

REPORT OF CASES APPEARING
BEFORE THE
**Commission of Industrial
Relations of the
State of Nebraska**

NEBRASKA
INDUSTRIAL
RELATIONS
COMMISSION

NOV 7

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IF COMMISSION
IS ISSUED

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COMMISSION OF INDUSTRIAL RELATIONS

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

REGINA DAVIS, DAWN RUSSELL-)	Case No. 1061
CUMMINGS, DANIELLE)	
MATTHEWS, TINA MEYERS,)	
DELORES SIMPSON, CHANTELLA	)	FINDINGS AND
WALLACE, JACK NELSON, and	)	ORDER
JOHNNIE MANN,)	
)	
Petitioners,)	
)	
v.)	
)	
FRATERNAL ORDER OF)	
POLICE LODGE NO. 8 OF)	
DOUGLAS COUNTY, NEBRASKA,)	
)	
Respondent.)	

Filed September 20, 2004

APPEARANCES:

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Before: Judges Orr, Blake, and Burger.

ORR, J:

NATURE OF THE PROCEEDINGS:

Regina Davis, Dawn Russell-Cummings, Danielle Matthews, Tina Meyers [sic], Delores [sic] Simpson, Chantella Wallace, Johnnie Mann and Jack Nelson, (hereinafter, "Petitioners") filed a Petition on October 31, 2003 pursuant to NEB. REV. STAT. § 48-824, claiming that the Fraternal Order of Police Lodge No. 8 of Douglas County (hereinafter

“Respondent”) committed various prohibited practices. Petitioners seek a cease and desist order directed to the officers of the Respondent ordering them not to engage in prohibited practices, an order directing the officers of the Respondent to post a notice directed to the correction officers promising not to commit the prohibited practices, suitable attorney fees to Petitioners’ attorneys, complete books and records of the Respondent to be opened to the Petitioners for an inspection and audit, and a requirement that the Union leadership fully disclose to all members of the bargaining unit the terms and conditions of their demands to Douglas County and the progress of all bargaining discussions.

Respondent filed an Answer on November 20, 2003, denying the Petitioners’ allegations and claiming that the Commission lacked subject matter jurisdiction to hear the case, that the Petitioners failed to comply with the applicable statute of limitations under NEB. REV. STAT. § 48-825(1) and that the Commission is without jurisdiction to enter some of the relief requested by the Petitioners.

The Commission of Industrial Relations (hereinafter, the “Commission”) conducted a Preliminary Proceeding on January 12, 2004, and held a Pretrial Conference on April 19, 2004. At the Pretrial Conference, the parties agreed to the following issues to be presented at trial:

A. Petitioners alleged the following issues:

1. Petitioners allege several controversies concerning the refusal of the Respondent to fairly represent the Petitioners in the negotiations of the collective bargaining agreement governing the terms and conditions of their collective employment as well as in matters of discipline and grievances which involve minority members of the bargaining unit.

2. The Petitioners allege that the Respondent, through its officers and directors, have engaged in a prohibited practice in violation of NEB. REV. STAT. § 48-824 as follows:

a. By refusing to fairly bargain with the employer, Douglas County, in the matter of rule changes, with respect to:

(i) the use of only female guards to supervise female prisoners,

(ii) the subsequent denial of the normal seniority rights of female guards in the matters of bids for work shifts, vaca-

tion, forced overtime and similar matters,

(iii) adequate relief for female guards so they can obtain timely relief to address various sanitary needs;

b. By actively opposing and harassing female Petitioners in their efforts to obtain equal working conditions and opposing any attempt to secure changes in the terms and conditions of their employment;

c. In refusing to represent, and in fact using the resources of the Respondent to oppose, the Petitioners' efforts to obtain equal terms and conditions of employment in lobbying efforts before the Nebraska Legislature and Douglas County;

d. In failing and refusing to advocate for female and minority members of the bargaining unit who are confronted with grievances and disciplinary matters. The Respondent thereby discouraged membership in the union by minorities and females. The Respondent then demands financially prohibitive retroactive dues payments by former union members to discourage reinstatement and changes in Union leadership and policy.

3. The Petitioner, Jack Nelson, alleges that the Respondent engaged in a prohibited practice by denying to minority members of the bargaining unit representation in disciplinary matters. In one incident, after the Respondent refused to assist in the disciplinary hearing, Petitioner Jack Nelson as an individual successfully represented the minority employee. The Respondent, in retaliation, then removed him from the office of union steward as punishment for representing the employee.

