No. S 25-26

IN THE NEBRASKA SUPREME COURT

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES LOCAL 61,

Appellant,

v.

STATE OF NEBRASKA,

Appellee.

On Appeal from the
Commission of Industrial Relations

Honorable Commissioners
Gregory M. Neuhaus, Dallas D. Jones, William G. Blake

BRIEF OF APPELLANT

Dated: April 14, 2025

Respectfully submitted:

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STATEMENT OF JURISDICTION

The Nebraska Commission of Industrial Relations ("CIR") had jurisdiction over the proceedings under Neb. Rev. Stat. §§ 48-824 and 48-825. This Court has appellate jurisdiction under Neb. Rev. Stat. § 81-1387, because the CIR rendered its finding of facts and order on July 11, 2024, (T264 –73), and subsequently issued an order awarding attorney fees on January 8, 2025 (T274–80). Appellant filed its notice of appeal and deposited the docket fee on January 9, 2025. (T281).

STATEMENT OF THE CASE

The core question in this case is whether the State of Nebraska was obligated to bargain over its implementation of the across-the-board elimination of remote work for its employees. The State, along with many private and public employers, has long offered remote work arrangements to certain employees. Recent technological advances have allowed for increased remote work flexibility and efficiency in the delivery of State services. *See, e.g.*, Chief Justice Funke's statements regarding virtual courtrooms and remote hearings at page 7 of his 2025 State of Judiciary report. https://supremecourt.nebraska.gov/sites/default/files/publication-report-files/State-of-Judiciary-2025.pdf.

When State agencies began to implement Governor Pillen's Executive Order 23-17 ("the EO") by eliminating remote work options for all public employees, (T3–13), the State refused to bargain with the Nebraska Association of Public Employees Local 61 of the American Federation of State and County Municipal Employees ("NAPE") over that implementation. In response, NAPE filed a prohibited practices petition with the Commission of Industrial Relations ("CIR") on behalf of the State employees NAPE represents. The State's unilateral decision to terminate remote work was a significant departure from standard operating procedure across State agencies and fundamentally

changed the established working conditions of numerous NAPE-represented State employees.

The State's refusal to bargain over the elimination of remote work violated Nebraska law because the implementation changed the established past practice concerning remote work and had adverse economic effects on state employees. NAPE initially sought a temporary order from the CIR preventing the unilateral changes to remote work. The CIR agreed with NAPE, ordered the State to maintain the status quo, and subsequently reiterated that the State could not modify any remote work arrangement, pending its resolution of the underlying prohibited practice case.

Shortly thereafter, in its decision on the merits, the CIR reversed course. The CIR determined that the State was not obligated to bargain over implementing the elimination of remote work because the State's actions were "covered by" a broad management rights provision in the State-NAPE collective bargaining agreement. The CIR then assessed an unprecedented attorneys' fees award against NAPE for simply fulfilling its statutory duty to represent bargaining-unit employees and advising those employees of its representational activity. On both issues—the failure to bargain and the award of attorneys' fees—the CIR erred on the law, and its decision was contrary to the preponderance of the evidence before it. Therefore, NAPE respectfully requests that this Court reverse the CIR's orders dismissing the petition and awarding attorneys' fees, and remand the matter to the CIR with directions to vacate the attorneys' fees decision and to order the State to negotiate with NAPE regarding changes to the terms and conditions of employment related to remote work.

ASSIGNMENT OF ERRORS

1. The CIR erred in its determination that the State was not obligated to bargain over implementation of across-the-board elimination of remote work. (T267).

2. The CIR erred by finding that the decision to unilaterally end remote work was covered by the CBA. (T271).
3. The CIR erred by not addressing economic effects on bargaining-unit employees of changes to remote work, which are mandatory subjects of bargaining.
4. The CIR erred in its determination that NAPE waived its right to bargain over implementation of the elimination of remote work. (T272).
5. The CIR erred because the preponderance of the evidence on the record does not support the CIR's finding that the parties' past practice concerning the State's revocation of individual telework agreements for particular performance-based reasons privileged the State to eliminate remote work without bargaining over implementation of that decision. (T271).
6. The CIR erred because the preponderance of the evidence does not support the CIR's finding that "[t]he parties previously bargained in good faith over the issues of remote work and working hours during negotiations for the current CBA." (T266).
7. The CIR erred because the preponderance of the evidence does not support the CIR's finding that NAPE withdrew its remote work proposal *in return for* wage increases. (T266).
8. The CIR exceeded its authority by assessing an unprecedented attorneys' fees award against NAPE for simply fulfilling its statutory duty to represent bargaining-unit employees and keeping those employees advised of NAPE's representational activity. (T273).
9. The CIR erred because the preponderance of the evidence does not support the CIR's finding that NAPE's intent in filing the petition was to "improperly delay[] the implementation" of the Executive Order and "boost[] membership numbers." (T272).
10. The CIR erred because the preponderance of the evidence does not support the CIR's finding that NAPE engaged in "willful, flagrant, aggravated, persistent, and pervasive prohibited misconduct" and pursued the action in bad faith. (T273, 276–77).

11. The CIR erred in awarding attorneys' fees and costs because the CIR does not have a uniform practice of awarding attorneys' fees. (T276–77).
12. The CIR erred when it relied on a regulation that does not provide for attorneys' fees under the circumstances present here. (T277).
13. The CIR erred by penalizing petitioning conduct protected by the First Amendment to the U.S. Constitution and Article I, Section 19 of the Nebraska Constitution.

PROPOSITIONS OF LAW

1. "Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole." *Douglas Cnty. Health Ctr. Sec. Union v. Douglas Cnty.*, 284 Neb. 109, 113–14 (2012).
2. Legal determinations by the CIR are reviewed *de novo* by this Court. *Int'l Union of Operating Eng'rs Loc. 571 v. City of Plattsmouth*, 265 Neb. 817, 819 (2003).
3. An employer commits a prohibited labor practice when it refuses to negotiate in good faith with respect to a mandatory topic of bargaining. *Pub. Ass'n of Gov't Emps. v. City of Lincoln*, 24 Neb. App. 703, 708 (2017). *See also* § 48-824(1).
4. Mandatory topics 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).
5. The phrase "conditions of employment" encompasses far more than just "working conditions." *Omaha Police Union Loc. 101 v. City of Omaha,* 15 CIR 292, 2007 WL 5114425, at *4 (2007).

