

IN THE NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA ASSOCIATION OF)	
PUBLIC EMPLOYEES LOCAL 61)	
of the AMERICAN FEDERATION)	
OF STATE, COUNTY, AND)	
MUNICIPAL EMPLOYEES,)	
)	
)	
Petitioner,)	CASE NO.
)	
v.)	PROHIBITED PRACTICES
)	PETITION
STATE OF NEBRASKA,)	
)	
Respondent.)	

COMES NOW the Petitioner, Nebraska Association of Public Employees, Local 61 of the American Federation of State, County and Municipal Employees, and invokes the jurisdiction of this Commission as stated in the Rules of the Commission of Industrial Relations, Rules 14 and 42, by alleging as follows:

1. 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, with address and telephone number of 1230 O Street, Suite 120, Lincoln, Nebraska, 402-486-3911; it is a labor organization as that term is defined in Neb. Rev. Stat., § 48-801(7) and within the meaning of that statutory clause.
2. That the Petitioner [NAPE/ AFSCME or the Union] is the exclusive collective bargaining agent for The Health & Human Care Non-Professional Bargaining Unit, The Examining, Inspection and Licensing Bargaining Unit, The Health & Human Care Professional Bargaining Unit, The Engineering, Science & Resources Bargaining

Unit, The Maintenance, Trades & Technical Bargaining Unit, The Social Services & Counseling Bargaining Unit, The Administrative Professional Bargaining Unit, The Bargaining Units, are defined in Neb. Rev. Stat., § 81-1369 et seq. and are subject to the jurisdiction of the Nebraska Commission of Industrial Relations.

3. The Respondent, State of Nebraska is a public employer pursuant to Neb. Rev. Stat. § 48-801(12) and employer pursuant to Neb. Rev. Stat. § 81-1371(5). The administrative offices for personnel and labor relations for Respondent State of Nebraska are located at 1526 K Street, Lincoln, Nebraska 68508 including the offices of the Chief Negotiator/Employee Relations Administrator. The statutorily designated agent for service of process is Mike Hilgers, Nebraska Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509.
4. Petitioner brings this action against Respondent for prohibited practice in violation of Neb. Rev. Stat. § 48-824(1) and (2)(e) and Neb. Rev. Stat. § 81-1386(1) and (2)(e) based upon Respondent's unilateral change to, and refusal to negotiate in good faith over, a mandatory subject of bargaining detailed below.
5. That at all times relevant to this matter, the parties have been covered by an effective collective bargaining agreement between the Petitioner and the Respondent covering wages, hours and conditions of employment. The agreement applies to eight bargaining units of the State of Nebraska, and has covered the period July 1, 2023 through June 30, 2025.
6. The collective bargaining agreement described in paragraph 5 contains Article 1 – Preamble. Article 1, Section 1.4 reads in relevant part as follows:
 - a. 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.

7. The collective bargaining agreement described in paragraph 5 contains no definition or description of remote work.
8. On November 9, 2023, Jim Pillen, Governor of the State of Nebraska issued Executive Order No. 23-17 – Bringing Nebraska’s Public Servant Workforce Back to the Office. (“Executive Order”).
9. The Executive Order stated, in relevant part:
 - a. WHEREAS, the Office of the Governor examined the status of the State of Nebraska’s public servant workforce and concluded that a significant portion of that workforce remains in hybrid or remote work arrangements which were implemented during the COVID-19 pandemic;
 - b. WHEREAS, the citizens of Nebraska have the common sense expectation that people are most productive when they are working together in the office and not remotely; and
 - c. WHEREAS, the COVID-19 pandemic is over, and the people of Nebraska expect their elected leaders to restore Nebraska’s public servant workforce to the posture it was in prior to the pandemic.
 - d. Beginning January 2, 2024, all public servants employed by the State of Nebraska shall perform their work in the office, facility, or field location assigned by their agency and not from a remote location.
 - e. Agency heads may grant exceptions to the schedule and location requirements for the following individuals and circumstances:

- i. Public Servants whose regularly assigned work hours are outside of the normal business hours stated above.
 - ii. Public servants who move away from their original office duty location and for whom no reasonable in-office arrangement is possible. This exception is not available to public servants who move outside of Nebraska.
 - iii. An agency is at full building occupancy and new office space would have to be acquired at additional cost.
 - iv. An agency head determines that an exception is necessary to sustain critical operations in business areas with a workforce shortfall. Such determination is subject to approval of the Governor.
 - v. Any other exception or circumstances imposed by law.
 - f. Any exception made for a public servant must be on an individualized basis and be approved by the agency head. Public servants who are allowed to work in a remote or hybrid status shall have mechanisms in place for measuring and confirming productivity.
 - g. Each agency head shall provide a quarterly report to the Department of Administrative State Personnel Division (SPD) regarding the composition of their workforce that is working in a remote or hybrid status. Upon the request of SPD, each agency shall provide an individualized roster of exceptions approved under this policy and identify which exception is applicable.
10. On or about November 14, 2023, Justin Hubly, Executive Director of NAPE/ AFSCME and Dan Birdsall - Employee Relations Administrator/Chief Negotiator for the Respondent met to discuss concerns regarding the Executive Order.

