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IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES LOCAL 61 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, Petitioner, v. STATE OF NEBRASKA, Respondent.	Case No. CI 24-33 **ORDER**

This case is before the Court on a Petition and Verified Motion for Contempt. On January 19, 2024, the Court heard argument and received evidence. Joy Shiffermiller appeared for the Petitioner Nebraska Association of Public Employees Local 61 of the American Federation of State, County, and Municipal Employees (Union). Mark Fahleson and Jennifer Huxoll appeared for the Respondent State of Nebraska (State). Being fully advised on the premises, the Court dismisses the Union's Petition and Verified Motion for Contempt.

I. BACKGROUND

On November 9, 2023, the Governor signed Executive Order 23-17. E6. The Governor ordered: "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." *Id.*, p. 1. The order made some exceptions that are not relevant here. *Id.*, p. 2.

In response to Executive Order 23-17, the Union apparently filed a petition with the Commission of Industrial Relations (CIR). The petition itself is not before the Court. But the CIR's orders refer to the Union as the "Petitioner." See E3; E4. From this context, the Court gathers that the Union alleged that Executive Order 23-17 was a prohibited practice under the Industrial Relations Act, Neb. Rev. Stat. §§ 48-801 to 48-839.

Two of the CIR's orders are before the Court. The Court will refer to them as "Order 1" and "Order 2." On December 29, 2023, the CIR filed Order 1, titled "Order on Motion for Temporary Relief." See E3. In Order 1, the CIR decided that a "Temporary Order maintaining the status quo . . . must be granted." *Id.*, p. 3. The CIR defined the "status quo" as follows:

> [T]he dispute in this matter arose upon the issuance of the Executive Order in question. Accordingly, we are compelled to find that the status quo in this matter consists of the agency policies relating to remote work assignments, and the application of those policies, which were in place just prior to the issuance of the Executive Order.
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> *Id.*, p. 4.

Order 1 concluded: "WE THEREFORE ORDER that the implementation of Executive Order 23-17 may not be applied to the bargaining unit employees represented by the Petitioner during the pendency of this case." *Id.*, p. 4.

Jason Jackson, the Director of the Department of Administrative Services, testified that Order 1 caused a lot of confusion among the State's managers. Order 1, again, defined the status quo as "the agency policies relating to remote work assignments, and the application of those policies, which were in place just prior to the issuance of the Executive Order." But apparently unknown to the CIR, the preexisting policies of some agencies gave them the discretion to change, terminate, or not renew remote-work assignments. See E8; E10, pp. 3–12; E11, pp. 3–12. Thus, the immediate question for the State was whether it could continue to exercise its discretion under these preexisting policies.

On January 2, 2024, Jackson held a webinar with the State's human resources managers. The Court notes that January 2 was the first business day after Order 1 was filed. During the webinar, Jackson told the managers that Order 1 appeared to define the status quo as the remote-work policies and agreements that were in place before Executive Order 23-17. Thus, Jackson advised the managers that they could continue to enforce those policies and agreements. That same day, January 2, several Union members who work for the Department of Health and Human Services received emails purporting to terminate their remote-work agreements. E2, EC. The next day, January 3, the Tax Commissioner purported to terminate "[a]ll previous teleworking agreements, not beginning in 2024 . . . ." E2, ED.

The Union disagreed with the State's interpretation of Order 1. On January 3, 2024, the State filed a Motion to Clarify with the CIR. E9. The motion alleged that the State and the Union had different understandings of the status quo under Order 1. *Id.*, pp. 1, 4. The parties had been unable to resolve their differences and the Union was threatening to file a contempt action. *Id.* The State asked the CIR to clarify that the status quo under Order 1 was the "[a]gency policies relating to remote work assignments that were in place prior to the issuance of the Executive

Order," as "[c]onsidered in light of how those policies were applied prior to the issuance of the Executive Order . . . ." *Id.*, p. 3.

On January 10, 2024, the CIR filed Order 2, titled "Order on Motion to Clarify." See E4. In Order 2, the CIR clarified Order 1 in the following way:

> The issue specifically before the Commission was the implementation of Executive Order 23-17 with respect to employees represented by the Petitioner during the pendency of this case. No other executive order or policy was argued or considered. There can be no doubt that the December 29 Order dealt with the application of the Respondent's policies just prior to the issuance of Executive Order 23-17 and that the remote work status of the members of the [b]argaining unit involved in this case was *not to be altered* during the pendency of this case.
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> *Id.*, p. 2 (emphasis in original).

Although the CIR "denied" the State's Motion to Clarify, it might be more accurate to say that it declined to clarify Order 1 on the terms sought by the State. Order 2 did, in fact, clarify Order 1 by stating that "the remote work status of the members of the [b]argaining unit involved in this case [is] *not to be altered* during the pendency of this case." E4, p. 2 (emphasis in original). Order 1 did not include this language.

In response to Order 2, Jackson spoke with the heads of the Departments of Health and Human Services and Revenue. Jackson explained that these two agencies had been on the "forward edge of bringing NAPE teammates back . . . ." Jackson told them that, under Order 2, "the work status of the teammate should be undisrupted until all this process goes forward." Jackson also said that, if the agencies had told employees with remote-work agreements to return to the office, then they should abandon those efforts. Jackson also held another webinar for the State's human resources managers in which he advised them not to "disrupt the workstyle of the NAPE teammate."