6. An employer violates its obligation to bargain in good faith with respect to a mandatory topic of bargaining when it unilaterally "change[s] past practices for employees who are represented by a union" without bargaining with the union until impasse on that subject. *SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001*, No. 1466, 2019 WL 5064676, at *7 (C.I.R. Sept. 25, 2019) (quoting *NLRB v. Katz*, 369 U.S. 736, 745–47 (1962)).
7. A topic may become a mandatory subject of bargaining between parties when it is a past practice that occurs "with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis." *SEIU Loc. 226*, 2019 WL 5064676, at *7.
8. "[T]he impact of whatever decision management may make . . . on the economic welfare of employees is a proper subject of mandatory bargaining." *Metro. Tech Com. Col. Educ. Ass'n v. Metro Tech. Com. Col. Area*, 203 Neb. 832, 842–43 (1979).
9. Employers must bargain even over seemingly minor economic impacts. *Omaha Police Union Loc. 101*, 15 CIR 292, 2007 WL 5114425, at *5.
10. A mandatory subject of bargaining is "covered by" the CBA only if the contract "fully defines the parties' rights as to [the] topic." *Douglas Cnty. Health Ctr. Sec. Union*, 284 Neb. at 115–17 (2012) (citing *Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)) (adopting DC Circuit's approach to contract coverage rule).
11. "[T]he burden of proving waiver rests on the employer." *SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001*, 286 Neb. 755, 768 (2013).
12. Waiver is "a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right . . . to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part." *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 594 (1990), *quoted*

in *Crete Educ. Ass'n v. Saline Cnty. Sch. Dist.*, 265 Neb. 8, 26 (2002).

13. "A clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct." *SEIU Loc. 226*, 286 Neb. at 766 (2013).
14. When presented with a fait accompli because an employer has made its decision and will not negotiate, "a union is not required to go through the motions." *SEIU Loc. 226*, 286 Neb. at 768 (2013) (quoting *NLRB v. Solutia, Inc.*, 699 F.3d 50, 64 (1st Cir. 2012)).
15. Attorney fees may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery. *Rosse v. Rosse*, 244 Neb. 967, 975 (1994); *Henry v. Rockey*, 246 Neb. 398, 406 (1994).
16. "To support an award of fees under CIR Rule 42(b)(2a), it must be found that the party in violation has undertaken a pattern of repetitive, egregious, or willful prohibitive practices." *AFSCME Loc. No. 2468 v. Cnty. of Lancaster*, 17 CIR 254, 2012 WL 1613217, at *6 (2012).
17. Attorney fee awards are meant to be reserved for extreme cases. *NAPE v. State of Nebraska*, No. 1442, 2018 WL 11633354, at *8 (C.I.R. Apr. 12, 2018).
18. The First Amendment to the U.S. Constitution and Article I, Section 19 of the Nebraska Constitution protect the right to petition the government for redress of grievances by, *inter alia*, filing administrative complaints and lawsuits.

STATEMENT OF FACTS

Appellant NAPE is the exclusive collective bargaining agent for approximately 8,253 of the 18,492 Nebraskans employed by the State. (T99). *See* Neb. Rev. Stat. § 81-1373(a)–(e), (h)–(j). NAPE-represented employees have the option to join NAPE and pay membership dues, but they are not required to do so in order to be represented by NAPE.

See Neb. Const. art. XV, § 13 ("No person shall be denied employment because of . . . refusal to join or affiliate with a labor organization.") In order to maintain robust representation of all bargaining-unit members, NAPE has engaged in an active internal organizing campaign since at least 2018, seeking to have represented employees become members. (305:12–13, 309:6–8, Vol. II). Every email that the union sends to bargaining-unit employees encourages recipients to become dues-paying members of the union. (310:14–16, Vol. II). As NAPE's Executive Director Justin Hubly has explained, "if [NAPE leaders are] not asking a state employee to join our union, we're not doing our job." (314:12–13, Vol. II).

Every two years, NAPE meets with the State's bargaining team to negotiate a successor collective bargaining agreement ("CBA") that describes terms and conditions of employment for NAPE-represented employees. E1, p.65, Vol. III; Neb. Rev. Stat. §§ 81-1369 through 1388. The negotiations for the 2023–2025 CBA took place between September 2022 and February 2023. (87:11–15, Vol. I; E513, p.241, Vol. VI). *See* Neb. Rev. Stat. § 81-1379. The resulting contract has been in effect since July 1, 2023. (E1, p.3, Vol. III).

For at least the past three iterations of the CBA, Article 1.3 has provided, in relevant part, that:

> [T]he 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.

(E1, p.5, Vol. III) (emphasis added); (E500, p.5, Vol. V; E501, p.5, Vol. VI).

Article 1.4 states, in relevant part, that:

> 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.

(E1, p.5, Vol. III) (emphasis added); (E500, p.5, Vol. V; E501, p.5, Vol. VI).

As is common in public sector collective bargaining agreements, the State has reserved certain rights "to the extent that such rights do not violate its legal authority, and to the extent such rights are not modified by this Contract," including "[t]he right to establish, allocate, schedule, assign, modify, change and discontinue Agency operations, work shifts, and working hours," "increase, reduce, change, modify and alter the composition and site of the workforce," and "to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures or policies." (E1, pp.8–9, Vol. III; E500, pp.8–9, Vol. V; E501, p.8, Vol. VI).

The parties' CBA has never contained a provision that explicitly, by its terms, *refers to or covers* remote work; however, since at least 1983, State agencies have made arrangements with individual employees for working remotely. (19:24–20:3, 21:23–24:3, 145:24–25, 146:11–13, Vol. I; 275:1–11, Vol. II; E508, pp.174–189, Vol. VI). The use of remote work accelerated during the COVID-19 pandemic, and by 2021, various state agencies had developed written telework policies. (24:5–11, Vol. I, 331:10–333:6, Vol. II; E505–507, 509–510, pp.143–172, 191–220, Vol. VI).