11. On or about November 27, 2023, Hubly and Birdsall had a phone conversation to further discuss concerns regarding the Executive Order.
12. Following the phone call on November 27, 2023, Hubly sent a demand to bargain to Birdsall in the form of a letter via email.
13. The Demand to bargain included in relevant part:
 - a. [The union's] foremost concern is ensuring that all of us can continue to provide effective and efficient services to our fellow Nebraskans, while also respecting the rights of [the union] members, [the union] contract, and the law.
 - b. ...a critical number of state employees are working partially and fully remotely. These workers provide vital services to our State, and they work tirelessly to deliver those services. Remote work assignments, where appropriate, are beneficial to both the taxpayer and the employees.
 - c. We share the Governor's goal to have an efficient and effective workforce.
 - d. [T]he terms and conditions of employment are mandatory subjects of bargaining under the State Employees Collective Bargaining Act and the Industrial Relations Act.
 - e. Further, Article 1.4 of our labor contract states that prior to making any change in the terms and conditions of employment which are mandatory subjects of bargaining and not otherwise covered by the contract, the State agrees to meet and bargain with our union.
 - f. Remote work is not currently covered by the agreement, and, therefore, must be bargained.
 - g. Please consider this letter a formal demand to bargain under Article 1.4.
 - h. We are prepared to bargain at your earliest convenience. Time is of the essence.
 - i. Some of our members have already begun applying for new jobs with outside employers because of their preference to work remotely.

- j. We are already critically short staffed in many areas, and we cannot afford to lose a single one of our public servants right now. If we do, Nebraskans pay the price.
14. On November 28, 2023, Birdsall sent Hubly a letter via email stating in relevant part:
- a. In response to your demand to bargain over work schedules and locations, the Labor Contract between the State of Nebraska and NAPE (“Contract”) does not impose a requirement to bargain over these issues.
 - b. Article 1.4 of the contract requires the parties to meet and bargain over mandatory subjects of bargaining tht are not otherwise covered (emphasis in original) by the Contract.
 - c. Work schedule and work location are both covered by the Contract.
 - d. Article 3.4 grants the State the right to “establish, allocate, schedule, assign, modify, change, and discontinue Agency operations, work shifts, and working hours.” (emphasis in original).
 - e. Article 3.8 grants the State the right to “increase, reduce, change, modify and alter the composition and site of the work force.” (emphasis in original).
 - f. Accordingly, Governor Pillen has elected to exercise the rights granted to the State by the Contract and we respectfully decline your demand to meet and bargain over these issues.
 - g. The expectations laid out in the Executive Order will require changes in many instances. However, we believe that such adjustments are positive and will result in benefits to all Nebraskans. We encourage all public servants to view these changes as an opportunity for growth, both individually and as teams.
15. On December 1, 2023, Hubly and Birdsall met to further discuss the Executive Order and the union’s demand to bargain.
16. During this meeting representatives for the Respondent said that all state employees have one worksite that they are assigned to, and

remote work assignments were allowed for the convenience of the employee.

17. On December 6, 2023 Hubly sent Birdsall a further letter via email demanding to bargain which included in relevant part:
 - a. It is our perspective that the EO requires wholesale changes to both the status quo and the terms and conditions of employment that have not been negotiated in our existing contract language.
 - b. These changes require bargaining under Article 1.4 of the labor contract, the State Employees Collective Bargaining Act, and the Industrial Relations Act.
 - c. During our meeting you said that all state employees have one worksite that they are assigned to, and remote work assignments were allowed for the convenience of the employee.
 - d. [The Union is] aware of hundreds of employees who were hired with a promise and advertisement of remote work opportunities, and who have never been assigned to a state office.
 - e. This lack of clear definition of workforce is just one reason why we must bargain.
 - f. We have identified some other items that must be bargained for as a result of the EO. These include, but are not limited to:
 - i. The definition of remote work and remote location
 - ii. The assignment procedures, criteria, and expenses if an office arrangement is not possible
 - iii. The assignment procedures, criteria and expenses if an office is at full capacity
 - iv. The definition, criteria, and duration for exceptions to sustain critical operations
 - v. The definition and requirements to declare a workforce shortfall to allow remote work
 - vi. Remote work options in lieu of using leave during severe weather and other emergencies

