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EMPLOYEES UNITED LABOR ASSOCIATION, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

816 N.W.2d 721

Filed July 13, 2012. Nos. S-11-712, S-12-121.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission 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 commission 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.
2. **Contracts: Labor and Labor Relations.** Generally, when terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision, even when that provision is contained in an expired contract.

Appeals from the Commission of Industrial Relations. Affirmed in part, and in part reversed and vacated.

Donald W. Kleine, Douglas County Attorney, and Diane M. Carlson for appellant.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In these consolidated appeals, the Commission of Industrial Relations (CIR) determined that Douglas County, Nebraska, committed a prohibited labor practice when it increased union members' monthly health insurance premiums without negotiating. Douglas County appeals, contending that the parties' collective bargaining agreement (CBA) authorized its unilateral action and that its action did not change the status quo. We affirm in part, and in part reverse and vacate.

FACTS

Douglas County and Employees United Labor Association (EULA) entered into a CBA effective January 1, 2009, through December 31, 2010. Article 12 of the CBA is entitled "Insurance and Pension Benefits" and provides in relevant part:

> **Section 1.** The County will publish a rate sheet to the employees that will show the premium equivalencies for medical and dental insurance costs. Such rate sheet shall also show the dollar contribution for each plan for the County and the employee according to the following:
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> 1. The County will pay 95% of the premium for each employee who has employee-only coverage under the County's medical insurance plan, and the employee shall pay the remaining 5%.
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> 2. The County will pay 77% of the premium for each employee who has employee plus one coverage under the County medical insurance plan, and the employee shall pay the remaining 23%.
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> 3. The County will pay 80% of the premium for each employee who has employee plus two or more coverage under the County medical insurance plan and the employee shall pay the remaining 20%.
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> . . . .
>
> The County reserves the right to select the method by which health insurance benefits are provided. In the event that health insurance benefits are not provided through an HMO and/or indemnity plan the County/employee contribution rates are subject to renegotiation.

The health insurance premiums are set annually. The CBA does not contain a continuation clause.

No increases were made in the health insurance premium rates for the 2010 calendar year. But on November 16, 2010, Douglas County sent a memorandum to EULA members with an attached health insurance premium rate sheet effective January 1, 2011. This rate sheet showed increases in the overall premium costs for all EULA members for calendar year 2011. The increases were based on the percentage of contribution allocations in the CBA. No changes were made to the health insurance coverage other than the increased premiums. The

November 16 memorandum stated that Douglas County was "pass[ing] along to the employees" "the increased premium cost for 2011" "as specified in the [CBA]." Douglas County began deducting the increased premium costs from employee paychecks in December 2010. Douglas County did not negotiate the increase in premiums with EULA.

On January 3, 2011, EULA filed a prohibited labor practice action alleging that Douglas County unilaterally changed the health insurance benefits of certain of its members without first negotiating. The CIR conducted an evidentiary hearing on the petition in April, and on July 25, the CIR held that in passing on the increase in premiums without first negotiating, Douglas County committed a prohibited labor practice in violation of the Industrial Relations Act.[1] The CIR reasoned Douglas County had a duty to bargain over the change as a mandatory subject of bargaining and ordered Douglas County to negotiate the issue. As a remedy, the CIR required Douglas County to reimburse EULA members for the amount of increased premiums they had paid, plus interest. Douglas County timely appealed, and the case is docketed before us as case No. S-11-712.

Meanwhile, on May 2, 2011, EULA filed three additional petitions alleging that Douglas County also unilaterally changed the health insurance benefits of certain other EULA members. These petitions were consolidated before the CIR. In November, a telephonic hearing was conducted and the parties stipulated that the record and exhibits received by the CIR in case No. S-11-712 should also be received in the pending case. On January 12, 2012, the CIR again held that Douglas County committed a prohibited labor practice by passing on the premium increase without bargaining and ordered Douglas County to negotiate the issue and reimburse EULA members for the amount of increased premiums they had paid, plus interest. Douglas County timely appealed, and the case is docketed before us as case No. S-12-121. We granted Douglas County's motion to consolidate the two appeals.

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[1] Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2010).

ASSIGNMENTS OF ERROR

Douglas County assigns in both appeals that the CIR erred in (1) finding it committed a prohibited labor practice when it passed on a portion of the increased cost of the health insurance plan to the employees; (2) not giving full force and effect to the plain language of the CBA, which unequivocally defined the parties' rights regarding how health insurance premiums were to be shared; and (3) concluding that the health insurance contribution percentages expired when the CBA expired.

In a cross-appeal, EULA contends the CIR erred in failing to award it attorney fees.

STANDARD OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by the 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.[2]

ANALYSIS

The Legislature has declared that the continuous, uninterrupted, and proper functioning and operation of state government is essential to the welfare, health, and safety of the people of Nebraska.[3] As part of this policy, it is a "prohibited practice" for any state government employer to refuse to negotiate in good faith with employee union representatives on mandatory topics of bargaining.[4] This principle applies

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[2] *Board of Trustees v. State College Ed. Assn.*, 280 Neb. 477, 787 N.W.2d 246 (2010); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[3] § 48-802.

