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RE: HF No. 5U, 2021/22 – IBEW Local 426 v. City of Madison

Greetings:

This matter comes before the Department of Labor based on an unfair labor practice complaints filed by Petitioners, IBEW Local 426, pursuant to SDCL 3-18-3.1, -3.2, -3.3, and -3.4 and ARSD 47:02:03:04. Jay M. Smith of Smith & McElwain and Nicole Mahning of Cutler Law Firm represented IBEW Local 426 (IBEW). David Jencks represented the City of Madison (City). A hearing was held before Administrative Law Michelle M. Faw on April 5, 2022, in Madison, South Dakota.

The issue presented at the hearing was whether the City of Madison engaged in good faith bargaining when it refused to bargain over the removal of a position in the bargaining unit.

Background:

IBEW and the City were parties to a collective bargaining agreement (Agreement), which was effective by its terms from January 1, 2020, through December 31, 2021. The Agreement required either party to provide written notice to the other

party requesting that the Agreement either be amended or canceled no later than August 1. If neither party provided written notice of its intent to amend or cancel, the Agreement would continue in full force and effect.

Article I of the Agreement recognizes IBEW as the sole and exclusive bargaining representative for all employees covered by the Agreement. Article I, Section 4 provides:

There is attached hereto and made a part of hereof Schedule “A” which lists the position titles and rates of pay for each position by this Agreement.

Article III, provides the “Management Rights” clause of the contract.

Section 1: The customary functions of the management for the carrying on of the business and operations are recognized and vested exclusively in the Employer. Such customary rights include the control and regulation of usages of its machinery, equipment, and other property; the determination of the number, location, and continuance of use of its plants and offices; the subletting of work; the direction and control of its work force as to size and composition and assignment of employees; to make all changes, rules, policies, and practices; to hire, promote, retire, demote, transfer, layoff and recall employees to work; to determine the work schedules as to hours and shifts to be worked; to reprimand, suspend, discharge or otherwise discipline employees for just cause and otherwise generally manage the Employer direct workforce and established terms and conditions of employment.

Section 2: Such right and power shall not be exercised arbitrarily or unfairly to any employee and shall not be exercised so as to violate any provisions of this contract. No rule, procedure or practice of the management shall be contrary to any provision of this contract.

Kory Rawstern (Rawstern) is the Business Manager and Financial Secretary for IBEW.

On July 27, 2021, Rawstern sent a letter to Marshall Dennert (Dennert), the City’s Mayor, copying Kristin Olson (Olson), the City’s Human Resources Director, opening the Agreement for negotiation. The letter included IBEW’s initial proposals.

On August 26, 2021, Rawstern emailed Olson inquiring as to when the parties would be able to meet to negotiate. Olson responded that she did not have a date. Rawstern replied to let Olson know that IBEW was available between September 13 and 17, 2021, except for September 16. On August 29, Olson responded that September 17 worked for the City.

On August 31, 2021, Jameson Berreth (Berreth), the City's City Administrator, emailed Rawstern informing him that the City intended to create an electric superintendent position, which would replace the Electric Utility Supervisor position, and be outside the bargaining unit. On September 2, 2021, Rawstern responded by email that the parties would need to address that change in negotiations.

On September 17, 2021, the parties met at City Hall in Madison at 10:00 a.m. for a bargaining session. Rawstern, Dennis Klein (Klein), and Jason Limmer were present for IBEW. Berreth and Olson represented the City. During the session, Rawstern went through IBEW's initial proposals in its letter to the City. The City responded to IBEW proposals but did not offer any counters or new proposals. The City did not propose to eliminate the Electric Utility Supervisor position from the bargaining unit. The session lasted less than an hour, and at the end, Berreth told IBEW he would take the proposals to the City Council and bring the response to the next bargaining session.

On October 14, 2021, Rawstern emailed Olson asking whether the City wanted to continue negotiations. The parties agreed by email to meet on October 22, 2021 at 2:30 p.m. For the October 22, 2021 session, Rawstern, Klein and Roy Brown represented IBEW. Berreth and Olson represented the City. The City responded to

IBEW's initial bargaining proposals and provide three new proposals related to holidays provided under the Agreement, the duration of the Agreement, and the make-up of the insurance committee provided for in the Agreement.