State agencies operated under pandemic emergency conditions for approximately fourteen months from March 13, 2020 until May 24, 2021, when the then-Governor issued Executive Order No. 21-05,

ordering the directors of code agencies to "return to normal working conditions" by requiring individuals who worked remotely *for COVID-19 purposes* to return to in-office work. (E503, p.135, Vol. VI). After the "return to normal working conditions," just as before the COVID-19 pandemic, many State employees continued to work remotely for a variety of non-pandemic-related reasons, including based on agency findings that remote work can help "maximize . . . services," "is consistent with sound business practices," and can "increase positivity, boost efficiency . . . and reduce overall operating costs." (E509, p.191, Vol. VI). It continued to be "standard" for State job postings to list remote work as an option. (106:21–23, 138:11–20, Vol. I).

At the beginning of collective bargaining negotiations in September 2022, NAPE submitted a proposal that would have added a new section clarifying the remote work arrangements already in place. (E513, p.255, Vol. VI). The State did not accept the proposal, (89:3, 134:20–21, Vol. I), or offer a counter proposal (320:16–19, Vol. II), responding only that the issue was a "non-starter." (320:20–23, 322:6, Vol. II). As a result, the subsequent CBA—the one in place during the instant litigation—again did not have any term that explicitly *referred to, or covered*, remote work arrangements.

On November 9, 2023, Governor Jim Pillen issued the EO, entitled "Bringing Nebraska's Public Servant Workforce Back to the Office." (E502, p.130, Vol. VI). The EO mandated that all public servants employed by the State "perform their work in the office, facility, or field location assigned by their agency and not from a remote location." (E502, p.130, Vol. VI). Limited exceptions were available at the discretion of agency heads. (E502, pp.130, 132, Vol. VI). To implement the EO, agency heads began to change, and even revoke, all existing remote working arrangements, including those that pre-dated COVID-19 and post-dated the 2021 return to normal. (E13–15, 29, 58, 60–64, pp.30–46, 51–60, 65–79, Vol. IV).

After the Governor issued the EO, NAPE received hundreds of calls from represented employees (both members and non-members)

who had concerns and questions about its implementation and impact on their work. (E1, p.6, Vol. II; 317:8–17, Vol. II). For example, Diane Schoch, a Program Specialist RN with DHHS, had worked fully remotely since March 18, 2019, and never reported to an office location. (E1, p.7, Vol. II). Similarly, Lauren Eckstrom and Debra Wert, Child and Family Services Specialist Lead Workers, signed remote work documents upon hire in early 2022. (*Id.*). Other employees raised additional concerns about the mechanics and implementation of directives that they return to the office full-time. (See id. at pp. 6, 8; E6, pp.23–24, Vol. II).

Around late November 2023, NAPE's Executive Director Justin Hubly and Dan Birdsall, the Employee Relations Administrator for the State, met to discuss implementation of the EO. (65:23–67:8, Vol. I). NAPE then made a formal demand to bargain. (E2, p.3, Vol. IV). The State declined. (E514, pp.292–94, Vol. VI). After another meeting, NAPE renewed its demand to bargain on a number of topics affected by the "wholesale changes to both the status quo and the terms and conditions of employment that have not been negotiated in [the] existing contract language." (E3, p. 5, Vol. IV). The demand to bargain listed examples of terms and conditions of employment related to remote work but that had not been negotiated with NAPE:

- The definition of remote work and remote location
- The assignment procedures, criteria, and expenses if an office arrangement is not possible
- The assignment procedures, criteria and expenses if an office is at full capacity
- The definition, criteria, and duration for exceptions to sustain critical operations
- The definition and requirements to declare a workforce shortfall to allow remote work
- Remote work options in lieu of using leave during severe weather or other emergencies

- The criteria for an agency head to make exceptions on an individual basis
- The procedures for measuring and confirming productivity in remote assignments
- Parking availability and assignments

(E3, p. 5, Vol. IV). The State responded on December 8, 2023 that it "[did] not intend to enter into negotiations at this time." (E515, p.296, Vol. VI). Five days later, NAPE filed a prohibited practice petition ("the Petition") and moved for temporary relief until such time as the state engaged in good faith bargaining over the topics identified in the demands to bargain. (T3–13, 17–18).

PROCEDURAL HISTORY

I. The CIR Granted Temporary Relief to NAPE-Represented Employees.

CIR Commissioners William G. Blake, Dallas D. Jones, and Patricia L. Vannoy heard NAPE's motion for temporary relief on December 21, 2023. (T22). NAPE described the ongoing "chaos" and inconsistency as agency heads attempted to implement the elimination of remote work and cancelled existing individual telework agreements. (19:14–20:3, Vol. I). NAPE also demonstrated numerous effects to the terms and conditions of employment that were not addressed by the CBA, and the economic impact of those changes on public servants, such as commuting and childcare costs. (20:23–21:15, Vol. I).

The State argued simply that, based on the dictionary definition of "site," Article 3.8 of the CBA grants the State unilateral authority to "direct where employees" work. (24:25–25:9, Vol. I). The State also argued that NAPE waived any right to collective bargaining on the issue of remote work because it withdrew its proposal related to remote work during the most recent round of contract bargaining. (25:10–17, Vol. I). The State acknowledged the "tremendous discretion" that the

Executive Order gave to agency heads directed to implement the EO, subject to the approval of the Governor. (26:13–27:5, Vol. I).

Unpersuaded by the State's position, the CIR found that NAPE's Petition sufficiently alleged a prohibited practice claim and granted a Temporary Order maintaining the status quo pursuant to Neb. Rev. Stat. § 48-816. (T29). The CIR explained 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." (T31). As described supra at 11–12, under the status quo, agencies had negotiated with individual employees to offer remote work options. The CIR ordered the State not to implement the Executive Order as it applied to bargaining-unit members. (T31).

In spite of the CIR's order, the State unilaterally terminated existing remote work assignments, including those for some bargaining-unit members. (T67–75). After NAPE filed a contempt motion in the District Court of Lancaster County, (T57), the State sought clarification from the CIR, arguing that the EO had no effect on pre-existing telework policies and agreements (T38). Therefore, according to the State, the status quo meant that the State could unilaterally revoke telework agreements without individualized cause. (*See* T39). After a hearing, the CIR found "no such support" for the State's position and reiterated 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." (T76) (emphasis in original).

II. The CIR Dismissed NAPE's Petition with Prejudice, Found that NAPE Filed the Prohibited Practice Charge in Bad Faith, and Issued an Unprecedented Award of Attorney Fees.