[4] See § 48-824(1).

before, during, and after the expiration of a collective bargaining agreement.[5]

Here, Douglas County is the governmental entity and EULA is the union representing certain employees of Douglas County. The parties agree that health insurance, including health insurance premiums, is a mandatory topic of bargaining.[6] They further agree that Douglas County refused to negotiate with EULA prior to passing on the increase in health insurance premiums. Under these circumstances, Douglas County's actions would normally be a per se violation of the duty to bargain in good faith on mandatory topics of bargaining.[7]

But Douglas County contends it did not commit a prohibited practice under the facts of these cases because (1) the health insurance premium issue is "covered by" the existing language of article 12 of the parties' CBA and (2) the increased premiums did not change the status quo.[8] In addressing these arguments, we may look to decisions of the National Labor Relations Board for guidance, although its decisions are not binding on this court.[9]

Contractual Language

Douglas County's primary argument is that it had no duty to bargain prior to passing on the increase in health insurance premiums, because the parties had already bargained the issue. Specifically, it contends that "the topic of premiums has

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[5] *Washington County Police Officers Association/F.O.P. Lodge 36 v. County of Washington, State of Nebraska*, No. 1247, 2011 WL 2286982 (C.I.R. May 31, 2011).

[6] See, e.g., *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 805 N.W.2d 320 (2011); *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994).

[7] See, *IBEW Local 763 v. Omaha Pub. Power Dist.*, 280 Neb. 889, 791 N.W.2d 310 (2010); *FOP Lodge 41 v. County of Scotts Bluff*, 13 C.I.R. 270 (2000).

[8] Reply brief for appellant at 3.

[9] See *Scottsbluff Police Off. Assn.*, *supra* note 6. See, also, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

already been negotiated and the result of that negotiation is specifically memorialized in [article 12 of] the CBA."[10]

We assume without deciding that the language of article 12 authorized Douglas County to unilaterally pass on a percentage of the increase in health insurance premiums during the term of the CBA. But that is not the circumstance before us. Here, Douglas County increased EULA members' health insurance premiums effective January 2011, after the CBA had expired. Although Douglas County repeatedly asserts in its brief that the parties agreed to abide by the terms of the CBA until a new one was negotiated, no evidence in the record supports a finding that the actual CBA remained in effect after December 31, 2010. Indeed, Douglas County's primary witness testified that the contract with EULA expired on December 31, 2010, and that the parties were "not under any existing contract" at the time of trial. The CBA had no continuation clause, and on the record before us, we conclude that it had expired before Douglas County implemented the increase in EULA members' health insurance premiums.

Because the CBA had expired, Douglas County's argument that it had no duty to bargain on the issue of health insurance premiums because the parties' bargain was memorialized in the CBA is without merit.[11] Instead, upon expiration of the CBA, either Douglas County or EULA could demand bargaining on any mandatory subject, including health insurance benefits, whether or not that subject was addressed in the previous agreement.[12] EULA effectively requested bargaining on the health insurance premiums when it asserted Douglas County improperly passed on the increases to its members, and it is clear from the record that Douglas County refused to bargain the issue. The CIR did not err in finding that Douglas County committed a prohibited labor practice and in ordering Douglas County to commence negotiations.

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[10] Reply brief for appellant at 4.

[11] See 1 N. Peter Lareau, Labor and Employment Law § 12.04[9][b] (2010).

[12] *Id.*

Status Quo

Douglas County also contends that it did not commit a prohibited practice because its action in passing on the premium increases pursuant to the percentage allocations in the CBA did not change the status quo. To support this argument, it contends that even though the CBA expired, legally, its terms continue in effect until a new agreement is reached. According to Douglas County, because the increase was implemented pursuant to the continuing contractual terms, there was no change in the status quo, and thus it had no duty to bargain on the issue.

The CIR has broadly held that "parties to a collective bargaining agreement continue it in effect beyond its expiration date until" a new agreement has been reached.[13] A more precise recitation of the rule is that once a CBA expires, the parties' obligations to one another are governed by the doctrine of maintaining the status quo while they continue to negotiate a successor agreement.[14] And the principle of maintaining the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired.[15]

But, contrary to the argument advanced by Douglas County, this does not mean that the expired CBA continues in effect. Rather, it means that the conditions under which the employees worked endure throughout the collective bargaining process.[16] Here, the CBA expired, and although its terms and conditions of employment continue in effect as a temporary means of

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[13] *Locals 601 et al. v. State of Nebraska Department of Public Institutions*, 6 C.I.R. 78, 80 (1982).