4. That the Respondent has failed and refused to make adequate disclosure to members of the bargaining unit of its initial demands and progress in contract negotiations with Douglas County. That the Respondent has a history of disclosing nothing of substance to the members of the unit until just before the vote of the members on the contract, thereby restricting the rights of individual members to understand and comment on contract proposals.

5. That the acts of the Respondent are ongoing and continue within the six months immediately preceding the filing of this Petition.

6. The Petitioners further allege on information and belief that improper and unauthorized expenditures are being made from Respondent funds.

B. Respondent alleges the following issues:

1. Whether any of the Petitioners' issues under NEB. REV. STAT. § 48-825 (1) fall beyond the statute of limitations.

2. Whether the Commission lacks subject matter jurisdiction over the claims of the Petitioners as alleged in paragraphs 5(2), 5(3), 5(4), 6, 7, and 9 in the Petition and therefore those allegations ought to be dismissed.

A Trial on the above listed issues was held on Tuesday, April 27, 2004, Wednesday, April 28, 2004, and Thursday, April 29, 2004. At Trial, the Petitioners did not present any evidence on behalf of Danielle Matthews or Johnnie Mann. Accordingly, pursuant to Respondent's Motion to Dismiss raised at the close of the Petitioners' evidence, both Danielle Matthews and Johnnie Mann were dismissed as Petitioners and Issues A2c, A4, and A6 were dismissed as well.

As discussed below, the Commission finds that it has jurisdiction on Respondent's issue B2 and that the Petitioners' allegations are not prohibited by any expiration of the statute of limitations under Respondent's issue B2 and Petitioners' issue A5. The Commission finds that the Respondent failed to meet its duty of fair representation with regard to issues A1 and A2a as listed above. However, with regard to issues A2b, A2d and A3, the evidence presented at trial does not support the Petitioners' allegation that the Respondent failed to properly meet its duty of fair representation with regard to those issues as a prohibited practice defined under NEB. REV. STAT. § 48-824.

FACTS:

Petitioners are all employees at the Douglas County Correction Center located in Omaha, Nebraska. The Petitioners' job positions are all included in one bargaining unit. These job positions include Corrections Officer I, Corrections Officer II, Corrections Officer III, Corrections Officer IV, Control Room Operators, and the Classification Department employees, excluding all part-time, seasonal and temporary employees. This bargaining unit is represented by the certified bargaining representative Fraternal Order of Police Lodge No. 8 of Douglas County, or the Respondent in these proceedings, and out of the estimated 270 to 300

employees in the bargaining unit approximately 225 are members of the union.

The Petition in this case alleges multiple levels of conduct on the part of the Respondent, which allegedly violate NEB. REV. STAT. § 48-824. Petitioners testified throughout the three-day trial that multiple issues exist between them and Douglas County, but the Respondent, despite numerous requests on the Petitioners' part, has refused to present those issues to Douglas County. One of the issues is the Petitioners' allegation that the lack of representation to the County occurs because of the Petitioners' race and/or gender. This allegation includes the Union's position to solely use female guards to guard female prisoners, the Union's position to not promote the seniority rights of the female Petitioners, the Union's stance on not advocating for relief of the sanitary needs of the female guards, and the Union's position on refusing to actively lobby the Legislature for a change in the NEB. REV. STAT. § 47-111 (1998), which provides:

In every county jail where there is a female prisoner, twenty-four-hour supervision shall be provided by a matron appointed by the county board, whose duty it shall be to have entire charge of the female prisoners, and the board may also in its discretion appoint such matron where there is a sick prisoner or one that is a minor under the age of sixteen. Such matrons shall be under the direction of the sheriff or such other person as may be charged with the administrative direction of the jail, shall take the necessary oath before entering upon the duties of the office, and shall be paid by the board from the county treasury only for the time actually engaged; *Provided*, that in counties having a population in excess of two hundred thousand inhabitants, a deputy or correctional officer shall be hired by the person whose duty it shall be to have charge of the female prisoners and perform those functions required of a deputy related to such duty, at a salary of not less than five hundred dollars per month, which salary shall be drawn out of the county treasury. Such matron, deputy or correctional officer shall, when required, report to the board or district judges.

The Petitioners also testified that these issues also include the active retaliation by the Respondent against the Petitioners who represent minority employees in grievance hearings, the Union's failure to solicit views of all members of the bargaining unit in contract negotiation, the refusal by the Union to communicate information on issues in the nego-

tiation process, and finally the Respondent's alleged active discrimination against minority and female members of the bargaining unit.

