NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

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

APPEARANCES:

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Before Commissioners Partsch, Blake and Carlson

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."
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> (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 believed 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:

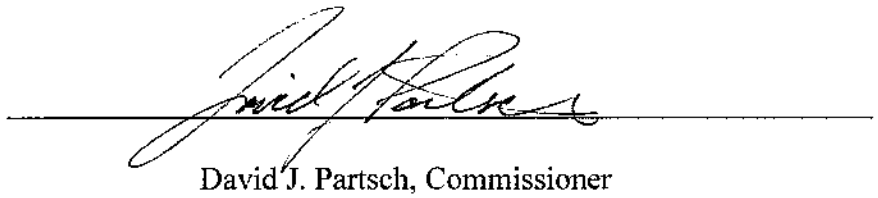
1. Cease and desist from failing to bargain in good faith with the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees regarding mandatory subjects of bargaining.

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.

Entered April 12, 2018.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



David J. Partsch, Commissioner