NE 68102

For Respondent: David J. Kramer
BAIRD HOLM LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102

Before Commissioners Carlson, Blake, and Vannoy

CARLSON, Commissioner

NATURE OF THE CASE

The Petitioner, Service Employees International Union Local 226 (“Local 226”) alleges that Respondent, Douglas County School District

001 ("OPS") has committed a prohibited practice of bad faith bargaining in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(1). In the four Petitions filed September 4, 2018, Local 226 alleged on behalf of the Office Personnel (Case No. 1466), Educational Paraprofessionals (Case No. 1467) , Transportation Division (Case No. 1468), and Nutrition Services Division (Case No. 1469) bargaining units that:

> "Respondent has failed and refused to negotiate or agree to negotiate regarding the change in the manner and method in which the ten (10) month employees are paid, and said unilateral action on the part of the Respondent constitutes a unilateral change in the terms and conditions of employment with respect to a mandatory subject of collective bargaining, and as such, constitutes a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1) (Reissue 2004)."

(Petitions in Cases 1466, 1467, 1468, and 1469).

Respondent's Answer and Counterclaim filed on September 12, 2018, in each case captioned above, admits that prior to August 1, 2018, hourly employees in the relevant bargaining units who worked an approximate ten month period were paid on a pro rata basis over twelve months. OPS also admits that on approximately August 1, 2018, it unilaterally changed the manner and method in which the above-described members in the Local 226 bargaining unit are paid, in which the Respondent unilaterally terminated the pro-rated payments over a twelve month period for ten month employees. OPS asserts that it was lawfully entitled to do so when it implemented its Last, Best and Final Offer which included paying ten month employees over a ten month period.

Respondent's counterclaim alleges that Local 226 has committed a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1). OPS alleges that Petitioner's behavior in negotiations was an attempt to delay, frustrate and stymie negotiations over payment of ten month employees. Further, Respondent alleges a pattern and practice of behavior designed to deny OPS exercise of its legal right to implement its Last, Best and Final Offer, which constitutes a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1).

At trial, Petitioner moved to have Petitioner's Amended Issues Presented, filed November 28, 2018, during trial, (17:24-18:20) be an amendment to the Petition in this matter. Over Respondent's objection,

Petitioner's motion was granted. (202:19-205:17). Rather than addressing the Petitions' allegations of failure and refusal of the Respondent to negotiate, we address Petitioner's issues as follows:

- Whether there was a custom and past practice of prorating the payment of wages for the ten month employees in the bargaining unit over a twelve month pay period, and if so, did the custom and past practice create a mandatory subject of bargaining?

- Did the Respondent make a unilateral change of a mandatory subject of bargaining?

- Whether the Respondent's conduct in this matter constitutes an unlawful unilateral change of a mandatory subject of bargaining when the Respondent changed the manner and method of how the ten month employees in the respective bargaining units were paid?

- If the Respondent engaged in any bargaining over the change of the custom and past practice of pro rating the payment of wages for the ten month employees in the bargaining units over a twelve month pay period, then did that bargaining constitute surface bargaining?

- Whether the failure to include the change of pro rating the payment of wages for the ten month employees in the bargaining unit over twelve month pay period in the written Last Best and Final Offer of the Respondent preclude the Respondent from unilaterally implementing the change?

- If it is found that the Respondent engaged in a prohibited practice, then what remedies should be afforded the Petitioner?

The parties have agreed to have the four cases heard and decided together. A trial was held before Commissioner Joel E. Carlson on November 28, 2018. Post-trial briefs have been received.

FINDINGS OF FACT

Local 226 is the exclusive bargaining unit representative for OPS employees in the Office Personnel, Educational Paraprofessionals, Transportation Division, and Nutrition Services Division bargaining units. In these bargaining units, there are some employees that only work ten months throughout the year, whereas there are other employees that work the entire twelve month calendar year. Prior to August 1, 2018, hourly employees in the relevant bargaining units who worked an approximate ten month period

were paid on a prorated basis over twelve months. This practice was not contained in the previous Collective Bargaining Agreements between these four bargaining units and OPS. (Exhibits 525, 529, 532, and 535).

During the January 15, 2017, monthly meeting between OPS and Local 226, OPS informed Local 226 that it was buying software and hardware for a time clock system and that no decisions as to the implementation of the system had been made. Issues with the current methods of time-keeping and prorated pay were discussed. The possibility of having both twelve month and ten month employees paid on an "hours worked, hours paid" basis rather than prorating their paychecks was also discussed. (Exhibit 563). As part of the implementation of a new software system, OPS desired to require employees to utilize time clocks, rather than paper time sheets, as the means of tracking hours worked. (Exhibit 30 ¶11).

During the April 25, 2017, monthly meeting between OPS and Local 226, Local 226 President Suzanne Anderson asked "So are we going to be time work, time paid?" (Exhibit 564, 1:23). OPS General Counsel Megan Neiles-Brasch responded:

> "We'd like to move in that direction if that's going to be something that - you know, I don't know exactly where the board's at on that yet, but I'm, you know, that's a huge conversation we think in some ways it would be a lot easier to have time work time paid. And so, is that something the union would be willing to agree to, or?"

(Exhibit 564, 2:1-5).

The discussion continued regarding ten month employees and how hours worked, hours paid could be implemented. Ms. Neiles-Brasch also specifically noted the importance of the Local 226's assistance and support when it was time to implement changes regarding the time keeping and how and when employees would be paid. (Exhibit 564, 3:19-4:3).

OPS and the leadership of Local 226 met again on June 27, 2017. (86:4-8; Exhibit 565). Ms. Neiles-Brasch expressed that OPS wanted to move all employees to two week cycles. She also stated that didn't necessarily mean people would be changed to hours worked, hours paid, it was something being considered. OPS indicated its desire to negotiate the issue with the leadership of Local 226, rather than each individual bargaining unit separately. (Exhibit 565, 1:1-9). During that meeting, there were extensive discussions between OPS and Local 226 over paying ten month employees as they work. While Local 226 had a number of questions about the overall

implementation process, Local 226 did not object or indicate that it was unwilling to continue meeting at the leadership level, rather than the bargaining unit level. (Exhibit 565).

OPS and the leadership of Local 226 met again on August 24, 2017. (Exhibit 566; 90:9-13). During that meeting, OPS first notified Local 226 of its desire to implement its proposed changes in August of 2018, nearly a full year later. (Exhibit 566, 1:1-12, 3:5-7; 91:1-25). At that same meeting, OPS informed Local 226 that it wanted to begin a major communication with Local 226 and the affected employees. (Exhibit 566, 7:6-11; 92:1 6). Doug Bush, an Assistant Steward for Local 226, responded that, "I think most of us is all for it apparently, I have no problem [inaudible]." (Exhibit 566, 7:6-11).

OPS and the leadership of Local 226 met again on October 24, 2017. Local 226 did not raise the issue of changing the pay periods for ten month employees. There was, however, extensive discussion regarding implementation of time clocks and scheduling issues. (Exhibit 567).

On January 25, 2018, OPS and the Local 226 leadership team met once again. (Exhibit 568; 92:22-93:2). At that meeting, OPS provided Local 226 with a draft communication which it intended to send to all employees entitled "OPS Anywhere" (Exhibit 11; Exhibit 544) regarding the changes to time reporting and pay schedules. (Exhibit 568, 1:6-13; 93:3-8). Again, Local 226 did not object to changing the pay periods for ten month employees. (Exhibit 568). Local 226 was given an opportunity to comment and respond to OPS regarding any concerns it might have about the proposed communication. (93:9-16). Ms. Anderson admitted she reviewed the proposed communication. (93:17-19). Neither Anderson nor any representative of Local 226 contacted OPS to express any concerns or reservations about the proposed communication to employees prior to its issuance. (93:20-94:20). On January 29, 2018, OPS sent the OPS Anywhere communication (Exhibit 11; Exhibit 544) to all employees. (220:21-24). Many employees represented by Local 226 were not happy, and they received many calls and emails in response to the OPS Anywhere communication. (96:8-18).