A hearing on NAPE's prohibited practice charge was held on February 26 and 27, 2024, before CIR Hearing Commissioner Gregory M. Neuhaus. (T80). In support of the Petition, NAPE argued that the State committed a prohibited practice "when it refused to negotiate with the Union about the implementation of EO 23-17." (T232).

Consistent with the status quo order, NAPE argued that the implementation of EO 23-17 was a mandatory subject of bargaining because it would fundamentally change terms and conditions of employment and that the State was obligated to bargain about implementation of the EO because the CBA was silent on the definable terms and/or exception procedures described therein. (T237–38, 257).

Several State management employees testified about the largescale disruption to the status quo that would be caused by implementation of the elimination of remote work. As was common across agencies, the Director for the Department of Banking and Finance testified that "[t]he team has always negotiated where they elect to work and how we can best serve that." (29:18–19, 45:8–17, Vol. I). Indeed, no witness testified to any instance of a particular remote work arrangement being revoked without individualized cause prior to November 2023 when the EO was issued. (137:15–25, 138:1–5, 175:10–16, 192:1–13, 206:15–18, 245:22–246:1, Vol. I). State management representatives also testified to the practical impossibility of requiring all public servants to report to an office (111:7–15, 148:22–149:8, 152:7–11, 153:12–24, Vol. I; E65, p.81, Vol. IV); between previously downsized office space and the demands of certain positions there simply were not enough offices. (*See, e.g.*, 150:20–24, Vol. I). One employee seriously questioned whether she would be expected to work from the parking lot outside of her assigned office building. (185:6–10, Vol. I).

Among agency heads, there was no dispute that implementation of the EO had a variety of economic impacts on employees. (46:24, 64:13–17, 97:20–98:4, 75:20–76:14, Vol. I). A number of public servants testified about the financial impact if their remote work options were revoked, such as costs of childcare, gas for their cars, and parking. (*See* T257, 259; 199:20–21, 213:10–11, 226:10–13, 239:12, Vol. I; 316:21–317:7, Vol. II). Their testimony showed that remote work was not only typical, but also an appropriate option for the delivery of State services

as they did not have any interaction with the public at the office. As examples,

- Jaime Aguilar, a Developmental Disabilities Service Coordinator and member of the bargaining unit, testified that she was hired into a fully remote position in February 2023. (159:12, 160:25, 161:10–12, Vol. I). Aguilar's assigned office location was a state building that had been closed for the duration of her employment with the State. (163:17–24, 165:14–15, Vol. I; *see* E12, p.27, Vol. IV).
- Anita Wisecup testified that when she was hired as Health Program Manager in April 2021, the position was advertised as having remote options, and her supervisor approved her for full time remote work. (198:9–13, Vol. I). She interacted with members of the public only during annual site visits. (194:20–195:6, Vol. I).
- Brenda Sensibaugh, a Procurement Contract Officer, testified that she performed her work fully remotely, and if required to return to the office would not have a designated workspace but would share "a drop-in station" with colleagues that would not provide the privacy necessary to efficiently do her work. (208:21–22, 224:20–22, Vol. I). She did not ever work in person with members of the public, instead meeting with vendors and signing contracts virtually. (210:1–3, Vol. I).
- Jessie Enfield is a Public Health Licensure Support Staff and began working a hybrid schedule in June 2022 after her probationary period ended. (232:18–25, Vol. I). She received virtually all assignments via email, even when working in the office. (237:6–15, Vol. I).

The State presented no evidence that management had ever before unilaterally changed remote work options for employees *en masse*. Instead, the State simply repeated its arguments from the preliminary hearing, first claiming that implementation of the EO was "covered by" the collective bargaining agreement because Article 3

grants the State the unilateral right to determine an employee's "working hours and site of work," (T246, 248–50), and then relying on Article 1.3 of the CBA to argue that NAPE once made a proposal related to remote work and had therefore waived its right to bargain on the subject. (T241, 250–52). The State then relied on NAPE's membership recruitment efforts to accuse NAPE of "abuse of the administrative and judicial process" by filing the Petition. (T241–42; T254–55; 305:12–13, 309:6–8, Vol. II; 310:14–16, 313:17–21, 306:18–24, Vol. II; E516, Vol. VI).

The CIR issued its findings of facts and order on July 11, 2024. (T264–73). After discussing the law concerning mandatory subjects of bargaining, the CIR concluded that remote work was "covered by" the parties' CBA, without an explicit finding on whether NAPE's petition involved a mandatory subject of bargaining. The CIR concluded that "remote work" was synonymous with and coextensive to "site of work" as referred to in Article 3 of the CBA. (T271). The CIR did not engage at all with the evidence establishing the State's past practice of offering remote work to employees or give any weight to the economic effects on employees should remote work be eliminated—it also did not mention its prior determination that the status quo concerning remote work arrangements did not privilege the State to unilaterally revoke those arrangements *en masse* without individualized determinations.

The CIR then found that, even if "remote work was a mandatory subject of bargaining **not** 'covered by' the CBA," NAPE had waived its right to negotiate on the issue based on pre-existing telework agreements and policies, Article 1.3 of the CBA, and NAPE's 2022 proposal to define remote work within the CBA. (T272). Citing only to two membership drive communications, the CIR further found that "[f]iling of the present petition was a disingenuous maneuver seemingly for the purpose of improperly delaying the implementation of EO 23-17 and boosting membership numbers using the subsequent press coverage." (T272 (citing E516–517, Vol. VI; 304:14–313:4, Vol.

II)). The CIR then summarily concluded that sanctions in the form of attorneys' fees were appropriate against NAPE. (T273).

In a subsequent Order, on January 8, 2025, the CIR ordered NAPE to pay $42,234.63 for attorneys' fees and costs to the State. (T274–80). The CIR acknowledged that "CIR Rule 42 has not been previously used as a basis for awarding attorney fees to a Respondent." (T276). NAPE timely appealed the CIR's July 11, 2024 and January 8, 2025 orders on January 9, 2025. (T281).

SUMMARY OF ARGUMENT

This Court should reverse the CIR's determinations in this case because the CIR orders are contrary to law and to the preponderance of the evidence on the record as a whole.

The CIR erred when it determined that the State was not obligated to bargain over implementation of the elimination of remote work. The CIR did not explicitly find that the implementation was a mandatory subject of bargaining. However, it implicitly so determined, since it applied the covered-by-the-contract analysis which serves to relieve the employer of bargaining *over mandatory subjects* if the matter is covered by the parties' existing CBA. That implicit mandatory subject determination is buttressed by the record evidence demonstrating the established past practice providing for remote work and the adverse economic impact on employees of the State's elimination of remote work.