The City did not propose to eliminate the Electric Utility Supervisor position from the bargaining unit, but Rawstern did raise the issues. Rawstern stated that the City could hire as many people as it wanted, but the issue involved whether employees outside of the bargaining unit could perform bargaining unit work. He also asserted that if the City wished to remove a position from the bargaining unit, the City was required to negotiate the change with IBEW. The City responded that it wanted the position removed. The sessions lasted about an hour. The parties agreed to meet again on November 5, 2021, at 3:30 p.m.

After the October 22, 2021 session, Berreth sent an email to Rawstern and Klein asking that they provided legal authority to support IBEW's position that the City did not have the right to determine who may complete work on the electric infrastructure. Berreth stated that if the parties could not come to an agreement, the City was happy to take the matter to arbitration or other litigation. Rawstern did not respond to Berreth's email.

On November 5, 2021, the same individuals that met on October 22, 2021, met again. IBEW provided responses to the City's last proposals. IBEW agreed to withdraw its proposal related to Article XVI, as well as the City's counterproposal regarding Working Rules, and the City's proposal related to changes to holidays. The parties also

made and responded to proposals at the meeting. IBEW raised the matter of the proposed elimination of the Electric Utility Supervisor position from the bargaining unit. Rawstern again stated that the proposed position could not perform bargaining unit work. The session lasted approximately forty-five minutes. Berreth commented that he did not see the need for another bargaining session. However, on November 17, 2021, Olson emailed IBEW to set up a meeting for the following week. By email, the parties agreed to meet on November 19, 2021, at 9:00 a.m.

On November 19, 2021, Rawstern, Klein, and two bargaining unit members represented IBEW. Berreth and Olson represented the City. The parties reviewed open proposals and reviewed their positions. The parties did not discuss the Electric Utility Supervisor position. The sessions lasted a little over an hour. The parties agreed to meet on November 29, 2021, at 9:00 a.m.

On November 22, 2021, Berreth spoke to the City Commission. Following the conversation, Berreth emailed Rawstern telling him that the City had no further movement regarding outstanding issues and the City was providing IBEW with its Last, Best, and Final Offer (Offer) which was attached to the email. The Offer did not include a proposal related to the elimination of the Electric Utility Supervisor position. Rawstern responded that in light of the Offer, he did not see a need to meet again, and the Offer would be taken to IBEW's membership for a vote. The membership approved the Offer.

On December 2, 2021, Rawstern emailed Berreth an email including the redline version of the changes to the Offer. On December 9, 2021, Berreth responded raising

four issues with the redline version including that, “The Electric Utility Supervisor position should be deleted from Schedule A as the position no longer exists.” On December 14, 2021, Rawstern replied agreeing to two of the four changes identified in the email but stating that “The City did not negotiate the removal of the Electric Utility Supervisor position, so it stays.”

On December 15, 2021, Berreth emailed back stating that the parties appeared to be at an impasse regarding two issues, and he attached a written statement declaring impasse and an intent to consult with the City’s legal counsel. The written statement provided the following:

2) Removal of the Electric Utility Supervisor position from Schedule A. The City maintains its inherent managerial right to create or remove positions and that such action is not a mandatory item of negotiation. Further, the City maintains that the position in question no longer exists at the City and it holds no intention to recreate or fill the position. IBEW maintains that the City needs to negotiate the removal of the Electric Utility Supervisor position.

The statement of impasse also included a copy of the Offer which did not contain a proposal to remove the Electric Utility Supervisor position from the Agreement. On December 23, 2021, Berreth emailed Rawstern stating that the City had requested conciliation, and the City would maintain current wage rates for employees and update benefits for bargaining unit employees.

On December 27, 2021, IBEW filed a Petition for Hearing on Unfair Labor Practice with the Department of Labor & Regulation (Department).

Analysis:

IBEW asserts that the City violated SDCL 3-18-3.1(5) when it failed to bargain regarding the removal of the Electric Utility Supervisor position from the Agreement.

SDCL 3-18-3.1 provides:

It shall be an unfair practice for a public employer to:

- (1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed by law;
- (2) Dominate, interfere, or assist in the formation or administration of any employee organization, or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
- (3) Discriminate in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter;
- (5) Refuse to negotiate collectively in good faith with a formal representative; and
- (6) Fail or refuse to comply with any provision of this chapter.

As Petitioner, the IBEW has the burden of proof in this case. *Rininger v. Bennett County School District*, 468 NW2d 423 (SD 1991).