- vii. The criteria for an agency head to make exceptions on an individual basis
- viii. The procedures for measuring and confirming productivity in remote assignments
- ix. Parking availability and assignments.
- g. The list above is not exhaustive, and I am sure more items will come up with further discussions. This is meant to highlight why we must negotiate and have further discussions regarding the broader topic of remote work.
- h. The EO does more than just direct agencies regarding worksites and schedules.
- i. As I mentioned on Friday, we conducted a week-long survey regarding remote work. More than 1,700 responses were collected.
- j. The issue of remote work is widely and deeply felt by our members.
- k. I have attached the data we collected with you so that you have a better idea of the potential effects of refusing to bargain.
 - i. The Data reflected in part that of the over 1700 employees surveyed, 186 employees worked remotely prior to 2020.
 - ii. That 1404 of the over 1700 employees work remotely in some capacity.
 - iii. 797 of the over 1700 employees are considering looking for a new employer.
 - iv. 593 of the over 1700 employees are actively looking, have already applied, or have already accepted a job with a new employer.
 - v. 1210 of the over 1700 employees said they would continue working for the state if the EO were rescinded.
 - vi. That at least 10% of the Child & Family Services workforce would be lost if the EO remains in effect

- vii. That at least 33% of the workforce who provide services to Nebraskans with disabilities would be lost if the EO remains in effect.
 - viii. That 25% of the workforce who provide social services to Nebraskans in need would be lost if the EO remains in effect
 - ix. That 20% of the engineers and scientists would be lost if the EO remains in effect
 - x. That 16% of the workforce who assist Nebraskans in finding gainful employment would be lost if the EO remains in effect
 - l. Our union's primary goal through these negotiations is to ensure that the State of Nebraska is able to retain employees and attract a new generation of public servants.
 - m. This is the only way we can serve our fellow Nebraskans effectively and efficiently.
 - n. It is clear from the data that a critical mass of state employees may leave state employment if we are unable to bargain mutually beneficial terms and conditions of employment regarding remote work.
 - o. This will hurt us all, especially the most vulnerable Nebraskans who rely on critical state services.
 - p. Based on the information above, I am asking you to reconsider our demand to bargain.
18. On December 8, Birdsall responded to Hubly in a letter via email in relevant part:
- a. Thank you for your letter dated December 6, 2023 requesting that we reconsider your demand to bargain.
 - b. We do not intend to enter into negotiations at this time.
 - c. The changes proposed in Executive Order 23-17 would vitally affect the terms and conditions of employment for the Petitioner employees as they would create a significant change in lifestyle required by EO 23-17 and constitute a matter of fundamental, basic, or essential concern to an employee's personal concern and are considered as

involving working conditions in addition to having an economic impact on employees.

19. Because EO 23-17 is silent on the number of items outlined by Hubly, and/or those items become in conflict with detailed portions of the CBA and is silent about the steps the Respondent would need to follow in order for EO 23-17 to be effectuated, therefore the parties are required to negotiate prior to implementing any changes identified in EO 23-17.
20. The changes unilaterally dictated in EO 23-17 and the position taken by Respondent through the Executive Order 23-17 and letters from Birdsall, and continuing support of their contents, constitutes a violation of Neb. Rev. Stat. 48-824(1) and 2(e) and Neb. Rev. Stat. §81-1386(1), and 2(e).
21. Respondent's unilateral actions are deliberate and willful, and designed to undermine the rights of the petitioner and the bargaining unit members under the Nebraska Industrial Relations Act and the State Employees Collective Bargaining Act, thereby entitling the Petitioner to reasonable attorney fees and costs.

WHEREFORE, the Petitioner prays that the Commission grant relief against the Respondent and in favor of the Petitioner finding that the Respondent has committed prohibited practices and ordering that the Respondent immediately cease and desist such actions, honor the negotiated agreements and enter into bargaining regarding the terms and conditions of employment, for attorney fees and for such other relief as may be deemed appropriate by the Commission.

DATED, December 13, 2023.

NEBRASKA ASSOCIATION OF
PUBLIC EMPLOYEES LOCAL 61 of
the AMERICAN FEDERATION OF
STATE, COUNTY, AND
MUNICIPAL EMPLOYEES,
Petitioner,

By: 

Abby Osborn, #24527

Shiffermiller Law Office, P.C., L.L.O.

1002 G Street

Lincoln, NE 68508

402-484-7700

abby@shiffermillerlaw.com