Most of the testimony at trial surrounded the issues regarding the Union's current and continuing interpretation of § 47-111 and all of the issues that are subsequent to the active implementation of that statute at the Douglas County Correctional Center. The Douglas County Correctional Center is composed of three female modules, F, G, and H. There are more male modules than female modules. A meeting to change the § 47-111 statute occurred on January 9, 2003 between the Respondent and the Douglas County administration, specifically Chief Deputy Ann O'Connor. This meeting resulted in a memo from Chief Deputy O'Connor, on January 29, 2004 in which she stated that the Respondent was and remains "adamantly" opposed to the attempted change in the state statute orchestrated by Douglas County administration. Furthermore, testimony throughout trial also supported Ms. O'Connor's memo. Also in the January 9th meeting, the Respondent further explained to the administration of Douglas County that they "will do whatever they can" to make sure that a change in the state statute does not occur.

The Petitioners opened their testimony with a former employee of the Douglas County Correction Center, Art Marr. Art Marr was employed by the county from May of 1990 to October of 1998. He was president of the F.O.P. Lodge No. 8 between 1995 and 1996. At the end of 1996, Mr. Marr was offered a position as the administrative assistant to Warden Larry Johnson in charge of security and logistics. He accepted the position and became a member of the administration and was no longer a member of the union. As president of the union between 1995 and 1996 Mr. Marr had meetings with administration as well as during his time as an administrative assistant in 1997 and 1998. These meetings usually occurred once a week on Friday afternoons. Mr. Marr claims that during these meetings the union and the administration discussed targeting black males. Mr. Marr allegedly helped the union and the administration target black officers through the inmate phone system in the jail by tapping their phone conversations with outside individuals. Furthermore, right before he left the union as president, Art Marr testified that he was asked by Christina Lustgarten, County Attorney assigned to the Corrections Department, and Bill McPhillips, who was the Chief Deputy Warden during part of Art Marr's employment, to do what he could to elect Ross Stebbins as the next union president, allegedly because of Mr. Stebbins' stance against African American employees. Throughout his testimony, Mr. Marr testified of numerous instances where the County and the Union colluded to target minority and female employees. Mr. Marr then testified that in October of 1998 his administrative position

was eliminated and he was offered four other positions in the current bargaining unit, all of which he turned down. Subsequently, Mr. Marr left employment with the Douglas County Correctional Center.

Petitioners' witness Walter Cummings testified that he is a member of the African-American Correctional Officer Association (hereinafter, the "AACOA"), which was formed to foster communication between the officers and the board of commissioners on issues within the jail with regard to inconsistencies in promotions, disciplinary practices and other labor issues. During the formation of the AACOA, Mr. Cummings was also a member of Lodge No. 8 but he left in approximately October of 1999. In sum, Mr. Cummings' testimony was based on his belief that the Union was unwilling to communicate with the AACOA to resolve important issues to the membership of the AACOA.

Petitioners' witness Dwand Hall testified that he has worked at the Douglas County Correctional Center for over thirteen years. At some point during his tenure he was a member of Lodge No. 8, although he left the union in 1997 or 1998 because of his sentiment that the Union was not representing all members equally and fairly. Mr. Hall then became a member of the AACOA and is currently the vice-president of that organization. Mr. Hall's testimony surrounded an incident that occurred while he was assigned to the clothing area. When Mr. Hall was assigned to the clothing area he had complete access to all parts of the jail. While in the clothing area, Mr. Marr told him that the administration and the union were watching Mr. Hall for selling drugs in the correctional center. Mr. Marr also commented in his testimony that the reason for placing Mr. Hall in the clothing area was to isolate Mr. Hall from the rest of the jail population. Upon finding out the alleged intentions of the administration, Mr. Hall requested a transfer out of the clothing area. Mr. Hall received the transfer and was never disciplined for any drug involvement resulting from his time in the clothing area.

The Petitioners next presented the testimony of Regina Davis. Ms. Davis is a correctional officer, with the rank of sergeant for the past five years at the correctional center. During her past twenty years of employment, she was a member of Lodge No. 8 from approximately 1984 until 2001. In 2001 Ms. Davis left the union because she felt they were not fairly representing females and African-Americans. Ms. Davis discussed § 47-111 and its past impact on female employees. In 2000, Ms. Davis testified that females were having a hard time receiving adequate bathroom breaks because they were told that they could not be relieved by males any longer, only by females. Ms. Davis, prior to being a supervisor, had to personally wait up to three or four hours before she received