The CIR then erred when it determined that the implementation of the elimination of remote work was "covered by" the contract's provisions. The contract coverage doctrine puts those matters the parties have already addressed through bargaining and incorporated into the contract outside of the CIR's purview. Here, the CIR's reliance on the CBA's broad management rights language ignored this Court's precedent applying the contract coverage doctrine

only where the language at issue fully defines the parties' rights on the topic and describes the steps to be taken when a relevant bargained-over event occurs. The contractual provisions on which the CIR relied do not even mention remote work at all, much less fully define the parties' rights with respect to it, or describe the steps to be taken when the State decides to eliminate it. The CIR also erred in its alternative finding that NAPE waived its right to bargain over implementation of the elimination of remote work. The parties' CBA does not contain language clearly and unequivocally waiving NAPE's right to bargain over the implementation, and the State did not carry its burden of demonstrating that the parties' past practice or conduct in negotiations constituted a waiver.

Finally, the CIR also exceeded its statutory authority by awarding unprecedented attorney fees against NAPE. Remarkably, the CIR based its extraordinary fees award on NAPE's alleged "bad faith" in pursuing a prohibited practice charge that the CIR itself had already determined met the standard for status quo relief. The CIR also found nefarious NAPE's commonplace publicity efforts, similar to those of interest groups across the ideological spectrum, to advise represented employees of its litigation activity, in the hope that those employees, recognizing NAPE's efforts on their behalf, would choose to become NAPE members. Not only is the CIR attorneys' fee award *ultra vires*, and contrary to statute, regulation, and prior precedent; if allowed to stand, the attorneys' fee award would penalize NAPE's petitioning activity, a chilling effect on the right to petition the government for redress of grievances the First Amendment to the U.S. Constitution and Article I, Section 19 of the Nebraska Constitution will not abide.

STANDARD OF REVIEW

"Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds

and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole." *Douglas Cnty. Health Ctr. Sec. Union v. Douglas Cnty.*, 284 Neb. 109, 113–14 (2012).

Legal questions are reviewed *de novo*. *Int'l Union of Operating Eng'rs Loc. 571 v. City of Plattsmouth*, 265 Neb. 817, 819 (2003).

ARGUMENT

I. Assignments of Error 1–7. The CIR Erred When It Determined that the State Was Not Obligated to Bargain Over the Mandatory Subject of Implementation of the EO Because the Matter Was "Covered By" the Parties CBA and Because NAPE Waived Its Right to Bargain.

The State was obligated to bargain over implementation of the elimination of remote work because the implementation was a mandatory subject of bargaining not covered by the parties' CBA, and NAPE did not clearly and unequivocally waive its right to bargain over the implementation.

a. Implementation of the EO, including elimination of remote work, is a mandatory subject of bargaining.

Under Nebraska law, an employer, including the State, commits a prohibited practice when it refuses to negotiate in good faith with respect to a mandatory topic of bargaining. *Pub. Ass'n of Gov't Emps. v. City of Lincoln*, 24 Neb. App. 703, 708 (2017). *See also* § 48-824(1). Here, the CIR did not make an explicit finding that implementation of the across-the-board elimination of remote work was or was not a mandatory subject of bargaining. Rather, after describing the legal standards for determining whether a particular matter was a mandatory subject requiring bargaining to impasse before

implementation, the CIR skipped to the issue of whether the elimination of remote work, with limited contemplated but unarticulated exceptions, was "covered by" the parties' CBA. Determining that the matter was in fact covered by the CBA, the CIR held that the State had no obligation to bargain.

However, because the contract coverage doctrine relieves an employer of bargaining over *mandatory subjects* that the parties have already covered in their CBA, by applying that doctrine the CIR implicitly found that the elimination of remote work *was a mandatory subject*. "Where the contract fully defines the parties' rights *as to what would otherwise be a mandatory subject of bargaining*, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant." *Douglas Cnty. Health Ctr. Sec. Union*, 284 Neb. at 116 (2012) (citing *Dep't of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)) (emphasis added). Since we describe in Section b below why the CIR incorrectly applied the "contract coverage" doctrine in this case, we start here by demonstrating that the CIR's implicit determination was, in fact, correct: the implementation of the elimination of remote work for all State employees was a mandatory subject triggering the State's obligation to bargain.

As the CIR noted at page 6 of its July 11, 2024 decision, mandatory subjects of bargaining are those that relate to "wages, hours, and other terms and conditions of employment or any question arising thereunder." Neb. Rev. Stat. § 48-816(1)(a). The phrase "conditions of employment" encompasses far more than just "working conditions." *Omaha Police Union Loc. 101 v. City of Omaha*, 15 CIR 292, 2007 WL 5114425, at *3–4 (2007) (citing decisions on, *inter alia*, dress codes, dues to professional organizations, noon duty, and grievance procedures). Moreover, "[a]n 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."

SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001, No. 1466, 2019 WL 5064676, at *7 (C.I.R. Sept. 25, 2019) (quoting *NLRB v. Katz*, 369 U.S. 736, 745–47 (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." *Id.* (citations omitted).

It is also well established that the economic impacts of a change to a condition of employment is in itself a mandatory subject of bargaining. *Cent. City Educ. Ass'n v. Merrick Cnty. Sch. Dist. No. 61-0004*, 280 Neb. 27, 32 (2010); *Scottsbluff Police Officers Ass'n, Inc./F.O.P. Lodge 38 v. City of Scottsbluff*, 16 CIR 478, 2010 WL 3523247, at *6 (2010). Employers are required to bargain even over seemingly minor economic impacts. *Omaha Police Union Loc. 101*, 15 CIR 292, 2007 WL 5114425, at *5. The United States Supreme Court has found that even the price of food in on-site vending machines is a mandatory subject of bargaining. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

Applying these precedents here, the preponderance of evidence before the CIR demonstrated that the elimination of remote work both changed an established past practice and had an adverse economic impact on employees. As discussed *supra* at 11, since at least the early 1980s, State agencies offered remote work options to employees. The State presented no evidence to the CIR that telework agreements had ever previously been revoked across-the-board by an agency's unilateral adoption of a remote work elimination policy; rather, the evidence of revocation, such as it was, involved individualized cause, such as work performance issues, for revoking particular employees' individual telework agreements. (175:10–16, 192:1–13, 206:15–18, 245:22–246:1, Vol. I).