On January 30, 2018, Local 226 sent OPS a letter requesting it cease and desist implementation of time reporting and pay schedules. (Exhibit 14). The letter was the first clear indication from Local 226 that it objected to OPS' conversion to a ten month pay plan, despite having been notified on August 24, 2017, that OPS planned to implement in August 2018. (Exhibit 30, ¶20; Exhibit 566). The letter also specifically requested meetings with OPS over the proposed change. (Exhibit 14; 98:17-20). OPS offered

four meeting dates. (Exhibit 502). OPS and the leadership of Local 226 conducted negotiations on February 13, 2018. (100:13-16; Exhibit 569). Local 226 cancelled the meeting scheduled for February 28, 2018. (100:24-101:1). On March 6, 2018, the leadership of Local 226 and OPS met to continue negotiations. (101:22-102:1). At the end of that meeting, OPS offered to permit local 226 to bring additional people to the meetings in order to represent the individual bargaining units. (102:16-23; Exhibit 570, p. 29:3-30:6). Local 226 and OPS met again on March 7, 2018. (Exhibit 571; 103:6-13). OPS offered to meet with each separate bargaining unit beginning on March 12 and continuing daily through March 15. (103:14-18; Exhibit 571, 1:2-7). OPS and the leadership of Local 226 spent the remainder of that meeting on issues relating to the necessity and timing of the individual bargaining sessions. (Exhibit 571). Upon completion of the meeting, OPS offered specific dates and times for each separate bargaining unit beginning March 12, 2019. (Exhibit 508). In response, Local 226 informed OPS that it would not meet to negotiate on Monday, March 12, 2018. (Exhibit 509). Local 226 also indicated that it would notify OPS on March 12, 2018, whether it intended to attend the remaining sessions scheduled for March 13-15. (Exhibit 509). On March 12, 2018, local 226 notified OPS that Local 226 would attend the scheduled individual bargaining unit negotiation sessions on March 13, 2018, (Exhibit 510). Upon arriving at the March 13, 2018, meeting, Ms. Anderson stated: "Well, we under [sic] we had a meeting with our attorneys and we have been advised that we do not have to do these meetings because we refuse so in our contract right now. Because we are not in negotiations." (Exhibit 572, 1:7-9). Ms. Neiles-Brasch asked "And so you are refusing to bargain with the district?" (Exhibit 572, 1:10). Ms. Anderson replied "We are refusing to open our contract at this time." (Exhibit 572, 1:11). Following extensive discussion, Anderson stated, "I guess what it kind of boils down to, ...you'll have to go back and tell them that we're not going to do this ... we're not going to have no more meetings." (Exhibit 572, 16:17-21). Anderson concluded, "So, I guess really, there's no more to say." (Exhibit 572, p. 22:19).

In a letter dated March 14, 2018, OPS notified Local 226 that it considered Local 226's refusal to bargain as evidence of the existence of impasse and that it intended to implement its proposed change effective August 1, 2018. (Exhibit 511). Despite the fact that OPS considered Local 226's refusals to bargain to be evidence of impasse, OPS raised the issue at the bargaining table during regular negotiations for each of the four bargaining units affected by this litigation. (Exhibit 30, ¶31). The purpose of raising the issue at the bargaining table was to have an opportunity to talk about the effects of the decision to implement the ten month pay plan and to ensure that Local 226 was clear on OPS's position. (263:11-22). At no time

did Local 226 offer a single counter proposal to OPS on the issue of moving from a twelve month to a ten month pay plan. (263:4-7; Exhibits 573 to 587). After the January 30, 2018, cease and desist letter, Local 226's position at the bargaining table never moved from "No." (Exhibit 30, ¶56, see also, e.g. Exhibit 577, 1:9-13). We find portions of the testimony of Ms. Anderson to be not credible. The testimony of Ms. Anderson regarding Local 226 offering counter proposals is directly contradicted by the meeting transcripts received into evidence. (70:1-5 and Exhibit 565, 1:10-12, regarding two week pay cycles, which is a 26 week pay cycle; 70:6-11 and Exhibit 565, 9:7-13:4, regarding a trial period).

On July 18, 2018, Ms. Anderson notified OPS Superintendent Dr. Cheryl Logan that Local 226 intended to file a prohibited practice action with the Commission. (Exhibit 539). This notification occurred more than a week before three of the Local 226 Bargaining Units (Paraprofessionals, Office Personnel and Nutrition) actually voted to reject OPS's contract proposal. (Exhibit 524, Exhibit 527, and Exhibit 533). The previous contracts between OPS and the four units affected by this litigation expired on July 31, 2018. (Exhibits 525, 529, 532, and 535). The previous contracts between OPS and the four Petitioner units did not contain a continuation clause. (Exhibits 525, 529, 532, and 535). On August 3, 2018, OPS notified Ms. Anderson via email that the Board of Education would consider unilateral implementation of the ten month pay schedule at the Board of Education's next regularly scheduled meeting on August 6, 2018. (Exhibit 521). Ms. Anderson responded to the email thanking OPS for the notice. (Exhibit 521). The Board of Education voted unanimously to implement the ten month pay schedule, retroactive to August 1, 2018. (123:18-20).

JURISDICTION

The Commission has been given jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. Both parties assert that the other has committed the prohibited practice of bad faith bargaining in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(1). The parties have properly invoked the jurisdiction of the Commission.

DISCUSSION

Neb. Rev. Stat. § 48-816(1)(a) defines good faith bargaining as the "performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment". The Act does not require parties to agree to any proposals put forth in negotiations,

only that the parties "confer in good faith" about those subjects which are mandatory subjects of bargaining. Neb. Rev. Stat. § 48-824(1) states that 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 a mandatory subject of bargaining.

Mandatory subjects of bargaining are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County,* 16 CIR 401 (2010). The Act only requires parties to bargain over mandatory subjects.

To establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metropolitan Technical Community College Education Association,* 203 Neb. 832 (1979), set forth the following test:

> "A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining."

Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (1979).

In *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County,* Nebraska, 19 CIR 132 (2015), the Commission considered decisions of the National Labor Relations Board ("NLRB"), which are instructive but not controlling. The NLRB has held that changes in payroll periods are a mandatory subject of bargaining. *Visiting Nurse Services of Western Massachusetts, Inc.,* 325 N.L.R.B. 1125 (1998), enforced 177 F.3d 52 (1st Cir. 1999). In Visiting Nurse Services, the employer unilaterally implemented

a new payroll system to change employees from a weekly payroll schedule to a biweekly payroll schedule without bargaining to impasse with the Union. The Commission found that changes in payroll periods are a mandatory subject of bargaining and additionally found that the economic impact a change in the monthly payroll practice would cause was also a mandatory subject of bargaining. *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County, Nebraska,* 19 CIR 132 at 139 (2015).

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). Further, a topic can be established as a subject of bargaining if it has been a past practice between the parties. "An employer has a duty to not change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz,* 369 U.S. 736, 745-747 (1962). To establish past practice, the practice must have occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Fraternal Order of Police, Lodge 26 vs. Sheriff of Lincoln County,* 19 CIR 132 (2015) citing *Sunoco, Inc.,* 349 N.L.R.B. 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.,* 340 N.L.R.B. 349, 353 (2003), enfd. Mem. 112 Fed.Appx. 65 (D.C. Cir. 2004).

Once a topic has been found to be a mandatory subject of bargaining, the burden of proving a waiver falls on the party asserting the waiver. *Washington County Police Officers Ass'n/F.O.P. Lodge 36 v. County of Washington,* 17 CIR 114 (2011). The possibility of waiver can be considered only after we have determined that the dispute was not covered by the relevant collective bargaining agreement." *Service Empl. Internat. v. Douglas Cty. Sch. Dist.,* 286 Neb. 755 (2013). In *Fraternal Order of Police, Lodge 21 v. City of Ralston,* 12 CIR 59 (1987), the Commission stated that the standard of proving waiver of a statutorily protected right must be clear and unmistakable.

Additionally, once a union has notice of a proposed change in a mandatory subject of bargaining, 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." *Id.* (citing *NLRB v. Alva Allen Indus., Inc.,* 369 F.2d 310, 321 (8th Cir. 1966)). "It is well settled Board law that 'when 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.'" *Id.* (citing *Haddon Craftsmen, Inc.,* 300 N.L.R.B. 789, 790 (1990)). 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. *Id*. In a prior similar case between these same parties, the Nebraska Supreme Court stated:

> "The employer must give the union notice that it intends to make changes to the conditions of employment. But once notice is given, it places an obligation upon the union to request bargaining so as not to waive the employees' right to bargain. The union must act with due diligence in requesting bargaining. Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain. Under federal case law, as under Nebraska law, the burden of proving waiver rests on the employer: To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change. In addition, the employer must show that the union failed to make a timely bargaining request before the change was implemented. (Internal quotations and citations omitted).

Service Empl. Internat. Union v. Douglas Cty. Sch. Dist., 286 Neb. at 767.

In *NLRB v. Katz,* 369 U.S. 736, 737 (1962), the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. In *Communication Workers of America, AFL-CIO v. County of Hall, Nebraska,* 15 CIR 95 (2005), the Commission held that

> "an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission.(internal citations omitted) If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith."

Id. at 104, *See also, Service Empl. Internat. Union v. Douglas Cty. Sch. Dist.,* 286 Neb. 755 (2013).

The Commission has defined impasse as when parties have reached a deadlock in negotiations. *Fraternal Order of Police, Lodge 41 v. County of Scottsbluff,* 13 CIR 270 (2000). In *County of Scottsbluff,* the Commission found that the following factors should be considered in determining whether impasse exists: number of meetings, length of meetings, period of negotiations, whether parties have expressed a willingness to modify its position, whether a mediator has been called in, the importance of the issues over which the parties disagree, and the understanding of the parties regarding the state of negotiations. *Id*. The party who claims that negotiations reached impasse has the burden of proof.