[14] *Appeal of Alton School Dist.*, 140 N.H. 303, 666 A.2d 937 (1995). See, *Intermountain Rural Elec. Ass'n v. N.L.R.B.*, 984 F.2d 1562 (10th Cir. 1993); *N.L.R.B. v. Southwest Sec. Equipment Corp.*, 736 F.2d 1332 (9th Cir. 1984); *R.E.C. Corp.*, 296 N.L.R.B. 1293 (1989); *Police Benev. Ass'n v. Orange County*, 67 So. 3d 400 (Fla. 2011); *Hill v. J.C. Penney, Inc.*, 70 Wash. App. 225, 852 P.2d 1111 (1993); *San Joaquin Cy. Emp. Ass'n v. City of Stockton*, 161 Cal. App. 3d 813, 207 Cal. Rptr. 876 (1984).

[15] *Id.*

[16] See *id.*

governing the parties' relationship during the period of renegotiations, Douglas County was not excused from its obligation to bargain for a successor agreement. The CIR properly found that Douglas County committed a prohibited practice when it refused to bargain on the issue of health insurance premium increases after the expiration of the CBA.

But we do find that Douglas County's argument that the percentage allocation of health insurance premiums in the CBA is the status quo is relevant to the remedy imposed by the CIR in these appeals. As noted, the CIR ordered Douglas County to both bargain the issue of health insurance and reimburse EULA members the amount of the increase in premiums, plus interest. The reimbursement was based on the CIR's implicit determination that the term or condition of employment surviving the expiration of the CBA was the amount EULA members were paying for health insurance premiums when the CBA expired.

[2] Generally, when terms or conditions of employment are in a contractual provision, the status quo is determined by reference to the precise wording of the relevant contractual provision, even when that provision is contained in an expired contract.[17] Here, the relevant contractual provision was contained in article 12 of the CBA, which set the percentages each party would pay for health insurance premiums. This provision unequivocally expressed the obligations of both Douglas County and EULA members. There is no other reasonable interpretation of the CBA, and thus the term or condition of employment that continued in effect after expiration of the CBA was the percentage allocations set forth in the CBA.[18] Therefore, Douglas County properly paid only its fixed percentage of the increased premiums, and EULA members were to continue to pay their fixed percentage as well, even when the

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[17] *Police Benev. Ass'n, supra* note 14. See, *Intermountain Rural Elec. Ass'n, supra* note 14; *San Joaquin Cy. Emp. Ass'n, supra* note 14.

[18] See, generally, *Intermountain Rural Elec. Ass'n, supra* note 14 (holding contract language setting precise percentage amounts of health insurance premiums established status quo).

premiums increased. We conclude the CIR erred when it found the status quo was the amount of health insurance premiums EULA members were paying at the time the CBA expired. We reverse and vacate that portion of the order requiring Douglas County to reimburse EULA members for the increased health insurance premiums.

Attorney Fees

In a cross-appeal, EULA alleges the CIR erred when it failed to award it attorney fees. This assignment of error is limited to case No. S-11-712, because no attorney fees were requested in case No. S-12-121.

The CIR has the power and authority to make such findings and to enter such temporary or permanent orders that it may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in § 48-802, and to resolve the dispute.[19] CIR rule 42(B)(2)(a) provides that "[a]ttorney's fees may be awarded as an appropriate remedy when the [CIR] finds a pattern of repetitive, egregious, or willful prohibited conduct by the opposing party."[20]

In refusing to award attorney fees, the CIR found that Douglas County's conduct "borders on the line between repetitive misconduct and overtly creative contract interpretation" but found "no direct evidence in the record of repetitive, egregious, or willful conduct." It also found no evidence that Douglas County "willfully" refused to bargain, but reasoned that it instead mistakenly believed that it was not required to bargain.

EULA argues that CIR precedent demonstrates Douglas County's persistent practice of bargaining in bad faith over health insurance. It notes that the day after the CIR issued the decision in this case, it found in another case an "emerging pattern of Douglas County and its refusal to negotiate over

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[19] § 48-819.01.

[20] See Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2008).

mandatory subjects of bargaining."[21] EULA further argues that on August 18, 2011, the CIR awarded attorney fees against Douglas County based on its pattern of past practice in refusing to negotiate.[22] Essentially, EULA contends the CIR should have recognized the pattern earlier and issued attorney fees in this case as well.

The record fully supports the CIR's decision not to award attorney fees in this case, and we affirm the denial of attorney fees.

CONCLUSION

Health insurance premiums are a mandatory subject of bargaining, and Douglas County therefore had a duty to bargain on the issue. It cannot rely on the terms of the expired CBA to excuse it from this duty, but the percentage allocation formula of the expired CBA constitutes the status quo after the CBA expired and governs the parties' obligations until a successor agreement is reached. We affirm (1) the CIR's determination that Douglas County committed a prohibited labor practice in failing to negotiate health insurance premium increases effective January 1, 2011, and (2) the CIR's decision not to award attorney fees. But we reverse and vacate those portions of the CIR's orders requiring Douglas County to reimburse EULA members for increased insurance premiums deducted from their wages, plus interest.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

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[21] *International Brotherhood of Electrical Workers Local 1483 v. Douglas County, Nebraska*, No. 1245, 2011 WL 3487525 at *5 (C.I.R. July 26, 2011).

[22] See *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, *ante* p. 109, 817 N.W.2d 250 (2012).