

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STEVEN BENNETT,) Case No. CI 23-53

Petitioner,)

v.)

STATE OF NEBRASKA)
DEPARTMENT OF)
TRANSPORTATION,)

Respondent.)

ORDER

JERRY JUDSON,) Case No. CI 23-54

Petitioner,)

v.)

STATE OF NEBRASKA)
DEPARTMENT OF)
TRANSPORTATION,)

Respondent.)

ORDER

JERRY JUDSON,) Case No. CI 23-55

Petitioner,)

v.)

STATE OF NEBRASKA)
DEPARTMENT OF)
TRANSPORTATION,)

Respondent.)

ORDER

On July 18, 2023, these consolidated cases came before the Court on petitions for judicial review under the Administrative Procedure Act. Abby Osborn appeared

for the Petitioners. Ami Huff appeared for the Respondent. Being fully advised on the premises, the Court affirms the decision of the agency in each case.

I. BACKGROUND

The Petitioners, Steven Bennett and Jerry Judson, were employees of the Nebraska Department of Transportation who assert that Article 7.8 of the labor contract requires NDOT to pay an employee, who is on call/standby pay status under Article 7.9 of the labor contract, a minimum of two hours at the appropriate rate of pay each time the employee is required to work during such time.

A. Factual background.

Bennett

Steven Bennett was employed by the Nebraska Department of Transportation as a Highway Traffic Operations Center Operator until July 3, 2022. Bennett's initial hire date with the State of Nebraska was October 17, 2016. At all times relevant to the grievance, Bennett's normal work schedule was eight hours per day, Monday through Friday. Bennett was eligible for overtime.

Bennett's normal work location was at the State Operations Center at the NDOT Central Complex, The Hill in Lincoln. The work Bennett performed in an on-call/standby status could be done remotely with a laptop, hotspot and a cellphone, so Bennett was not required to be at his home.

Bennett was placed into "on call/standby status" beginning on Friday night, January 28, 2022, at approximately 10:30 pm, until Sunday, January 30, 2022, at approximately 11:00 pm. On Saturday, January 29, 2022, while in on-call/standby

status, Bennett was required to work at approximately 2:00 pm and worked for 45 minutes. On Sunday, January 30, 2022, while in on-call/standby status, Bennett was required to work at approximately 6:30 am and worked for 30 minutes. On Sunday, January 30, 2022, while in on-call/standby status, Bennett was required to work at approximately 8:30 am and worked for 30 minutes. On Sunday, January 30, 2022, while in on-call/standby status, Bennett was required to work again at approximately 5:00 pm and worked for 30 minutes.

Bennett's job duties as a Highway Traffic Operations Center Operator included responding to emails, watching and responding to activity on cameras, inputting work orders, working on projects as assigned, updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents.

When required to work on January 29-30, 2022, Bennett performed emergency work such as updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents. There was no travel required before or after working.

All work performed on January 29-30, 2022, was performed at Bennett's home using his state issued laptop and phone. Bennett was paid a 12% on-call compensation rate for the time he was on-call from Friday, January 28-30, 2022. Additionally, Bennett was paid for the time he actually worked between January 29-30, 2022.

Judson 1

Jerry Judson was employed by the Nebraska Department of Transportation as a Highway Traffic Operations Center Operator. Judson's initial hire date with the State of Nebraska was August 10, 2009. Judson resigned employment with NDOT on April 1, 2022. At all times relevant to the grievance, Judson's normal work schedule was eight hours per day, Monday through Friday. Judson was eligible for overtime.

Judson's normal work location was at the State Operations Center at the NDOT Central Complex, The Hill in Lincoln. The work Judson performed in an on-call/standby status could be done remotely with a laptop, hotspot and a cellphone, so Judson was not required to be at his home.

Beginning at 2:00 pm on Friday, January 21, 2022, and continuing until 6:00 am on Monday, January 24, 2022, Judson was placed into "on call/standby status". On Friday, January 21, 2022, while in on call/standby status, Judson was required to work at approximately 4:00 pm and worked for 15 minutes. On Saturday, January 22, 2022, while in on-call/standby status, Judson was required to work at approximately 5:37 am and worked for 45 minutes. On Sunday, January 23, 2022, while in on-call/standby status, Judson was required to work at approximately 9:55 am and worked for 15 minutes. On Sunday, January 23, 2022, while in on-call/standby status, Judson was required to work again at approximately 12:26 pm and worked for 15 minutes.