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a bathroom break and was forced to use inmates' restrooms. Ms. Davis testified that since 2000, and continuing to the present day, she has attempted through her best effort to get the union to address the issue of females in the workplace at the Douglas County Correctional Center. Ms. Davis detailed varying experiences of female officers that she had observed over the past few years in receiving fewer preferential shifts because of the rules currently at place in Douglas County, as well as more overtime hours required of females than less senior male employees. Furthermore, Ms. Davis detailed a meeting at Senor Matias in 2000, with the union's executive board, in which a group of female officers approached the union for help in changing these work rules and asked to address the union membership on those pressing female issues. After this meeting in front of the union leadership, the female employees were not allowed any opportunity to address the entire union membership, nor did the union make any additional attempts to solve the female employees' issues. Ms. Davis also testified that during her first 15 years of employment, when males were allowed to break and guard female prisoners, the working conditions were significantly better. She remarked that under her supervision, both males and females received bathroom breaks expeditiously. However, she witnessed male supervisors in her same position not allowing females to receive bathroom breaks. Ms. Davis also testified that this occurred and is still ongoing for females guarding female housing modules as well as females guarding male housing modules.

Petitioner Jack Nelson testified that he has worked for Douglas County Department of Corrections for almost six years, holding the rank of Correctional Officer II. Mr. Nelson was a member of Lodge No. 8 from September of 1998 until February of 2003. During his time as a member of the union, Mr. Nelson served both as a union steward and on the grievance review board. Mr. Nelson, through his involvement in the Union as well as his individual involvement, testified to situations in which the union chose not to represent employees. After the Union declined to represent these employees, he took on their cases as those employees' representative, winning several appeals for employees. He testified that in February of 2003 he received a letter from the union, stating that the union executive board voted to remove him as union steward and grievance review board member. After his removal as union steward, Mr. Nelson began having what he considered hate crimes committed against him. These hate crimes included graffiti written on bathroom walls in an employee-only access area of the jail, stating that Mr. Nelson was a racist and a Black Panther. Both the union and the administration agreed that the statements written on the bathroom wall were not racist. Other incidents included more writing on the bathroom wall,

receiving in his mailbox a picture of a monkey holding a banana, and finally in November of 2003, shortly after this case was filed in the Commission, Mr. Nelson received a death threat. Mr. Nelson also testified that it was his opinion, in his capacity as both an employee and as a union steward, that the union consistently treated certain females different than certain male employees.

The Petitioners next presented the testimony of Chantella Wallace. Ms. Wallace has worked for eight years at the Douglas County Department of Corrections and currently holds the position of Correction Officer III. Ms. Wallace was a member of Lodge No. 8 until January of 2001, leaving the union as a result of lack of minority officers including race and gender. Ms. Wallace testified that because of their gender, the female officers are forced to work the same housing areas, time after time, without rotating through the jail as required by the automatic rotation in place at the jail. Furthermore, Ms. Wallace testified that female officers have been forced to work overtime based on their gender and are not allowed adequate bathroom breaks. Ms. Wallace testified that since Ann O'Connor's memo in 2003, the administration has been supportive of the efforts of the females in the Department of Corrections in both changing the current working conditions and seeking a change in the state statute § 47-111. However, upon the administration's issuance of this memorandum, the workplace has become more hostile and male supervisors expressed their dissatisfaction by not allowing males to give females restroom breaks under any circumstances. Finally, Ms. Wallace testified that in her experiences she has seen more female officers terminated for having relationships with male inmates than male officers terminated for relationships with female inmates.

Petitioner Tina Myers testified with regard to females receiving restroom breaks. Up until a week before her testimony, Ms. Myers has had to wait anywhere from 30 minutes to an hour for a restroom break. Ms. Myers also testified to a very humiliating experience in which she had to wait so long for a restroom break in a male housing unit that she soiled herself. Ms. Myers also testified to being required to work forced overtime because of her gender. Ms. Myers further testified that she believed some of the problems with regard to female issues could be solved through bargaining for more appropriately scheduled employees to fill all of the positions at the jail during any particular shift.

The Petitioners also presented the testimony of Delois Simpson, an employee at Douglas County Corrections Center for approximately fifteen years. Ms. Simpson testified that she has been called out of a module in order to give bathroom breaks or to search incoming inmates. Ms.

Simpson also testified that ninety percent of the time women do not receive timely restroom breaks.

Finally, Ms. Dawn Russell-Cummings testified on behalf of the Petitioner. Ms. Russell-Cummings testified to waiting for a bathroom break anywhere from an hour to an entire shift, causing her great discomfort. Ms. Russell-Cummings further testified that she had placed herself in danger by using an inmate's toilet to relieve herself. She talked a great deal about being ordered to work forced overtime out of turn over less senior male employees. Ms. Cummings sent an e-mail to the union president requesting talk-time at a union meeting to address some of the female issues, which was denied.