The Commission will consider the totality of circumstances reflecting the parties' bargaining intent to determine if the parties are in fact bargaining in good faith. A party violates its duty to bargain in good faith by engaging in surface bargaining - negotiating under the pretense of bargaining while never intending to reach an agreement. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.,* 17 CIR 240 (2012), *see Continental Ins. Co. v. NLRB,* 495 F.2d 44 (2nd Cir. 1974). Following its own decisions and the decisions of the NLRB, the Commission has offered seven activities to serve as guideposts in determining whether an employer has engaged in hard but lawful bargaining or surface bargaining: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC v. City of Omaha, et al.,* 17 CIR 240 (2012); *County of Hall v. UFSW Local 22,* 15 CIR 167 (2006), (citing *Atlanta Hilton & Tower,* 271 N.L.R.B. 1600 (1984)). However, these guideposts are not an exhaustive list.

> "The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from circumstantial evidence, *NLRB v. Patent Trader,* 415 F.2d 190 (2d Cir. 1969). Certain specific conduct, such as the Company's unilateral changing of working conditions during bargaining, may constitute per se violations of the duty to bargain in good faith since they in effect constitute a 'refusal to negotiate in fact,' *NLRB v. Katz,* 369 U.S. 736, 743, (1962). Absent

> such evidence, however, the determination of intent must be founded upon the party's overall conduct and on the totality of the circumstances, as distinguished from the individual pieces forming part of the mosaic. *NLRB v. General Electric Co.,* 418 F.2d 736, 756 (2d Cir. 1969). Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith."

Continental Ins. Co. v. NLRB, 495 F.2d 44, 48. (2d Cir. 1974).

Analysis

The Commission finds that changing the pay periods of the ten month employees represented by Local 226 is a mandatory subject of bargaining. The parties agree that changing the longstanding past pay practice of ten month employees is a mandatory subject of bargaining. Changes in payroll periods and the related economic impact of those changes have previously been determined to be mandatory subjects of bargaining. See *Fraternal Order of Police, Lodge 26 v. Sheriff of Lincoln County, Nebraska,* 19 CIR 132 (2015).

The parties also agree that the payment practice at issue is not contained in the collective bargaining agreements between the Petitioners' and Respondent. The Commission finds that prior to January 28, 2018, Local 226 waived its right to bargain the changes in pay practices detailed in Respondent's OPS Anywhere communication issued January 29, 2018. The Petitioner first had notice that a possible change was being considered over one year before the Respondent sent the OPS Anywhere communication notifying employees of the upcoming change. (Exhibits 11, 544 and 563). Throughout 2017, and into January 2018, Local 226 continued to have monthly meetings with the Respondent where the issue was discussed. The Petitioner and Respondent disagree as to whether the monthly meetings held between January 15, 2017, and January 25, 2018, should be considered "negotiations". The Petitioner states the monthly meetings are separate from negotiations. (47:11-53:19). For purposes of this analysis, we agree with the Petitioner and find that the regular monthly meetings were not negotiation meetings for the purpose of collective bargaining. The parties' usual practices treat the two types of meetings separately. (48:21-49:14). This finding does not purport to hold that collective bargaining cannot occur at these meetings, only that in these cases Local 226's representatives believed that they were not participating in bargaining during these monthly meetings. We note that these same parties, including the same leadership representatives from both parties, have previously negotiated issues not found

in within their collective bargaining agreements outside of their regularly scheduled contract negotiations. (*Service Employees International Union Local 226 v. Douglas County School District 001,* CIR Case 1440 (2017); Exhibit 572).

However, on several occasions Local 226 was provided with sufficient notice to have triggered their duty to request bargaining on the issue. Certainly, at the June 27, 2017, monthly meeting Local 226 had clear notice that OPS wanted to pursue an hours worked, hours paid pay practice; as well as what could be described as an invitation to request bargaining on the issue and an expression of Respondent's willingness to bargain with the Petitioners if so requested. (Exhibit 565). During the August 24, 2017, meeting, Ms. Neiles-Brasch clearly stated OPS's intent to implement the hours worked hours paid plan in August 2018, a year later. (Exhibit 566, 1:1-12). Further, statements made by Local 226's representatives during these monthly meetings were reasonably interpreted by OPS to be acceptance, or at least not an objection, by Local 226 of OPS to continuing to work towards moving hourly employees, including the ten month employees represented by Local 226, to an hours worked, hours paid pay practice. The parties participated in discussions as to how best communicate to and accommodate employees and OPS in making those changes as part of the implementation of the new computer system. This included discussions and requests for the amount of lag time between making the employees aware of coming changes to time keeping and pay practices and the implementation of the same. Local 226 was continuously updated and had the opportunity to ask questions, object, and request negotiations throughout the process of OPS programming and planning for the implementation of its new software system, including the timekeeping and pay schedule aspects. The Commission finds that Local 226's inaction and failure to request bargaining after nearly a year of continued discussions, on both the proposed change itself and the economic impact of implementing the change, to be a waiver of Local 226's right to bargain those issues. By the time Local 226 sent its cease and desist letter, the Respondent was no longer required to bargain regarding changing the ten month employees to an hours worked, hours paid pay practice. As such, we need not address Petitioners' allegations of surface bargaining. We find that the Respondent was permitted to unilaterally change the manner and method in which the above-described members in the Local 226 bargaining unit are paid.

While we have found Petitioners' waived their right to bargain the issue, the evidence is clear that Respondent had thought itself to be in negotiations throughout the relevant time period discussed here. In order to address the counterclaim against Petitioners, we will briefly address the Respondent's impasse claim. Although we find the Respondent was no longer required

to negotiate the change in pay practice by the time Local 226 sent its cease and desist letter, it voluntarily did so, at which point both parties were required to participate in good faith bargaining. The Respondent remained open at that time to not implementing the change to ten month employees as previously scheduled should the negotiations come to that result. The Respondent also offered many options to alleviate the economic impact of the changes on the affected employees, including continuation of insurance benefits, financial management training, and deposit options for savings accounts. Local 226 refused to continue bargaining, at which point OPS considered the negotiations to be at impasse. (Exhibit 572). The Commission finds that OPS' final counter offer was provided at the March 6, 2018, meeting. (Exhibit 512). The March 14, 2018, letter is a final offer for purposes of this impasse analysis. (Exhibit 511). The change was implemented prior to the filing of the petitions. The Respondent raised the issue at the individual bargaining unit meetings, again providing Local 226 an opportunity to negotiate the impact of the implementation of the plan. Again, Respondent was permitted to unilaterally change the manner and method in which the above-described members in the Local 226 bargaining unit are paid.

The above facts and findings do not constitute a convincing basis for the Petitioners' claim that OPS committed a prohibited practice. We therefore find that Respondent did not violate § 48-824(1). The above-captioned petitions are hereby dismissed.

COUNTERCLAIM

Respondent's counterclaim alleges that Local 226 has committed a prohibited practice of bad faith bargaining in violation of Nebraska Revised Statute §48-824(1). The Commission finds that Local 226 bargained in bad faith in violation of Nebraska Revised Statute §48-824(1).

The Petitions in this matter, while later modified over objection at trial, stated completely false allegations that the Respondent failed and refused to negotiate or agree to negotiate. The exhibits and testimony are replete with evidence that OPS was trying to negotiate throughout 2017, and into 2018. OPS detrimentally relied on Local 226's inaction and lack of protest as it proceeded through the planning and programming stages of the larger PeopleSoft implementation plan. There is no evidence that Local 226 leadership addressed the proposed changes with its bargaining unit members prior to the OPS Anywhere communication. (Exhibit 11; Exhibit 544). Throughout 2017, and into January 2018, the Respondent believed it was in negotiations, while Local 226 did not. Yet, Local 226 sat on its right to request bargaining on the issue. Then when faced with backlash from their

membership about implementation, Local 226 proceeded to issue the cease and desist letter to the Respondent. Once the parties entered into bargaining, Local 226 quickly refused to bargain in what we infer to be an effort to delay implementation. Later, when individual bargaining unit contract negotiations occurred, Local 226 did not raise the issue that it previously refused to bargain when it claimed it would only negotiate during the individual contract meetings. Taking into account Local 226's overall conduct and the totality of the circumstances, the Commission finds the actions of Local 226 to be an attempt to delay, frustrate and stymie negotiations over payment of ten month employees and implementation of the same.

Pursuant to CIR Rule 42, the Commission has authority to award attorney's fees when there has been a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. The Commission has found it to be an appropriate remedy in cases where a party's misconduct was flagrant, aggravated, persistent, and pervasive. *See Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al.,* 16 CIR 401 (2010). At this time, the Commission finds that while Local 226 bargained in bad faith, the evidence does not show what rises to a willful pattern or practice of such behavior. As such, Local 226's actions in this case do not rise to the level deemed appropriate for the award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

INTERNATIONAL BROTHERHOOD	)	Case No. 1476
OF ELECTRICAL WORKERS	)	
LOCAL 1597, and	)	
VALERIE KILLINGER,	)	
	)	
Petitioners,	)	
	)	
v.	)	FINDINGS OF FACT
	)	AND ORDER

CITY OF ST. PAUL,)
)
Respondent.)

Filed November 13, 2019

APPEARANCES:

For Petitioner: Robert E. O'Connor, Jr.
P.O. Box 451116
Omaha, NE 68145

For Respondent: Jerry L. Pigsley
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, NE 68508-2578

Before Commissioners Blake, Carlson and Jones.