Judson's job duties as a Highway Traffic Operations Center Operator included responding to emails, watching and responding to activity on cameras, inputting

work orders, working on projects as assigned, updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents. When required to work on January 21-23, 2022, Judson performed emergency work such as updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents. There was no travel required before or after working.

All work performed on January 21-23, 2022, was performed at Judson's home using his state issued laptop and phone. Judson was paid a 12% on-call compensation rate for the time he was in on call/standby status from Friday, January 21, 2022, to Sunday, January 23, 2022. Additionally, Judson was paid for 2 hours, instead of the 1.5 hours he actually worked between January 21-23, 2022.

Judson 2

Judson was again placed into "on call/standby status" all day on Saturday, February 19, 2022, Sunday, February 20, 2022, and Monday, February 21, 2022. State of Nebraska offices were closed on Monday, February 21, 2022, to observe the Presidents Day Holiday.

On Saturday, February 19, 2022, while in on-call/standby status, Judson was required to work at approximately 8:00 am and worked for 2 hours and 45 minutes. On Saturday, February 19, 2022, while in on call/standby status, Judson was required to work again at approximately 11:59 am and worked for 15 minutes. On Saturday, February 19, 2022, while in on-call/standby status, Judson was required to work again at approximately 1:43 pm and worked for 15 minutes. On Saturday,

February 19, 2022, while in on-call/standby status, Judson was required to work again at approximately 4:33 pm and worked for 15 minutes. On Monday, February 21, 2022, while in on-call/standby status, Judson was required to work at approximately 9:11 am and worked for 15 minutes. On Monday, February 21, 2022, while in on-call/standby status, Judson was required to work again at approximately 12:23 pm and worked for 15 minutes. On Monday, February 21, 2022, while in on-call status, Judson was required to work again at approximately 4:41 pm and worked for 15 minutes. On Monday, February 21, 2022, while in on-call/standby status, Judson was required to work again at approximately 7:19 pm and worked for 15 minutes.

Judson's job duties as a Highway Traffic Operations Center Operator included responding to emails, watching and responding to activity on cameras, inputting work orders, working on projects as assigned, updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents. When required to work from February 19-21, 2022, Judson performed emergency work such as updating highway message boards, working in the 511 system, and communicating with road district personnel regarding incidents.

All work performed on February 19-21, 2022, was performed at Judson's home using his state issued laptop and phone. Judson was paid a 12% on-call compensation rate for the time he was on call/standby status on Saturday, February 19, 2022, Sunday, February 20, 2022, and Monday, February 21, 2022. Additionally, Judson was paid for the time he actually worked between February 19-21, 2022.

B. Procedural background.

On February 9, 2022, Bennett filed a timely grievance alleging a violation of Article 7.8 of the labor contract between NAPE/AFSCME and the State of Nebraska. On March 2, 2022, the grievance was denied by NDOT Human Resources Business Partner Todd Ludwig. On March 3, 2022, Bennett filed a timely appeal to Step 2 of the grievance process. On March 29, 2022, the Nebraska Department of Administrative Services Employee Relations Administrator ordered the matter be heard by the State Personnel Board. The parties mutually agreed to bypass Step 2 of the grievance process in accordance with Article 4 of the labor contract.

On February 10, 2022, Judson filed a timely grievance alleging a violation of Article 7.8 of the labor contract between NAPE/AFSCME and the State of Nebraska. On March 2, 2022, the grievance was denied by NDOT Human Resources Business Partner Todd Ludwig. On March 3, 2022, Judson filed a timely appeal to Step 2 of the grievance process. On March 29, 2022, the Nebraska Department of Administrative Services Employee Relations Administrator ordered the matter be heard by the State Personnel Board. The parties mutually agreed to bypass Step 2 of the grievance process in accordance with Article 4 of the labor contract.

On February 23, 2022, Judson again filed a timely grievance alleging a violation of Article 7.8 of the labor contract between NAPE/AFSCME and the State of Nebraska. The parties mutually agreed to bypass Steps 1 & 2 of the grievance process in accordance with Article 4 of the labor contract. On March 29, 2022, the Nebraska Department of Administrative Services Employee Relations Administrator

ordered the matter be heard by the State Personnel Board. The parties agreed that the matter was properly before the hearing officer in accordance with Article 4 of the labor contract.

A joint hearing on the Petitioners' grievances was held on July 20, 2022, in Lincoln, Nebraska. On July 27, 2022, the hearing officer issued his recommendations that the Nebraska State Personnel Board grant the appeals.