The established past practice here, as determined by the CIR in its initial orders to maintain the status quo and then defining that status quo, was to continue remote work absent a particularized cause-related basis for terminating a particular individual's agreement—the

sole exception was the return-to-the-office of employees whose work, because of the pandemic, had been forced to be remote. (T30–31, 76). Thus, the established practice, based on both the pre- and post-pandemic periods, was that employees working remotely could anticipate to continue to do so absent an individualized, cause-based determination that they had to return to the office. The past practice was not to have remote work eliminated across-the board, particularly given the facts, established at the hearing, that a significant number of employees were hired into jobs advertised as remote or had no office to which to return. Because the State was changing an established past practice, it was obligated to bargain with NAPE over implementation of that change.

Moreover, the CIR was also presented with numerous examples of adverse economic impacts on employees as a direct result of the elimination of remote work, ranging from commuting costs to purchase of office attire to an increased need for sick leave, flex time, and other paid time off. (T229–32; 187:1–10, 190:17–191:13, 199:17–25, 213:7–14, 226:7–13, 239:8–240:8, 244:6–22, Vol. I; 316:14–317:7, Vol. II). Thus, as the CIR implicitly found, implementation of the elimination of remote work options was a mandatory subject of bargaining.

b. The CIR erred when it found that the CBA covered the implementation of the elimination of remote work.

The CIR determined that elimination of remote work was "covered by" the CBA. (T270). Under this Court's precedent, the CIR's analysis was flawed because it relied on an overly broad interpretation of the CBA's management rights provision that did not mention remote work at all, much less refer to or cover it, or fully define the parties' rights as to the topic.

If a mandatory subject of bargaining is "covered by" a CBA, then the participating employer has no further obligation to bargain over the issue. *Douglas Cnty. Health Ctr. Sec. Union*, 284 Neb. at 115 (2012) (citing *Dep't of Navy*, 962 F.2d at 57 (D.C. Cir. 1992)) (adopting D.C. Circuit's, as opposed to the NLRB's, approach to contract coverage

rule). A mandatory subject of bargaining is "covered by" the CBA only if that contract "fully defines the parties' rights as to [the] topic." *Id.*, and at 117.

The contract clause this Court considered in *Douglas County* is instructive for our purposes here. There, the issue was subcontracting. In the CBA clause in question, the union recognized the employer's right to subcontract, stated that right could not be used to undermine the union or to discriminate against employees, and provided that where subcontracting had the effect of eliminating bargaining-unit jobs, the employer would provide the union with an opportunity to discuss with the employer the necessity and effect on bargaining-unit employees. *Id.* at 119. This Court reversed the CIR and held that the employer had no obligation to bargain over the subcontracting in question because the contract covered the matter and "specifically notes the steps that the County needs to follow" when the subcontracting in question has the effect of eliminating bargaining-unit jobs. *Id.*

In the instant case, in contrast, not only is there no contractual language detailing what steps should be taken should the State decide to eliminate remote work; remote work (and its possible elimination) *is not mentioned at all* in the parties' CBA. The CIR's determination that the issue was covered by the contract relied on broad general language concerning the State's right to determine the site of work and what the CIR characterized as "related policies." (T271). But these general statements of broad State authority do not "fully define the parties' rights" as to the elimination of remote work as *Douglas County* understood "fully define"—that is, the CBA provision does not direct the steps that will be taken when an event occurs and thereby evidence that the parties have, in the contract, previously established a procedure to be followed so that the matter is "covered" by the contract, and no additional bargaining is warranted. *See Pub. Ass'n of Gov't Emps.*, 24 Neb. App. at 710 (2017) (By comparison, in *Douglas County*, the Court found contract coverage because the CBA "specifically

note[d] the steps the [c]ounty needed to follow when the . . . subcontracting . . . had the effect of eliminating bargaining unit jobs, [a]nd the elimination of bargaining unit jobs [was] at issue in the dispute." *Id.* at 119).

Analogously, the Court of Appeals has applied the *Douglas County* standard, found no contract coverage, and held that an employer failed to bargain in good faith when it unilaterally changed employee work schedules by imposing *mandatory* standby, even when the management rights provision preserved the city's right to modify and change work shifts and working hours *and* the relevant collective bargaining agreement contained a provision on hours of work and standby. *Id.* at 711. In that case, the Court of Appeals had previously noted the CIR's finding that "the past practice of voluntary standby duty had been in place for at least 20 years such that employees could reasonably expect the practice to continue." *Id.* at 707.

The CIR's reliance on the past practice concerning the existence of telework polices and individual telework agreements is similarly unavailing. As discussed in section (a) above, the relevant past practice consisted of the revocation of individual telework agreements for particular cause-related reasons; nothing in that past practice, which is independent of, and not memorialized anywhere in, the CBA constitutes evidence that the *CBA itself* covered the implementation of, and steps to be taken with respect to, the elimination of remote work in its entirety. Rather, employees could reasonably expect that the past practice of remote work would continue, rather than be completely eliminated by unilateral, across-the-board State action.

In conclusion, at page 8 of its July 11, 2024 decision, the CIR cited its own decision in *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292, 2007 WL 5114425 (2007), for the proposition that "we will not allow broad and vague reservations to negate the entirety of the bargaining process" before concluding that "this case does not approach any such result." With all due respect, the CIR's decision in this case came to exactly the result the cited CIR precedent, and this

Court's decision in *Douglas*, preclude. The CIR relied on inapposite broad statements in the CBA that did not mention the elimination of remote work, much less "fully define" the rights of the parties should such elimination take place, much less describe the steps to be taken when the State decides upon such a course of conduct. The CIR also relied on a completely inapposite description of the parties' past practice, bearing an apples-to-oranges relationship to the question facing it. Under these circumstances, the CIR erred by finding the issue of whether the State was obligated to bargain over its implementation of the elimination of remote work was "covered by" the parties' CBA.

c. The CIR erred when it concluded that NAPE waived its right to bargain over implementation of the EO.