BLAKE, Commissioner

NATURE OF THE CASE

The Petitioners, International Brotherhood of Electrical Workers Local 1597 ("IBEW") and Valerie Killinger, allege that Respondent, City of St. Paul, committed a prohibited practice in violation of the Nebraska Industrial Relations Act ("Act"), Neb. Rev. Stat. §48-824(2)(a),(c) and (d). In the Amended Prohibited Practices Complaint filed January 4, 2019, Petitioner IBEW alleged an anti-union statement was made by City Clerk Connie Jo Beck to a union member, Deputy Clerk Valerie Killinger, and that the alleged statement damaged the Union and its members by denying the right to representation by the Union without coercion. This anti-union statement was allegedly made during a disciplinary meeting. During the Pre-Trial Conference on April 19, 2019, Petitioner was granted leave to amend its petition to add Valerie Killinger as a party. Petitioners' Second Amended Prohibited Practices Complaint was filed April 22, 2019. Respondent's Answer to Amended Prohibited Practices Complaint was filed on January 14, 2019. Respondent asserts that its actions toward Petitioners were based on legitimate, non-discriminatory reasons and not based on any exercise of rights granted by the Act; and requests dismissal of the Complaint and reimbursement for attorney fees and costs. A trial was held before the Honorable William G. Blake on April 29, 2019. Post-hearing briefs were submitted.

FINDINGS OF FACT

Petitioner IBEW 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 between Petitioner IBEW and Respondent covering wages, hours and conditions of employment. (Exhibit 502). Petitioner and union member, Ms. Killinger, was employed by Respondent as the Deputy Clerk of the City of St. Paul. At all times relevant to this matter, Ms. Killinger's supervisor was Ms. Beck.

Various problems with Ms. Killinger's job performance had been noted on her annual performance evaluations for several years. (Exhibits 16, 17 and 18; 120:14-20, 121:6-122:11). On August 2, 2018, Ms. Killinger was given an employee performance appraisal by Ms. Beck. As part of this appraisal Ms. Killinger was asked by Ms. Beck to answer three questions in preparation of her fulfilling the duties of the City Clerk, once the City Clerk vacated the position. Ms. Killinger answered "Not at this time" to the following question: "Would you feel comfortable as Deputy Clerk in performing the duties of the City Clerk, if the City Clerk would vacate the position of City Clerk?" (Exhibit 4; 96:11-22). Ms. Killinger was also asked: "Are you willing to give up your job title as Deputy Clerk for the best interests of the City of St. Paul?" She answered, "No." (Exhibit 4; 96:23-97:8).

Also on August 2, 2018, Ms. Killinger received a notice of disciplinary warning from Ms. Beck. (Exhibit 2). Attached to the warning was a document entitled "Concerns and Issues that City Clerk Beck has with Deputy Clerk Killinger" and attachments. (Exhibit 510). Ms. Killinger was put on probation for 90 days with the possibility of termination or demotion. (Exhibit 2; 16:3-7.) On August 13, 2018, Petitioners filed a grievance regarding the August 2, 2018, disciplinary warning as allowed by Article 9 of the parties' collective bargaining agreement. (Exhibits 3 and 502, pgs.10-11). On August 21, 2018, Ms. Beck denied the grievance pursuant to Step 1 of the grievance procedure. (Exhibit 5). On September 4, 2018, Petitioners appealed the denial to Mayor Tracy Howard pursuant to Step 2 of the grievance procedure. (Exhibit 3). On September 14, 2018, a meeting was held regarding Step 2 of the grievance. (Exhibit 6; 45:19-46:23). The Mayor denied the grievance. (20:7-21:3). Petitioners appealed the denial to the City Council pursuant to Step 3 of the grievance procedure. The issue was placed on the agenda for the City Council meeting to be held on October 15. 2018. (Exhibits 511, 512). At the meeting, Petitioners, through Union President Larry Grim, elected not to proceed with the grievance, after his request to have the matter heard in Closed Session was denied. The City

Council was then advised by its legal counsel that the Petitioners' choice not to proceed with its appeal ended the grievance process. (Exhibit 513, pg. 3).

On September 7, 2018, Ms. Beck presented to Ms. Killinger documentation of problems regarding her job performance concerning zoning permits. (Exhibit 508). On September 24, 2018, Ms. Beck presented to Ms. Killinger documentation of her deficiencies for the period of August 3, 2018, through September 24, 2018. Ms. Killinger refused to sign the documentation given to her. Union Steward Ed Thompson was present for this meeting with Ms. Beck. (Exhibit 509). On November 1, 2018, Ms. Beck presented to Ms. Killinger documentation of her deficiencies for the period of September 25, 2018, through October 30, 2018, with supporting documentation. (Exhibit 514).

At the November 5, 2018, City Council meeting, Ms. Beck was given authority to make decisions for the City Office. (Exhibit 515, pg. 5). On November 9, 2018, Ms. Beck met with Ms. Killinger and informed Ms. Killinger that she had not seen improvement in her work and gave Ms. Killinger a letter stating she had until Tuesday, November 13, 2018, by 9:00 a.m. to submit her resignation or be terminated. (Exhibits 518 and 519). On November 13, 2018, Ms. Killinger and Mr. Thompson came into Ms. Beck's office in response the letter instructing her to submit her resignation or be terminated. Mr. Thompson asked Ms. Beck if she would give Ms. Killinger a demotion. Ms. Beck stated, "Absolutely not, not due to the deficiencies I had received within the 90 days that I gave her the disciplinary warning letter." (135:24-136:13). Mr. Thompson then told Ms. Beck that Ms. Killinger was not going to resign, but wanted to be terminated. (138:14-18). Ms. Killinger's employment was then terminated. (Exhibit 519, 138:19-23).

JURISDICTION

The Commission has jurisdiction to adjudicate alleged violations of the Act by virtue of Neb. Rev. Stat. §§ 48-824 and 48-825. The Commission does not have subject matter jurisdiction with respect to "uniquely personal" matters, such as Petitioner Killinger's termination. *See Nebraska Dept. of Roads Employees Ass 'n v. Department of Roads,* 189 Neb. 754, 205 N.W.2d 110 (1973), *See also, Schmieding v. City of Lincoln and Lincoln General Hospital,* 2 CIR 60 (1972). *Schmieding* held that uniquely personal matters are not within the legislative policy behind the Industrial Relations Act. Here, however, it is not the unique circumstances of the termination that is at issue. The issue is whether the Respondent committed a prohibited practice under the Act.

DISCUSSION

Petitioners allege that the Respondent, through City Clerk Beck has violated Neb. Rev. Stat. §48-824(2)(a),(c) and (d).

> (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;
>
> (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;
>
> (d) Discharge or discriminate against a public employee because the employee has filed an affidavit, petition, or complaint or given any information or testimony under the Industrial Relations Act or because the public employee has formed, joined, or chosen to be represented by any public employee organization.

Neb. Rev. Stat. §48-824(2)(a),(c) and (d).

The parties have raised a number of issues, including the adequacy of the allegations in the pleadings and pre-trial order, the importance of a dual motive and how to determine such situations, and how to formulate an appropriate remedy. We find we do not need to decide any of those issues. The only issue before us is whether the termination of Ms. Killinger was the result of her Union activity. Specifically, whether on November 13, 2018, Ms. Beck stated that she would not demote Ms. Killinger instead of terminating her because she had "gone to the Union" by grieving the August 2, 2018, disciplinary warning.

At the end of the meeting on November 13, 2018, Ms. Beck was asked by Mr. Thompson if a demotion was a possibility. Petitioners claim that her response was "no, since Val had gone to the Union that couldn't happen". (67:7). Mr. Thompson's testimony leaves this alleged blatant anti-union statement unchallenged and unquestioned, and with no immediate reaction from either the employee or the Union Steward, and no additional questions asked. (67:7-14).

Ms. Beck denies any such statement was made by her. Instead, Ms. Beck testified that she told Mr. Thompson, "Absolutely not, not due to the deficiencies I had received within the 90 days that I gave her the disciplinary warning letter." (136:9-13). Ms. Killinger's job performance is relevant, but only for the purpose of determining whether the stated reasons for her termination support the credibility of the witnesses. They do support the credibility of Ms. Beck, who had documented Ms. Killinger's work performance as her supervisor, for both regular performance evaluations and pursuant to the August 2, 2018, disciplinary warning. Further, Ms. Killinger had previously indicated she would not be willing to give up her position of Deputy Clerk. (Exhibit 4, 137:23-138:5). It is unreasonable to find that Ms. Beck would have, at the last moment, as an aside to a Union Steward, make an obvious negative comment about union activity. Just as it is unreasonable to find that a Union Steward would have left such a statement unchallenged and unquestioned if made.

"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).

We find the testimony of Ms. Beck to be more credible than that of the Petitioners' witnesses as to the alleged statement. The evidence does not support the Petitioners' claim that the statement was made by Ms. Beck. We find a lack of credible evidence to support a finding that any anti-union motive was stated or that one was involved in the termination of Ms. Killinger. We make no finding as to whether the termination of Ms. Killinger was justified, as that is outside our jurisdiction. We therefore find that the Respondent did not violate Neb. Rev. Stat. §48-824(2)(a),(c) and (d) with respect to the termination of Ms. Killinger. Accordingly, the Second Amended Prohibited Practices Complaint should be and is dismissed.