Jackson admitted that he does not know what the leadership of each individual agency told their employees after Order 2. He is also not familiar with the remote-work policies of every state agency. And he did not know if some employees without written remote-work agreements were still being told to return to the office. Jackson explained that each agency reports directly to the Governor, not to him.

The Union's executive director, Justin Hubly, testified that the Union has received complaints after the CIR filed Order 2. But the Union offered no admissible evidence of the

substance of those complaints. Hubly has not asked any of the State's managers if Union members are still being asked to return to the office.

II. STANDARD

The Union moves to hold the State in contempt under Neb. Rev. Stat. § 48-819 (Reissue 2021). That section provides that the CIR's orders may be enforced in a contempt action before a district court:

> Orders, temporary or final, entered by the Commission of Industrial Relations shall be binding on all parties involved therein and shall be deemed to be of the same force and effect as like orders entered by a district court and shall be enforceable in appropriate proceedings in the courts of this state. Failure on the part of any person to obey any order, decree or judgment of the Commission of Industrial Relations, either temporary or final, shall constitute a contempt of such tribunal in all cases where a similar failure to obey a similar order, decree or judgment of a district court would constitute a contempt of such tribunal, and upon application to the appropriate district court of the state shall be dealt with as would a similar contempt of the said district court.

Under § 48-819, district courts should treat the CIR's orders the same as court orders for purposes of contempt. The following standards apply when a party is alleged to be in contempt of a court order:

> Civil contempt requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order. . . . Willfulness is a factual determination to be reviewed for clear error. Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence and without any presumptions.
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> *McCullough v. McCullough*, 299 Neb. 719, 729 (2018) (citations omitted).

Also, because the consequences of contempt can be serious, the order must be clear:

> Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed. The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one . . . . [T]hose who must obey them will know what the court intends to require and what it means to forbid. Understood in light of these principles, the "four corners" rule for interpreting consent decrees is intended to narrowly cabin the circumstances in which contempt may be found. It is because [t]he consequences that attend the violation of a court order are potentially dire, . . . that courts must read court decrees to mean rather precisely what they say. So a court cannot hold a person or party in contempt unless the order or consent decree gave clear warning that the conduct in question was required or proscribed.

Smeal Fire Apparatus Co. v. Kreikemeier, 279 Neb. 661, 699–700 (2010), disapproved on other grounds by *Hossaini v. Vaelizadeh*, 283 Neb. 369 (2012) (punctuation removed, alterations in original).

III. ANALYSIS

The Court finds that the Union has not shown by clear and convincing evidence that the State willfully violated the CIR's orders. To understand how the parties got here, it is important to emphasize that the CIR only considered Executive Order 23-17 when it entered Order 1. See E4, p. 2. The State's preexisting remote-work policies were not before the CIR. See *id.* Thus, the CIR was apparently unaware that those policies gave some agencies the discretion to change, terminate, or not renew remote work assignments.

One might infer that the CIR, unaware of the terms of the State's preexisting policies, assumed that barring the State from enforcing the executive order would effectively bar the State from changing the remote-work status of Union members. But Order 1 did not expressly prohibit the State from changing the remote-work status of Union members. Instead, Order 1 prohibited the State from enforcing Executive Order 23-17. The CIR directed the State to instead apply the policies in place just prior to Executive Order 23-17. This Court cannot hold the State in contempt for trying to apply the very same policies that the CIR ordered it to apply, albeit in a manner apparently not anticipated by the CIR. To hold a party in contempt, their conduct must be contrary to the letter of the order, not just its spirit. See 17 Am. Jur. 2d *Contempt* § 140 ("The mandate alleged to be violated must be clearly expressed rather than implied.").

The State's lack of willfulness is also shown by its diligent efforts to determine the meaning of Order 1. Immediately after Order 1 was filed, Jackson met with State executives and managers to discuss how Order 1 applied to the State's preexisting remote-work policies, which, again, had not been considered by the CIR. Then, only two business days after Order 1 was filed, the State filed a Motion to Clarify. That is exactly what the State should have done. See 17 Am. Jur. 2d *Contempt* § 15 ("If the alleged contemnor has any doubt as to what may be done without violating the order, the contemnor should ask for a modification of the order or a construction of its terms."). The State's actions are not those of a party thumbing its nose at a tribunal. They are instead the actions of a party laboring to understand how a tribunal's order should be applied to policies not considered by the tribunal.

Finally, there is no evidence that the State has told any Union member to return to the office after Order 2. Questions were asked during the contempt hearing about whether Union members without written remote-work agreements were still being recalled. But the Union offered no admissible evidence that this was happening. The Union had the burden to prove the State's contempt by clear and convincing evidence, see *McCullough, supra*, and it failed to do so.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petitioner's Petition and Verified Motion for Contempt is **DISMISSED**.

DATED this 5 day of February, 2024.

BY THE COURT:

Andrew R. Jacobsen
District Court Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 5, 2024 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Mark A Fahleson
mfahleson@remboltlawfirm.com

Tara T Paulson
tpaulson@remboltlawfirm.com

Joy Shiffermiller
joy@shiffermillerlaw.com

Date: February 5, 2024 BY THE COURT: _____
CLERK