On December 8, 2022, the Personnel Board accepted the hearing officer's recommended findings of fact in each appeal but rejected the hearing officer's conclusions of law and denied the appeals. On January 6, 2023, the Petitioners timely filed petitions for judicial review.

II. STANDARD

Under the Administrative Procedure Act, a court reviews the agency's action without a jury *de novo* on the agency's record. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 2022). A court may affirm, reverse, or modify the agency's decision, or remand for further proceedings. *Id.*

III. ANALYSIS

The parties disagree on the application of two provisions of the Labor Contract between the State of Nebraska and NAPE/AFSCME for the period of July 1, 2021 – June 30, 2023. Specifically, Articles 7.8 and 7.9, which provide:

7.8 Call-Back Time/Call-In: Employees eligible for overtime who are called back for duty or called in on the employee's day off will be guaranteed a minimum of two hours at the appropriate rate of pay. This provision shall not be construed so as to provide for additional compensation if the employee is recalled back for duty within the original two hour period, except that employees who are called back to work in excess of two hours will be paid for

actual time worked. To qualify for call-in compensation, the time worked cannot be contiguous to the end of an employee's scheduled work shift.

7.9 On Call/Standby Pay: Employees eligible for overtime under this Agreement, and required to be on-call/standby status shall be compensated at the rate of 12% of the normal hourly rate of pay for each hour in such on-call/standby status. Employees shall not be placed in an on-call status for more than seven (7) calendar days in a pay period unless agreed to by the employee.

On Call/Standby shall be defined as an employee who is not on the Employer's premises, but is on call and waiting for work, and the employee's personal activities are substantially restricted.

Each Petitioner argues he should be paid the guaranteed two-hour work minimum in Article 7.8 instead of only the actual time each worked because each was "called back for duty" each time they transitioned from on call/standby status under Article 7.9 to active work status. NDOT responds that since the Petitioners were "on call" under Article 7.9, and compensated accordingly, these Petitioners were not "called back for duty" under Article 7.8. NDOT also worries that Petitioners' proffered interpretation of the contract would create a windfall for already compensated on call employees such as these who briefly transition from on call to active work status while working from home.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Daehnke v. Neb. Dep't of Soc. Servs.*, 251 Neb. 298, 303, 557 N.W.2d 17, 20 (1996). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Id.* This determination is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not

necessarily compel the conclusion that the instrument is ambiguous. *Id.* Both the Petitioners and NDOT believe that the language of the labor contract is clear and unambiguous. And the Court agrees. The parties simply disagree on how the contract applies to the facts here.

A contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Id.* In other words, a party may not pick and choose among the clauses of a contract, accepting only those that advantage it. *Id.* A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Id.* The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Id.*

Giving the terms of the contract their plain and ordinary meaning, Article 7.8 applies to employees that are either off duty or on their day off. But these Petitioners in “on call/standby status” were not “called back for duty” when they were off duty or “called in” on their “day off.” The employees were “on call and waiting for work, and the employee’s personal activities are substantially restricted.” And they were compensated accordingly. Petitioners argue various burdens related to returning to work while on call at home. But those burdens are already contemplated by the substantial restrictions on the employee’s personal activities and the rate of pay while on call. The two-hour minimum bargained for in Article 7.8 separately addresses the disruption to off duty employees who transition to active work status. Those

employees are not on call waiting for work and their personal activities are not otherwise substantially restricted.

The parties disagree on whether an on call employee is “on duty.” And Petitioners note “on duty” is not defined in these two contractual provisions. But answering whether these on call employees were “on duty” under the contract does not entitle them to call-back pay here because these employees were not off duty or on their day off as required under Article 7.8. If they were off duty or on their day off, their personal activities would not have been substantially restricted. Whether the contract creates some sort of continuum between off duty and on duty is not a question this Court needs to resolve here because these Petitioners were not off duty under Article 7.8.¹

IV. CONCLUSION

In sum, the Court finds that Article 7.8 of the labor contract does not require NDOT to pay these employees, who were on call/standby pay status under Article 7.9 of the labor contract, call-back pay for the periods of time grieved.

The December 8, 2022, decisions of the Personnel Board are affirmed.

DATED this 10th day of August, 2023.



Ryan S. Post
District Court Judge

¹ To be clear, this Order is limited to the petitions before the Court and the provisions of the contract at issue. On other facts, it may be possible that an off duty employee who is momentarily instructed to standby before being called back for duty could receive call-back pay under Article 7.8. Or that an employee on their day off, who is called in to a worksite or office and instructed to standby, could receive call-back pay under Article 7.8.