The Respondent requests attorney's fees and costs. The Commission has authority to award attorney's fees when there has been a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party. The Commission has found it to be an appropriate remedy in cases where a party's misconduct was flagrant, aggravated, persistent, and pervasive.

See Fraternal Order of Police, Lodge No. 8 v. Douglas County, et. al., 16 CIR 401 (2010). The Commission finds the evidence does not show what rises to a willful pattern or practice of such behavior. As such, we find the parties' actions in this case do not rise to the level deemed appropriate for an award of attorney fees. The Commission finds that the parties are to pay their own costs and fees.

All Panel Commissioners join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

IN THE MATTER OF THE LABOR CONTRACT NEGOTIATIONS BETWEEN	)	Case No. 1479
STATE OF NEBRASKA	)	FINDINGS OF FACT AND ORDER
and	)	
STATE LAW ENFORCEMENT BARGAINING COUNCIL.	)	

Filed March 1, 2019

APPEARANCES:

For the State of Nebraska

Steve Bogue
Abigail Moland
McGrath North
First National Tower, Suite 3700
1601 Dodge Street
Omaha, NE 68102

For the State Law Enforcement Bargaining Council
Gary L. Young
Keating, O'Gara, Nedved & Peter, PC, LLO
530 South 13th, Suite 100
Lincoln, NE 68508

Before Commissioners Vannoy, Jones, and Partsch

VANNOY, Commissioner

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).

[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).

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. 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

[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).

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.

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 employ-

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[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).

ees 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

[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.

agreements. Again, 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).

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.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

IN THE MATTER OF THE LABOR	)	Case No. 1480
CONTRACT NEGOTIATIONS	)	
BETWEEN	)	
	)	
STATE OF NEBRASKA	)	FINDINGS OF FACT
	)	AND ORDER
and	)	
	)	
FRATERNAL ORDER OF POLICE,	)	
NEBRASKA PROTECTIVE	)	
SERVICES LODGE 88 (FOP 88).	)	
	)	

Filed February 28, 2019

APPEARANCES:

For State of Nebraska	A. Stevenson Bogue Abigail Moland McGrath North First National Tower, Suite 3700 1601 Dodge Street Omaha, NE 68102
For Fraternal Order of Police, Nebraska Protective Services Lodge 88	Gary L. Young Keating, O'Gara, Nedved & Peter, PC, LLO 530 South 13th, Suite 100 Lincoln, NE 68508

Before Commissioners Blake, Vannoy and Carlson

Blake, Commissioner

NATURE OF THE CASE:

The Parties filed a Joint Submission of Unresolved Issues Under 81-1382 on January 15, 2019, after having reached impasse on the stated issues for the labor contract for contract term July 1, 2019 to June 30, 2021, pursuant to the State Employee Collective Bargaining Act (SECBA). This matter was heard by the Commission on February 14, 2019. This is the first opportunity for the Commission to set wages and benefits under the amendments to SECBA at Neb. Rev. Stat. §§ 81-1382 and 81-1383 adopted by LB 397 (2011).

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. The FOP 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 the FOP presented evidence that there were approximately 32,000 full-time non-university employees in Colorado (Exhibit 503), the State presented more credible evidence that there were approximately 37,000 such employees. (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 capitols 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 the state capitols of Arkansas and 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.

PAY RANGES

Now we must turn to the pay ranges in the array states and Nebraska. The statute is clear that we must look at total compensation by job class or by bargaining unit.

In establishing wage rates, the commission shall take into consideration the overall compensation received by the employees at the time of the negotiations, having regard to:

(A) Wages for time actually worked;

(B) Wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions; and

(C) The continuity and stability of employment enjoyed by the employees.

Neb. Rev. Stat. §§ 81-1383(2)(b)(i).

The bargaining unit in this case is rather diverse, with members in twelve different job classifications. The Parties have stipulated that the job classifications for each job in the bargaining unit have been appropriately matched by the Parties, and to the minimum and maximum rates of pay in the array states for the positions of Corrections Corporal, Corrections Officer, Corrections Sergeant, Corrections Unit Caseworker, Mental Health Security Specialist I, Mental Health Security Specialist II, Youth Security Specialist I, Youth Security Specialist II, Security Communications Specialist, Security Guard, and Developmental

Disabilities Safety & Habilitation Specialist. (Exhibit 553). We will determine total compensation by job classification.

The statute is also clear that we must include wages and benefits that can be quantified with a dollar value and determine total compensation for comparisons with the array states. We have evidence of the minimums and maximums of the pay ranges in comparator states for the job classifications. For some of these classifications the evidence includes all seven array states. For the job classification of Developmental Disabilities Safety & Habilitation Specialist there is data from only two array states. Unfortunately, we must decline to make any pay range changes for the job classification without data for at least three states. To do so would be speculation and conjecture.

Once we determine the comparisons based on total compensation, Neb. Rev. Stat. §§ 81-1383(2)(b)(ii) requires that any changes to the pay scale in Nebraska be made to wage rates. Exhibit 558 shows the current pay ranges for all classes involved in this case in all of the array members, including the midpoints of both the minimums and maximums of the pay ranges. This data is also shown on Tables 1 through 10. It also shows the current minimums and maximums of the pay ranges in the bargaining unit. For instance, the midpoint for Corporals in the array is a minimum of $15.84 per hour, and a maximum of $25.28 per hour. Nebraska's current pay range is from $18.44 to $24.84 per hour for Corporals. (See Exhibit 558, page 1). The total compensation for Corporals in the array has a midpoint of $23.25 per hour at the minimum and $36.58 per hour at the maximum. 98% of this maximum is $35.85 per hour. Nebraska's current total compensation minimum for Corporals is $26.60 per hour and the maximum is $35.38 per hour. At the maximum rate, insurance and miscellaneous benefits total $8.68 per hour plus 7.5% of hourly pay as pension benefit. It can be argued that the result of this should be that the pay range in Nebraska should be stretched out by reducing the hourly rate of pay below what corporals are now paid, while increasing the maximum hourly pay.

Similar reductions in minimum pay could result from the evidence before us in other classifications. However, we decline to decrease minimum pay in any of the job classifications. Using Corporals as the example, we set the minimum hourly pay at a range from $18.44 per hour to a maximum of $25.27 per hour. (See Table 1).

There are several persuasive reasons for not decreasing the minimum hourly pay rates in this bargaining unit and instead setting the minimums at the current rates, among them:

- Nebraska has a published minimum pay that is the actual minimum pay. This is not the case in at least some of the array states. (Exhibit 545).

- Nebraska moves people up the pay scale very slowly, if at all. Approximately 85% of the corporals are now paid at the minimum hourly rate, and this is found throughout the bargaining unit. (Exhibit 546). There is very little movement within the pay ranges in Nebraska. The evidence is that this is not prevalent, but again, the evidence does not provide a means for the Commission to quantify this.

- The evidence is persuasive that morale and longevity in the bargaining unit is a significant concern, and adding to this condition could not serve the people of Nebraska well.

- Staffing needs under very difficult conditions.

- The State admitted that no wages should be decreased as a result of our findings in this case.

- Neb. Rev. Stat. §§ 81-1383(2)(b)(i) states that when considering overall compensation, the Commission is to have regard to the continuity and stability of employment enjoyed by the employees.

These wage ranges shall apply to both current and new employees. (See Tables 1-10).

PLACEMENT

We turn next to placement of employees on the pay scale. The Parties each argue for a method of placing employees on the new pay scale in a way that will place them in the same relative position they have occupied. We have previously referred to this as a compa-ratio method. The parties may not have correctly understood our intent in doing this. As we have used the term, compa-ratio does not necessarily mean the employee's new pay scale placement is to be preserved relative to either the minimum or the maximum pay. Both methods have been used in the past in order to provide just results and avoid anomalies that could result from strict adherence to either method of calculations. In this case, current employees shall be placed by looking at their position on the old pay range as a percentage of the distance between the minimum and maximum pay and placing the employee at the same percentage on the new pay scale.

For example, a Corporal who is currently paid at the minimum hourly rate of $18.44 has not advanced up the pay scale at all. Their pay will remain $18.44 per hour. A Corporal who has been paid above the minimum has progressed a percentage of the spread between the minimum and maximum. The spread for the Corporal range has been $6.40 between minimum and maximum pay. (See Table 1). A Corporal paid at the rate of $24.00 per hour has advanced 86.9% along that spread, and will be placed on the new pay scale at that same point on the spread. The new spread from $18.44 to $25.27 per hour is $6.83, and to place the Corporal on the new pay scale at 86.9% of the range, his or her wages shall be increased to the rate of $24.38 per hour.

Another example can be described using the Corrections Officer classification. The spread from $17.00 to $24.41 is $7.41. (See Table 2). An Officer who has been paid at the hourly rate of $20.585 has been at 61% of the spread, and is now placed in the same position in the new spread. 61% of $7.41 is $4.52. When adding this amount to $17.00, the result is placement on the pay scale at $21.52 per hour.