IBEW asserts that bargaining regarding the removal of the electric supervisor position is required pursuant to the South Dakota Supreme Court (Court) decision, *Rapid City Ed. Assoc. v Rapid City Area School Dist. # 51-4*, 376 N.W.2d 562, 564 (S.D. 1985). IBEW further asserts that the record does not support that the parties engaged in bargaining.

In *Rapid City Ed. Assoc.*, the Court provided a three-prong test to determine whether a particular subject falls within the scope of collective bargaining:

First, a subject is negotiable only if it “intimately and directly affect[s] the work and welfare of public employees....”

....

Second, an item is not negotiable if it has been preempted by statute or regulation....

Third, a topic that affects the work and welfare of public employees is negotiable only if it is a matter “on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

Id at 564 (Citations omitted).

The Court applied the *Rapid City* test in a case with a similar issue to the present matter, *Oberle v. City of Aberdeen*, 470 N.W.2d 238 (S.D.1991). In *Oberle*, the City of Aberdeen eliminated three captain positions by merging them into new deputy chief positions that were not part of the bargaining unit. The Circuit Court determined that the removal of the captain positions was a “reorganization within the scope of management prerogatives and not a mandatory subject of bargaining.” The Court found that the removal of the positions affected the welfare of those who were employed as captains and thus, met prong one of the *Rapid City* test. The Court also found that the issue of eliminating the positions was not preempted by statute or regulation and so the second prong was also met. Finally, the Court found that the subject would not significantly interfere with the City’s exercise of its inherent management prerogatives. Therefore, the termination of the positions was a mandatory subject of bargaining.

The City argues that the topic of the removal of the Electric Utility Supervisor position is not a mandatory subject of bargaining as it would significantly interfere with the exercise of the inherent management prerogatives and determination of City

governmental policy. Berreth testified at the hearing that, several years ago, the City brought in an outside company to conduct a study of all employee positions and create a step in grade scale. The company recommended that several positions become management and salary positions. As a result, the City changed the water collections distribution supervisor and the water treatment supervisor to superintendent positions. Later, in 2021, the City moved the parks supervisor position to a salaried superintendent position. The City asserts that making the supervisor positions into superintendent positions is an important part of the management of an efficient and functioning city government, and the inability to create and remove positions significantly interferes with the management prerogatives and determination of City policy.

The Court in *Oberle* concluded that a governmental entity's legitimate effort to reorganize was not a mandatory subject for bargaining, but if the intent was solely to remove bargaining unit work then it was a mandatory subject. *Id* at 244. The Court found that in *Oberle*, Aberdeen's motivation was prompted by its desire to remove the captain's duties from the bargaining unit. The City hired an outside company to make recommendations regarding the reorganization, thus there is no evidence that the City's intent with its reorganization was to remove the Electric Utility Supervisor duties from the bargaining unit. Additionally, the *Oberle* Court found guidance in a case from Michigan which held that "a decision to transfer work in pursuit of a legitimate reorganization effort was not a mandatory subject of bargaining, but the impact of that decision was an issue for bargaining." *Ishpeming Supervisory Employees' Chapter of Local 128 v City of Ishpeming*, 155 Mich. App. 501 (further citations omitted).

In this matter, the City asserts that the Agreement gives it the contractual right to manage and determine the composition and assignment of employees and the inability to remove the Electric Utility Supervisor positions interferes with that right. Article III, Section 1 of the Agreement pertains to Management Rights and grants the following rights to the City: (1) carry on and operate its business; (2) determine the direction and control of its workforce as to the size, composition, and assignment of employees; and (3) direct the workforce. Additionally, Article III, Section 2 expressly prohibits the City from exercising its rights arbitrarily or unfairly as to any employee so as to violate any provision of the contract and from establishing a rule, procedure, or practice that is contrary to any provision of the contract. Article 1, Section 4 provides Schedule A, a list of the positions covered by the Agreement, and the Electric Utility Supervisor position is included. Therefore, while Article III, Section 1 allows the City to assign employees and decide how many employees there will be, it does not give it the authority to remove the positions themselves from the Agreement or the bargaining unit. The City does not need to fill a position, but the position still exists in the Agreement. Further, the City has not provided an argument for the removal of the position beyond its assertion that it has the right to do so.