As demonstrated above, the CIR erred by finding that the State's implementation of the across-the-board elimination of remote work was covered by the CBA. The CIR's alternative finding that NAPE waived its right to bargain over the implementation also was clearly in error. There was no language in the parties' CBA agreement clearly and unmistakably waiving NAPE's right to bargain over the topic, and nothing in the structure of that agreement or the parties' course of conduct constituted a waiver of NAPE's right to bargain.

"[T]he burden of proving waiver rests on the employer." *SEIU Loc. 226 v. Douglas Cnty. Sch. Dist. 001*, 286 Neb. 755, 768 (2013). This Court has defined waiver as "a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right . . . to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppels on his part." *See Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 594 (1990), *quoted in Crete Educ. Ass'n v. Saline Cnty. Sch. Dist.*, 265 Neb. 8, 26 (2002). "[G]enerally speaking, waivers of statutory rights must be demonstrated by an express statement in the contract to that effect." *Gannett Rochester*

Newspapers v. NLRB, 988 F.2d 198, 203–04 (D.C. Cir. 1993) (citations, internal quotation marks, and alteration omitted). Consequently, employers cannot rely on contractual silence. *Id.* at 203. Nor can the standard be met with only "general contractual provision[s]," *Gannett Rochester*, 988 F.2d at 203, or "[e]quivocal, ambiguous language in a bargaining agreement," *NLRB v. Gen. Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986). The most generous interpretation of the standard is that "[a] clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct," *SEIU Loc. 226*, 286 Neb. at 766 (2013); however, where a particular subject is not "covered by" a collective bargaining agreement, that agreement generally will not clearly and unmistakably waive bargaining over that matter. *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 378 (D.C. Cir. 2017).

Applying those standards here, the CIR did not identify any express waiver in the language of the CBA, nor was the CIR presented with evidence that the parties' course of conduct amounted to a clear and unmistakable waiver. The CIR's waiver finding was based on (1) Article 1.3 of the CBA, (2) the existence of telework agreements, and (3) a 2022 NAPE proposal to define remote work. (T272). None of those facts, independently or combined, support the CIR's clear and unmistakable waiver determination.

First, the CIR's flawed interpretation of Article 1.3 relies on its erroneous finding that remote work was covered by the CBA. The contract speaks for itself, and there is no express language relating to remote work. Article 1.3 simply reinforces the established principle that no party is "obligated to bargain collectively with respect to any subject or matter referred to, *or covered*" by a CBA. (E1, p.5, Vol. III) (emphasis added). As remote work is not, by its terms, referred to or covered by the CBA, Article 1.3 does not apply. *See Wilkes-Barre Hosp.*, 857 F.3d at 378 (explaining that "general contractual provision" in a contract does not amount to an express statement of waiver).

Second, the State's past practice of offering remote work to employees does not imply a clear and unmistakable waiver by NAPE but, as discussed *supra* at 22–24, establishes remote work as a mandatory subject of bargaining.

The CIR found that, by withdrawing its remote work proposal during the most recent contract negotiations, NAPE voluntarily waived its right to bargain on remote work and related issues, (T272), but the preponderance of the evidence showed that NAPE withdrew its remote work proposal not because it intended to waive its right to bargain over remote work and related issues, or as a specific quid pro quo for a "historic" "record-breaking" CBA, but because the state asserted that a provision on remote work was a "nonstarter." (T261). State law is clear that, when presented with a fait accompli because an employer has made its decision and will not negotiate, "a union is not required to go through the motions." *SEIU Loc. 226*, 286 Neb. at 768 (2013) (quoting *NLRB v. Solutia, Inc.*, 699 F.3d 50, 64 (1st Cir. 2012)).

Finally, it bears noting that the State cannot meet its burden to prove that NAPE's proposal to codify existing practices concerning remote work during contract negotiations in late 2022 was an intentional waiver of a right to bargain on a subsequent and unexpected change to the parties' past practice on remote work by eliminating such work completely. The relevant negotiations took place from August 2022 through January 2023. (T266). By that time, the EO to "return to normal" operations after the COVID-19 pandemic had already issued, with non-COVID-related remote work continuing as before the pandemic, (E503, pp.135–37, Vol. VI), and there is no evidence that NAPE had any knowledge that the State would implement sweeping changes eliminating remote work across the board. Indeed, no union was consulted during the development of the EO, (54:16–19, 65:9–11, Vol. I), and the CBA was executed well before the EO issued. (E1, p.3, Vol. III; T266).

For the foregoing reasons, the CIR's waiver finding is contrary to law, is not supported by a preponderance of the competent evidence on the record, and must be reversed.

II. Assignments of Error 8–13. The CIR's Extraordinary Award of Attorneys' Fees Should Be Vacated.

a. The CIR's award of fees is *ultra vires*.

Relying on its flawed findings that remote work was covered by the CBA and that NAPE waived its right to bargain over remote work, the CIR found that NAPE filed the Petition in bad faith and awarded attorney fees and costs to the State. This sanction is punitive, unprecedented, and exceeded the CIR's authority.

This Court has repeatedly held that attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow for such a recovery. *Rosse v. Rosse*, 244 Neb. 967, 975 (1994); *Henry v. Rockey*, 246 Neb. 398, 406 (1994).

The CIR has nevertheless implemented CIR Rule 42 to provide for a *Petitioner* to recover attorney fees in order to make themselves whole upon the finding that the *Petitioner* has been subjected to a prohibited practice, and this Court has cited to that Rule without reference to the above-cited precedent, albeit in the context of affirming a CIR determination not to award fees to a petitioning union. *Omaha Police Union, Loc. 101 v. City of Omaha*, 274 Neb. 70, 88 (2007). In its fee award here, the CIR pointed to the *City of Omaha* case as support for its general authority to award fees, even though there has been no reciprocal authority, CIR Rule, or course of procedure for a *Respondent* to obtain attorney fees in an action before the CIR.

Rule 42 is titled "Prohibited Practice Proceedings" and provides that "[r]elief under a prohibited practice petition may include, but is not limited to . . . [a] request for attorney's fees." Neb. Comm'n Indus. Rel. R. 42(B)(1).

> (a) Attorney's fees may be awarded as an appropriate remedy when the Commission finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party.
>
> (b) Attorney's fees are a remedy used to reimburse the injured party's costs caused by the *opposing party's* conduct. An award of fees shall be granted in an amount sufficient to make whole the injured party, and *shall not be construed as a sanction* against the opposing party.