MOVEMENT WITHIN THE WAGE RANGE

The wage range movement information presented by the Parties demonstrates that it is prevalent to have some movement within the range (See Exhibits 16 and 516). While there may be movement within pay range, the data presented by the Parties does not demonstrate either that there is a consistent and prevalent methodology for such movement or that there is reliable evidence of the amounts of such movement. The State's expert testified that the movement within the wage range, which is described as "Combination," could include legislative action, executive order, merit pay, etc. and that such movement does not necessarily take place on a consistent regular or yearly basis. We note that, as described below, the survey data presented by the Parties clearly shows that no step system is prevalent among the comparators. Accordingly, while movement is prevalent, there is no prevalent and comparable methodology for such movement, and, under existing Commission precedents in wage and benefits setting matters, the Commission concludes that it cannot enter an Order of comparability in that regard. We reject, as unsupported by the data, the opinion of the FOP's expert that a movement of one percent to one and one-half percent should be ordered, since such personal opinion was not based on the data of the prevalent or comparability. (See Exhibit 549). The Commission finds that it is prevalent among the comparators that there should be no step movement within the pay range (Exhibits 16 and 516), and, accordingly, orders that there be no change in the existing practice and structure of no steps within the wage range.

MANDATORY OVERTIME

The Commission finds that it is not prevalent among those states in the selected array to impose any restrictions upon the practice of mandatory overtime. Further it is not prevalent to restrict the total number of hours of mandatory overtime. While the testimony offered at the hearing concerning the impact of mandatory overtime was compelling, the Commission declines to order any such restrictions.

HOLIDAY/OVERTIME HOURS

The State has presented evidence to support its position that holiday hours should not be considered, when the holiday is not worked, to be hours worked for the purposes of calculating overtime. The data presented (Exhibit 19) clearly 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 be discontinued.

LIFE INSURANCE

A review of the data submitted by both Parties (Exhibits 23 and 528) indicates that the present level of employer paid life insurance, namely $20,000 should be increased. Accordingly, we order that such increase should be consistent with the midpoint of the array data rounded to the nearest $1,000. (See Table 11). Such rounding would not undermine comparability. See *IBEW, Local 1521 v. MUD,* 18 CIR 319(2012).

ORDER

IT IS ORDERED, that for the contract term of July 1, 2019 to June 30, 2021:

1. The rates of pay for the bargaining unit classifications of Corrections Corporal, Corrections Officer, Corrections Sergeant, Corrections Unit Caseworker, Mental Health Security Specialist I, Mental Health Security Specialist II, Youth Security Specialist I, Youth Security Specialist II, Security Communications Specialist, and Security Guard, shall be set as shown in the attached Tables. Where the Tables show that total compensation for a classification in Nebraska has been less than ninety three percent of the array midpoint, the wage rate increase for any employee whose wage rate would be increased to such extent shall receive such increase in three equal annual increases.

2. The rates of pay for Developmental Disabilities Safety & Habilitation Specialist shall remain unchanged.

3. The hourly rate of pay for current employees that currently earn above that minimum shall be adjusted in accordance with the formula above.

4. There shall be no change in the existing practice and structure of movement, including no steps within the wage ranges.

5. The Commission declines to impose restrictions on the use of mandatory overtime.

6. The present practice of counting unworked holiday hours towards the calculation of overtime shall be discontinued.

7. The present level of employer-paid life insurance shall be increased consistent with the midpoint of the array members.

All Panel Commissioners join in the entry of this Order.

TABLE 1

CORRECTIONS CORPORAL

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Correctional Corporal	$ 15.58	$ 22.59	$ 2.26	$ 3.28	$ 3.05	$ 3.05	$ 1.44	$ 3.43	$ 22.32	$ 32.34
Oklahoma	Correctional Security Officer III	$ 12.08	$ 22.14	$ 1.99	$ 3.65	$ 4.10	$ 4.10	$ 1.21	$ 4.03	$ 19.38	$ 33.92
Indiana	Correctional Officer	$ 15.00	$ 25.28	$ 1.68	$ 2.83	$ 4.12	$ 4.12	$ 1.80	$ 4.17	$ 22.60	$ 36.40
Iowa	Senior Correctional Officer	$ 21.24	$ 31.76	$ 2.01	$ 3.00	$ 5.10	$ 5.10	$ 1.74	$ 4.92	$ 30.08	$ 44.78
Kansas	Corrections Officer II	$ 15.03	$ 21.13	$ 1.99	$ 2.79	$ 3.67	$ 3.67	$ 1.33	$ 3.08	$ 22.02	$ 30.68
Wisconsin	Correctional Officer	$ 16.65	$ 28.47	$ 1.78	$ 3.05	$ 4.48	$ 4.48	$ 1.70	$ 4.43	$ 24.61	$ 40.43
Wyoming	Corrections Corporal	$ 17.09	$ 25.63	$ 1.43	$ 2.15	$ 6.20	$ 6.20	$ 1.61	$ 4.75	$ 26.33	$ 38.73
	Mean	$ 16.10	$ 25.29							$ 23.91	$ 36.75
	Median	$ 15.58	$ 25.28							$ 22.60	$ 36.40
	Midpoint	**$ 15.84**	**$ 25.28**							**$ 23.25**	**$ 36.58**
Nebraska	Corrections Corporal	$ 18.44	$ 24.84	$ 1.38	$ 1.86	$ 5.08	$ 5.08	$ 1.70	$ 3.60	$ 26.60	$ 35.38

NE % of Midpoint -3.27%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 26.60	$ 35.85
Health Ins.	$ (5.08)	$ (5.08)
Misc.	$ (1.70)	$ (3.60)
Subtotal	$ 19.82	$ 27.17
Pension (7.5%)	$ 1.38	$ 1.90
New Hourly Wage	**$ 18.44**	**$ 25.27**

TABLE 2
CORRECTIONS OFFICER

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Correctional Officer I	$ 13.94	$ 20.25	$ 2.02	$ 2.94	$ 2.76	$ 2.76	$ 1.29	$ 3.12	$ 20.01	$ 29.07
Oklahoma	Correctional Security Officer II	$ 10.98	$ 20.13	$ 1.81	$ 3.32	$ 3.62	$ 3.62	$ 1.10	$ 3.75	$ 17.51	$ 30.82
Indiana	Corrections Officer	$ 15.00	$ 25.28	$ 1.68	$ 2.83	$ 3.64	$ 3.64	$ 1.78	$ 4.15	$ 22.10	$ 35.90
Iowa	Corrections Officer	$ 19.51	$ 28.91	$ 1.84	$ 2.73	$ 4.67	$ 4.67	$ 1.61	$ 4.54	$ 27.63	$ 40.85
Kansas	Corrections Officer I (A&B)	$ 13.61	$ 20.13	$ 1.80	$ 2.66	$ 3.54	$ 3.54	$ 1.21	$ 2.96	$ 20.16	$ 29.29
Wisconsin	Corrections Officer	$ 16.65	$ 28.47	$ 1.78	$ 3.05	$ 4.06	$ 4.06	$ 1.70	$ 4.43	$ 24.19	$ 40.01
Wyoming	Corrections Officer	$ 15.56	$ 23.34	$ 1.30	$ 1.95	$ 5.66	$ 5.66	$ 1.47	$ 4.43	$ 23.99	$ 35.39
	Mean	$ 15.04	$ 23.79							$ 22.23	$ 34.48
	Median	$ 15.00	$ 23.34							$ 22.10	$ 35.39
	Midpoint	**$ 15.02**	**$ 23.56**							**$ 22.16**	**$ 34.93**
Nebraska	Corrections Officer	$ 17.00	$ 22.90	$ 1.27	$ 1.72	$ 4.67	$ 4.67	$ 1.57	$ 3.32	$ 24.51	$ 32.60

NE % of Midpoint -6.68%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 24.51	$ 34.23
Health Ins.	$ (4.67)	$ (4.67)
Misc.	$ (1.57)	$ (3.32)
Subtotal	$ 18.27	$ 26.24
Pension (7.5%)	$ 1.27	$ 1.83
New Hourly Wage	**$ 17.00**	**$ 24.41**