IBEW asserts that the *Rapid City* test should be applied in this matter. The Department agrees. First, the bargaining unit member who holds the Electric Utility Supervisor position has an interest in that position and its removal from the bargaining unit directly affects his or her work and welfare as well as the ability of IBEW to negotiate for better terms and conditions of employment for that position. Second, the

elimination of the Electric Utility Supervisor position is not preempted by statute or regulation. Finally, the Electric Utility Supervisor position does not affect the determination of governmental policy and thus, the negotiation of the position does not interfere with the exercise of inherent management prerogatives pertaining to the same. Therefore, the termination of the Electric Utility Supervisor position was a mandatory subject of bargaining and failing to do so would constitute an unfair labor practice pursuant to SDCL 3-18-3.1.

Whether the Parties bargained over the Electric Utility Supervisor position

As the above analysis has shown that the issue of removing the Electric Utility Supervisor position is a mandatory subject of bargaining, the Department must deduce whether good faith bargaining occurred. IBEW asserts that the City did not make a proposal regarding the elimination of the Electric Supervisor Position. The first time the issue was mentioned was by email on August 31, 2021. In the email, Berreth stated that the City “intends to create an Electric Superintendent position.” IBEW argues this was not an attempt to propose the elimination of the position, but instead, the statement of an intent to take unilateral action. Further, the union argues that informing IBEW of the City’s plan did not indicate an intent to negotiate the issue. Rawstern responded that the parties would need to address the City’s intended change in negotiations. IBEW also points to the fact that the City maintained its stance that it has an inherent managerial right to create positions as evidence that the City did not engage in good faith bargaining.

The City argues that it negotiated in good faith over the issue of the removal of the Electric Utility Supervisor position both in person and electronically. The City notified IBEW of its desire to make the position change in an email on August 31, 2021, to Rawstern. The City's negotiation notes for the September 17, 2021, meeting reflect that the issue was raised by IBEW. However, the notes further state that the City had asserted that it had an inherent managerial right to create positions and did not desire to discuss the item during negotiations. The notes reflect a similar outcome of the October 22, 2021, meeting. IBEW initiated discussion, and the City asserted its managerial authority. IBEW again brought it up on November 5, 2021, asserting that it was industry standard that supervisors could not perform work on the electric system. The City stated it could not change its position without new information.

The City further argues that IBEW had not sent any kind of written proposal or discussion regarding the removal of the Electric Utility Supervisor position until after the union voted on the Agreement. As a result, the City claims it did not know that the removal of the position was still an issue for IBEW until Berreth received an email from Rawstern stating, "The City did not negotiate the removal of the Electric Utility Supervisor position, so it stays." The City asserts it was open to meeting and discussing any topic.

The Department finds that the City did not engage in good faith bargaining. The Court has stated, "Although we have no explicit definition of the term 'negotiate collectively in good faith,' we interpret this requirement to mean that the parties must

seriously work to resolve differences and reach a common understanding.” *Bon Homme County Commission v. AFSCME, Local 1743A*, 699 N.W.2d 441, 448 (S.D. 2005).

The parties went back and forth in negotiations on multiple issues both verbally and in writing. However, according to the City’s own negotiation notes, the only times the issue of removing the Electric Utility Supervisor position was discussed was when IBEW raised the topic, and the City’s response was to assert that it had the right to make the change. The City’s assertion that it engaged in good faith bargaining on the subject is belied by the fact that the removal of the Electric Utility Supervisor position was not included in the City’s Last, Best, and Final Offer. The City claims that it was willing to discuss any topic but in this matter, a willingness to discuss has not translated into an effort to “seriously work to resolve differences and reach a common understanding.” *Id.* The record does not reflect that the City engaged in good faith bargaining on the issue.

IBEW has met its burden of proof in this matter showing that the City of Madison failed to engage in good faith bargaining when it refused to bargain over the removal of a position in the bargaining unit. It is hereby ORDERED, the City of Madison shall:

1. return to the bargaining table to propose its intention to remove the electric utility supervisor position to IBEW ;
2. meet with IBEW at reasonable times and places to engage in good faith bargaining regarding the effect of the removal of the position; and
3. provide representatives at those bargaining sessions who have the authority to enter into agreements with IBEW.

IBEW shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within twenty (20) days from the date this Decision is received. The City shall have twenty (20) days from the date of receipt of IBEW's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, IBEW shall submit such Stipulation along with an Order in accordance with this Decision.

Sincerely,

A handwritten signature in blue ink that reads "Michelle Faw". The signature is written in a cursive, flowing style.

Michelle M. Faw
Administrative Law Judge