Id. (emphasis added).

In construing this rule against NAPE, the CIR erred in multiple ways. The "opposing party" as referenced in Rule 42(B) is, by definition, the respondent—here, the State. As CIR Rule 3 provides, "'Respondent' shall mean the party against whom action or relief is prayed or who opposes the prayer of the petition." Neb. Comm'n Indus. Rel. R. 3. Responsive pleadings are governed by Rule 18 and may include "an answer in which the responding pleader shall assert every defense, objection, and claim in law and in fact available to it at the time of filing." Neb. Comm'n Indus. Rel. R. 18. Noticeably absent from Rule 18 is a provision for attorney fees. CIR precedent bears this out. The CIR has previously held that Rule 42 is for granting attorney fees when a prohibited practice has occurred because of "the employer's misconduct." *Fraternal Order of Police, Lodge No. 8 v. Douglas Cnty.*, 16 CIR 401, 2010 WL 452278, at *5 (2010). As the CIR grudgingly acknowledged here, "Petitioner's assertions that CIR Rule 42 has not been previously used as a basis for awarding attorneys fees to a Respondent may be true," (T295)—the reason for that is not because NAPE acted in peculiar bad faith, as CIR asserted and as our next section refutes, but because CIR did not have a properly promulgated Rule or uniform procedure on which to base such an award.

For the foregoing reasons, the CIR exceeded its authority when it awarded attorney fees against NAPE for filing and pursuing the Petition.

b. The facts of this case did not establish a willful pattern or practice of misconduct, or bad faith, by NAPE.

Even if this Court finds that, absent any explicit statutory authorization or uniform practice, the CIR somehow has the authority to interpret Rule 42 to go the additional step of sanctioning *petitioners*, the record does not support sanctions under the circumstances here. To support an award of fees under CIR Rule 42(B)(2)(a), the CIR has required that the party in violation has undertaken a pattern of repetitive, egregious, or willful prohibitive practices. *AFSCME Loc. No. 2468 v. Cnty. of Lancaster*, 17 CIR 254, 2012 WL 1613217, at *6 (2012) ("We did not find any evidence that Respondent has been willfully refusing to bargain with Petitioner. Therefore, we do not award attorney fees in the instant case."). Such an award is reserved for cases where the employer's misconduct was flagrant, aggravated, persistent, and pervasive. *Fraternal Order of Police*, 16 CIR 401, 2010 WL 452278, at *5 ("As to the request for attorney fees, we find that the evidence does not establish a willful pattern or practice of violation of behalf of the Respondents."). Plainly, attorney fee awards are meant to be reserved for extreme cases. *NAPE v. State of Nebraska*, No. 1442, 2018 WL 11633354, at *8 (C.I.R. Apr. 12, 2018) ("[W]hile the [respondent] bargained in bad faith, the evidence does not show a willful pattern or practice of such behavior.")

This is not such an extreme case. In fact, the CIR itself found the petition here sufficient to order the maintenance of the status quo, and in so doing rejected essentially the same arguments the State advanced subsequently and that a differently composed panel of the CIR ultimately found persuasive. The CIR apparently feels that, in response to 1) the implementation of an order adversely affecting State employees economically and eliminating an established past practice, 2) about which many represented employees complained and raised

legitimate questions concerning how their compliance would be effectuated, and 3) after attaining an order from the CIR to maintain the status quo, NAPE should have abandoned the prohibited practice petition and acquiesced in the State's unilateral action and refusal to bargain about the implementation of the elimination of remote work. Not to put too fine a point on it, but had NAPE followed the CIR's preferred path it would not have fulfilled its statutory duty to fairly represent Nebraska public employees. *See* Neb. Rev. Stat. § 48-824(3).

The only evidence to which the CIR points in support of its finding that NAPE acted in bad faith in pursuing the prohibited practice petition are two communications describing the litigation and seeking additional membership support. Rather than bad faith, these innocuous communications are in line with similar communications from interest groups across the political spectrum who engage in litigation to advance their interests and publicize their actions in the hope of obtaining monetary support. *See, e.g.*, The Right to Work Legal Defense Fund, https://www.nrtw.org/blog/ (detailing recent litigation on webpage with "Make A Donation"); Sierra Club Foundation, https://www.sierraclubfoundation.org/environmental-law-program (describing environmental law "litigation advocacy" on same webpage as "DONATE NOW" link).

Penalizing organizations for highlighting litigation activities in membership recruitment materials would have a pernicious chilling effect on the activities of interest groups across the political spectrum, and implicate the right to petition the government for redress of grievances protected by the First Amendment to the U.S. Constitution and Article I, Section 19 of the Nebraska Constitution. Such chilling effects are particularly worrisome for NAPE and the public employees it represents, who are prohibited by law from striking and required to seek relief through the CIR for resolution of their workplace disputes.

There are limits, of course, on petitioning activity to protect against sham lawsuits that are both "objectively baseless" *and* "motivated by bad faith." *ACI Worldwide Corp. v. Baldwin Hackett &*

Meeks, Inc., 296 Neb. 818, 861 (2017) (applying the *Noerr-Pennington* doctrine). Those limits are not approached here. NAPE had a reasonable expectation of success on the merits—the CIR's own status quo order supports that proposition—and the relied upon evidence of "bad faith" falls woefully short. NAPE was entirely within its rights to petition the CIR to review the State's actions, especially given the hundreds of State employees who raised concerns in direct response to implementation of the EO, the established past practice with respect to remote work, and the adverse economic effects on numerous employees NAPE represented. Under these circumstances, this Court should reverse the CIR's attorneys' fees and costs award.

CONCLUSION

For the reasons set forth above, the Court should reverse the CIR's orders dismissing the petition and awarding attorneys' fees, and remand the matter to the CIR with directions to vacate the attorneys' fees decision and to order the State to negotiate with NAPE regarding changes to the terms and conditions of employment related to remote work.

Dated: April 14, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned certified that the foregoing Brief of Appellant complies with Neb. Ct. R. App. P. § 2-103. It was generated on Microsoft Word Version 2503 and contains 10,692 words in Century 12 pt. font.

/s/Abby Osborn

Certificate of Service

I hereby certify that on Monday, April 14, 2025 I provided a true and correct copy of this *Brf of Appt NE Assoc of Public Employees* to the following:

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