TABLE 3

CORRECTIONS SERGEANT

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Correctional Sergeant	$ 17.38	$ 25.20	$ 2.52	$ 3.65	$ 3.71	$ 3.71	$ 1.60	$ 3.78	$ 25.22	$ 36.34
Oklahoma	Correctional Security Manager	$ 17.68	$ 32.42	$ 2.92	$ 5.35	$ 5.23	$ 5.23	$ 1.77	$ 5.45	$ 27.60	$ 48.45
Indiana	Correctional Sergeant	$ 15.45	$ 27.64	$ 1.73	$ 3.10	$ 5.24	$ 5.24	$ 1.89	$ 4.59	$ 24.31	$ 40.56
Iowa	Correctional Seupervisor	$ 22.35	$ 37.29	$ 2.11	$ 3.52	$ 6.11	$ 6.11	$ 1.83	$ 5.65	$ 32.41	$ 52.58
Kansas	Corrections Supervisor I	$ 17.39	$ 24.28	$ 2.30	$ 3.23	$ 3.99	$ 3.99	$ 1.54	$ 3.49	$ 25.22	$ 35.20
Wisconsin	Correctional Sergeant	$ 17.45	$ 30.39	$ 1.87	$ 3.25	$ 5.47	$ 5.47	$ 1.78	$ 4.73	$ 26.57	$ 43.85
Wyoming	Correctional Sergeant	$ 21.59	$ 32.39	$ 1.81	$ 2.71	$ 7.47	$ 7.47	$ 2.03	$ 5.70	$ 32.90	$ 48.27
	Mean	$ 18.47	$ 29.94							$ 27.75	$ 43.61
	Median	$ 17.45	$ 30.39							$ 26.57	$ 43.85
	Midpoint	**$ 17.96**	**$ 30.17**							**$ 27.16**	**$ 43.73**
Nebraska	Corrections Sergeant	$ 20.60	$ 26.58	1.54	1.99	$ 6.14	$ 6.14	$ 1.90	3.85	$ 30.19	$ 38.56

NE % of Midpoint -11.82%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 30.19	$ 42.85
Health Ins.	$ (6.14)	$ (6.14)
Misc.	$ (1.90)	$ (3.85)
Subtotal	$ 22.15	$ 32.86
Pension (7.5%)	$ 1.55	$ 2.29
New Hourly Wage	**$ 20.60**	**$ 30.57**

TABLE 4
CORRECTIONS UNIT CASEWORKER

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	ADC/DCC Treatment Coordinator	$ 19.39	$ 28.12	$ 2.81	$ 4.08	$ 2.86	$ 2.86	$ 1.79	$ 4.16	$ 26.85	$ 39.22
Oklahoma	Correctional Case Mgr II	$ 13.38	$ 24.53	$ 2.21	$ 4.05	$ 3.78	$ 3.78	$ 1.34	$ 4.36	$ 20.71	$ 36.72
Indiana	Corrections Caseworker 4	$ 12.84	$ 22.45	$ 1.44	$ 2.51	$ 3.81	$ 3.81	$ 1.57	$ 3.73	$ 19.65	$ 32.50
Iowa	Correctional Counselor	$ 23.29	$ 35.31	$ 2.20	$ 3.33	$ 4.82	$ 4.82	$ 1.89	$ 5.38	$ 32.20	$ 48.84
Kansas	Corrections Counselor I	$ 17.39	$ 24.48	$ 2.30	$ 3.23	$ 3.59	$ 3.59	$ 1.54	$ 3.49	$ 24.81	$ 34.79
Wisconsin											
Wyoming	Caseworker	$ 19.93	$ 29.89	$ 1.67	$ 2.50	$ 5.85	$ 5.85	$ 1.88	$ 5.35	$ 29.33	$ 43.59
	Mean	$ 17.70	$ 27.46							$ 25.59	$ 39.28
	Median	$ 18.39	$ 26.33							$ 25.83	$ 37.97
	Midpoint	**$ 18.05**	**$ 26.89**							**$ 25.71**	**$ 38.62**
Nebraska	Corrections Unit Caseworker	$ 19.23	$ 26.33	1.44	1.97	$ 4.64	$ 4.64	$ 1.78	3.81	$ 27.09	$ 36.76

NE % of Midpoint -4.82%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 27.09	$ 37.85
Health Ins.	$ (4.64)	$ (4.64)
Misc.	$ (1.78)	$ (3.81)
Subtotal	$ 20.67	$ 29.40
Pension (7.5%)	$ 1.44	$ 2.05
New Hourly Wage	**$ 19.23**	**$ 27.35**

TABLE 5
MENTAL HEALTH SECURITY SPECIALIST I

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Behavioral Health Aide	$ 12.52	$ 18.15	$ 1.82	$ 2.63	$ 3.78	$ 3.78	$ 1.16	$ 2.84	19.28	$ 27.40
Oklahoma											
Indiana	Behav Hlth Recovery Attendnt	$ 11.26	$ 20.61	$ 1.26	$ 2.31	$ 5.35	$ 5.35	$ 1.45	$ 3.49	19.32	$ 31.75
Iowa	Residential Treatment Worker	$ 15.89	$ 23.21	$ 1.50	$ 2.19	$ 6.21	$ 6.21	$ 1.36	$ 3.81	24.97	$ 35.43
Kansas	Mental Health/Dev Disab Tech	$ 12.35	$ 17.39	$ 1.63	$ 2.30	$ 4.03	$ 4.03	$ 1.09	$ 2.62	19.10	$ 26.33
Wisconsin	Residental Care Tech Objective	$ 14.76	$ 24.55	$ 1.58	$ 2.63	$ 5.57	$ 5.57	$ 1.50	$ 3.82	23.41	$ 36.57
Wyoming	Health Care Assistant	$ 12.60	$ 18.90	$ 1.05	$ 1.58	$ 7.59	$ 7.59	$ 1.19	$ 3.81	22.44	$ 31.88
	Mean	$ 13.23	$ 20.47							21.42	$ 31.56
	Median	$ 12.56	$ 19.76							20.88	$ 31.82
	Midpoint	**$ 12.90**	**$ 20.11**							**21.15**	**$ 31.69**
Nebraska	Mental Health Security Specialist I	$ 13.29	$ 19.24	$ 1.00	$ 1.44	$ 6.37	$ 6.37	$ 1.23	$ 2.79	21.89	$ 29.83

NE % of Midpoint -5.86%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 21.89	$ 31.05
Health Ins.	$ (6.37)	$ (6.37)
Misc.	$ (1.23)	$ (2.79)
Subtotal	$ 14.29	$ 21.89
Pension (7.5%)	$ 1.00	$ 1.53
New Hourly Wage	**$ 13.29**	**$ 20.37**

TABLE 6
MENTAL HEALTH SECURITY SPECIALIST II

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas											
Oklahoma											
Indiana	Special Attendant	$ 11.76	$ 22.53	$ 1.32	$ 2.52	$ 3.53	$ 3.53	$ 1.43	$ 3.72	$ 18.04	$ 32.30
Iowa	Psych Sec Spec/Res Treat Tech	$ 18.14	$ 28.91	$ 1.71	$ 2.73	$ 4.57	$ 4.57	$ 1.51	$ 4.54	$ 25.63	$ 40.75
Kansas	Mental Health/Dev Dis Tech	$ 12.35	$ 17.39	$ 1.63	$ 2.30	$ 3.51	$ 3.51	$ 1.09	$ 2.62	$ 18.58	$ 25.82
Wisconsin	Psychiatric Care Tech Adv	$ 17.45	$ 30.39	$ 1.87	$ 3.25	$ 3.97	$ 3.97	$ 1.78	$ 4.73	$ 25.07	$ 42.34
Wyoming	Health Care Technician	$ 17.09	$ 25.63	$ 1.43	$ 2.15	$ 5.54	$ 5.54	$ 1.61	$ 4.75	$ 25.67	$ 38.07
	Mean	$ 15.36	$ 24.97							$ 22.60	$ 35.86
	Median	$ 17.09	$ 25.63							$ 25.07	$ 38.07
	Midpoint	**$ 16.22**	**$ 25.30**							**$ 23.83**	**$ 36.96**
Nebraska	Mental Health Security Specialist II	$ 15.35	$ 22.24	$ 1.15	$ 1.67	$ 4.56	$ 4.56	$ 1.42	$ 3.22	$ 22.48	$ 31.69
								NE % of Midpoint		-5.67%	-14.27%

New Hourly Wage Computation	Minimum: 98% of Midpoint	Maximum: 98% of Midpoint
Total Compensation	$ 23.36	$ 36.23
Health Ins.	$ (4.56)	$ (4.56)
Misc.	$ (1.42)	$ (3.22)
Subtotal	$ 17.38	$ 28.45
Pension (7.5%)	$ 1.21	$ 1.98
New Hourly Wage	**$ 16.16**	**$ 26.46**

TABLE 7
SECURITY COMMUNICATIONS SPECIALIST

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas											
Oklahoma											
Indiana											
Iowa	Corrections Center Spec I	$ 17.13	$ 25.08	$ 1.62	$ 2.37	$ 3.81	$ 3.81	$ 1.42	$ 4.03	$ 23.98	$ 35.28
Kansas	Communications Officer	$ 14.30	$ 20.13	$ 1.89	$ 2.66	$ 3.27	$ 3.27	$ 1.27	$ 2.96	$ 20.72	$ 29.01
Wisconsin		$ 16.05	$ 24.55	$ 1.72	$ 2.63	$ 3.22	$ 3.22	$ 1.64	$ 3.82	$ 22.63	$ 34.22
Wyoming											
	Mean	$ 15.83	$ 23.25							$ 22.44	$ 32.84
	Median	$ 16.05	$ 24.55							$ 22.63	$ 34.22
	Midpoint	**$ 15.94**	**$ 23.90**							**$ 22.54**	**$ 33.53**
Nebraska	Security Communications Specialist	$ 13.09	$ 18.96	$ 0.98	$ 1.42	$ 3.76	$ 3.76	$ 1.21	$ 2.75	$ 19.04	$ 26.89
								NE % of Midpoint		-15.52%	-19.80%

New Hourly Wage Computation	Minimum: 98% of Midpoint	Maximum: 98% of Midpoint
Total Compensation	$ 22.09	$ 32.86
Health Ins.	$ (3.76)	$ (3.76)
Misc.	$ (1.21)	$ (2.75)
Subtotal	$ 17.12	$ 26.35
Pension (7.5%)	$ 1.19	$ 1.84
New Hourly Wage	**$ 15.92**	**$ 24.51**

TABLE 8
SECURITY GUARD

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Security Officer	$ 12.52	$ 18.18	$ 1.82	$ 2.63	$ 2.20	$ 2.20	$ 1.16	$ 2.84	$ 17.69	$ 25.82
Oklahoma											
Indiana	Security Officer 3	$ 9.53	$ 17.18	$ 1.07	$ 1.92	$ 2.69	$ 2.69	$ 1.16	$ 2.84	$ 14.44	$ 24.63
Iowa	Security Guard II	$ 13.81	$ 19.88	$ 1.30	$ 1.88	$ 3.81	$ 3.81	$ 1.18	$ 3.35	$ 20.10	$ 28.91
Kansas	Safety & Security Officer I	$ 13.61	$ 19.16	$ 1.80	$ 2.53	$ 3.27	$ 3.27	$ 1.21	$ 2.84	$ 19.88	$ 27.80
Wisconsin	Security Officer II/III	$ 13.18	$ 24.35	$ 1.41	$ 2.61	$ 3.22	$ 3.22	$ 1.34	$ 3.79	$ 19.16	$ 33.97
Wyoming	Security Guard II	$ 13.94	$ 20.92	$ 1.17	$ 1.75	$ 4.58	$ 4.58	$ 1.31	$ 4.09	$ 21.00	$ 31.34
	Mean	$ 12.77	$ 19.95							$ 18.71	$ 28.74
	Median	$ 13.40	$ 19.52							$ 19.52	$ 28.35
	Midpoint	**$ 13.08**	**$ 19.73**							**$ 19.12**	**$ 28.55**
Nebraska	Security Guard	$ 12.18	$ 17.64	$ 0.91	$ 1.32	$ 4.57	$ 4.57	$ 1.12	$ 2.55	$ 18.78	$ 26.09

NE % of Midpoint -8.62%

New Hourly Wage Computation	Minimum: No Change	Maximum: 98% of Midpoint
Total Compensation	$ 18.78	$ 27.98
Health Ins.	$ (4.57)	$ (4.57)
Misc.	$ (1.12)	$ (2.55)
Subtotal	$ 13.09	$ 20.86
Pension (7.5%)	$ 0.91	$ 1.46
New Hourly Wage	**$ 12.18**	**$ 19.40**

TABLE 9
YOUTH SECURITY SPECIALIST I

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas	Youth Services Technician	$ 13.96	$ 20.25	$ 2.02	$ 2.94	$ 2.37	$ 2.37	$ 1.29	$ 3.12	$ 19.65	$ 28.68
Oklahoma	Juvenile Security Officer II	$ 10.31	$ 18.30	$ 1.70	$ 3.02	$ 2.95	$ 2.95	$ 1.03	$ 3.50	$ 15.99	$ 27.76
Indiana	Correctional Officer	$ 15.00	$ 25.28	$ 1.68	$ 2.83	$ 2.98	$ 2.98	$ 1.76	$ 4.13	$ 21.42	$ 35.22
Iowa	Youth Services Worker	$ 16.36	$ 23.91	$ 1.54	$ 2.26	$ 4.07	$ 4.07	$ 1.37	$ 3.88	$ 23.34	$ 34.12
Kansas	Juvenile Corrections Officer I A&B	$ 13.61	$ 20.13	$ 1.80	$ 2.66	$ 3.35	$ 3.35	$ 1.21	$ 2.96	$ 19.96	$ 29.10
Wisconsin	Youth Counselor	$ 16.65	$ 27.68	$ 1.78	$ 2.96	$ 3.48	$ 3.48	$ 1.70	$ 4.31	$ 23.61	$ 38.44
Wyoming	Youth Services Security Officer	$ 13.95	$ 20.92	$ 1.17	$ 1.75	$ 4.92	$ 4.92	$ 1.31	$ 4.09	$ 21.35	$ 31.68
	Mean	$ 14.26	$ 22.35							$ 20.76	$ 32.14
	Median	$ 13.96	$ 20.92							$ 21.35	$ 31.68
	Midpoint	**$ 14.11**	**$ 21.64**							**$ 21.06**	**$ 31.91**
Nebraska	Youth Security Specialist I	$ 13.29	$ 19.24	$ 1.00	$ 1.44	$ 4.51	$ 4.51	$ 1.23	$ 2.79	$ 20.02	$ 27.98
								NE % of Midpoint		-4.92%	-12.32%

New Hourly Wage Computation	Min: 98% of Midpoint	Max: 98% of Midpoint
Total Compensation	$ 20.64	$ 31.27
Health Ins.	$ (4.51)	$ (4.51)
Misc.	$ (1.23)	$ (2.79)
Subtotal	$ 14.90	$ 23.97
Pension (7.5%)	$ 1.04	$ 1.67
New Hourly Wage	**$ 13.86**	**$ 22.30**

TABLE 10
YOUTH SECURITY SPECIALIST II

State	Title	Hourly Wage Minimum	Hourly Wage Maximum	Minimum Pension	Maximum Pension	Health Insurance	Health Insurance	Minimum Misc.	Maximum Misc.	Total Comp. Minimum	Total Comp. Maximum
Arkansas											
Oklahoma	Juvenile Security Officer III	$ 10.98	$ 20.13	$ 1.81	$ 3.32	$ 3.57	$ 3.57	$ 1.10	$ 3.75	$ 17.46	$ 30.77
Indiana	Correctional Officer	$ 15.00	$ 25.28	$ 1.68	$ 2.83	$ 3.60	$ 3.60	$ 1.77	$ 4.14	$ 22.05	$ 35.86
Iowa	Youth Services Technician	$ 17.88	$ 26.30	$ 1.69	$ 2.48	$ 4.63	$ 4.63	$ 1.49	$ 4.20	$ 25.69	$ 37.61
Kansas	Juvenile Corrections Officer II	$ 15.73	$ 21.13	$ 2.08	$ 2.79	$ 3.53	$ 3.53	$ 1.39	$ 3.08	$ 22.73	$ 30.53
Wisconsin	Youth Counselor Advanced	$ 17.45	$ 30.39	$ 1.87	$ 3.25	$ 4.03	$ 4.03	$ 1.78	$ 4.73	$ 25.12	$ 42.40
Wyoming	Youth Services Specialist II	$ 17.09	$ 25.63	$ 1.43	$ 2.15	$ 5.61	$ 5.61	$ 1.61	$ 4.75	$ 25.74	$ 38.14
	Mean	$ 15.69	$ 24.81							$ 23.13	$ 35.89
	Median	$ 16.41	$ 25.46							$ 23.92	$ 36.74
	Midpoint	**$ 16.05**	**$ 25.13**							**$ 23.53**	**$ 36.31**
Nebraska	Youth Security Specialist II	$ 15.35	$ 22.24	1.15	1.67	$ 4.43	$ 4.43	$ 1.42	3.22	$ 22.35	$ 31.56
								NE % of Midpoint		-5.00%	-13.08%

New Hourly Wage Computation	Min: 98% of Midpoint	Max: 98% of Midpoint
Total Compensation	$ 23.06	$ 35.58
Health Ins.	$ (4.43)	$ (4.43)
Misc.	$ (1.42)	$ (3.22)
Subtotal	$ 17.21	$ 27.93
Pension (7.5%)	$ 1.20	$ 1.95
New Hourly Wage	**$ 16.01**	**$ 25.99**

TABLE 11
LIFE INSURANCE PREMIUMS

State	**Calculation Amount**
Arkansas	$10,000.00
Oklahoma	$20,000.00
Indiana	$55,839.00
Iowa	$20,000.00
Kansas	$55,839.00
Wisconsin	$37,226.00
Wyoming	$50,000.00
Mean	$35,557.71
Median	$37,226.00
Midpoint	**$36,391.86**
Nebraska	$20,000.00

APPELLATE DECISIONS SINCE 19 CIR 132

Case No. 1435
Rep. Docket No. 526
Nebraska Protective Services Unit, Inc. d/b/a Fraternal Order of Police Lodge #88 v. State of Nebraska and The Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees (NAPE/AFSCME). Affirmed, April 26, 2018. 299 Neb. 797 (2018).

Case No. 1480
State of Nebraska v. Fraternal Order of Police, Nebraska Protective Services Lodge 88 (FOP 88). Appeal dismissed July 8, 2019.

Case No. 1479
State of Nebraska v. State Law Enforcement Bargaining Council, page 56.

Case No. 1480
State of Nebraska v. Fraternal Order of Police, Nebraska Protective Services Lodge 88 (FOP 88), page 63.