At the close of the Petitioners' evidence the Respondent renewed its Motion to Dismiss and Judge Orr sustained the motion with regard to A2(c), A4, and A6 and overruled the rest of the Respondent's objections. The Respondent then presented numerous witnesses to dispute the testimony of Art Marr. Some of the witnesses claimed that the meetings Art Marr said allegedly occurred did not occur and other witnesses claimed that a few of those meetings did occur but the discussions did not center on discriminatory conduct. The Respondent also presented employee testimony to refute the testimony of the African-American and female employees. David Chamberline testified that the union held a vote on changing NEB. REV. STAT. § 47-111. As the secretary of the Union, Mr. Chamberline testified that out of the 225 members, only 30 voted on the issue of changing § 47-111, 28 voting in favor of keeping the statute and 2 voting to change the statute. The Respondent also included two Caucasian female members of the bargaining unit and active members of Lodge No. 8. Kristin Banning testified that as an executive board member of the union, she has never had to wait excessive amounts of time for a bathroom break. Ms. Banning also testified as to a vote by the union and its members in which she voted against changing the state statute because getting breaks had never been a problem for her currently or in the past. Ms. Sandra Riha, a member of the union, testified that she had waited up to an hour and 15 minutes for a restroom break. Ms. Riha testified that during the vote by the Union regarding a change in the state statute, she and Mr. Nelson voted yes for the union to support the change in the state statute and the rest of the union that voted, voted no.

Finally, the Union presented the testimony of the union president, Ross Stebbins. Mr. Stebbins testified that he was "adamantly" opposed to a change in the state statute because of past experiences with female inmates accusing male guards of inappropriate sexual contact. Mr. Stebbins also testified that the Union has allowed non-members to address

the union membership on many occasions.

Mr. Stebbins also testified that the union had been bouncing around the idea of offering amnesty to non-members around the time mediation first began in June of 2003. However, the vote for offering amnesty did not occur until after this case was filed. The union members voted unanimously to allow non-members back into the union for free during the month of February, 2004.

Currently, the Respondent and Douglas County are in negotiations for their next two-year contract for the years of 2003 to 2005. The parties' current contract expired in July of 2003 and they are operating under a contract continuation clause in the 2001 to 2003 contract.

After a review of the testimony of Art Marr, we find his testimony to be less credible than the testimony presented by the Respondent's witnesses. The evidence at trial demonstrated a strong difference in events between the testimony of Mr. Marr and other administrative employees. Mr. Marr also testified that the administration's placement of Mr. Hall in the clothing area isolated him from the rest of the jail population when in fact such placement allowed Mr. Hall access to most parts of the jail. Therefore, we will accordingly disregard Mr. Marr's testimony.

DUTY OF FAIR REPRESENTATION:

Jurisdiction

The Respondent argues the Commission lacks subject matter jurisdiction over claims of the Petitioners. The Petitioners argue that the Commission does have subject matter jurisdiction over the claims presented at trial under NEB. REV. STAT. §§ 48-838(4), 48-824 and 48-825. While the Commission has had several cases in the past that briefly mention the duty of fair representation, the issue of whether the Commission can decide cases regarding the duty of fair representation in the context of a prohibited practice is one of first impression.

In situations of first impression, where our statutory provisions are substantially similar to the National Labor Relations Act (hereinafter, the "NLRA"), and the issue is not definitively settled in Nebraska, we may look to the National Labor Relations Board (hereinafter, "NLRB") decisions for guidance. NLRB and United States Supreme Court interpretation of "wages" and "conditions of employment" under the NLRA can serve as a guide to what constitutes negotiable subjects under Nebraska law. *Norfolk Education Ass'n v. School District of Norfolk*, 1

CIR 30 (1971). The Nebraska Supreme Court has repeatedly held that “[d]ecisions under the NLRB are helpful where there are similar provisions under the Nebraska statutes”, *Nebraska Pub. Emp. v. Otoe City* [sic], 257 Neb. 50, 63, 595 N.W. 2d 237 (1999) (quoting *University Police Officers Union v. University of Neb.*, 203 Neb. 4, 12, 277 N.W. 2d 529, 535 (1979)). We have also held that Sections 8(a), 9(a), and 8(d) of the NLRA are substantially similar to NEB. REV. STAT. § 48-824. See *Fraternal Order of Police Lodge 41 v. County of Scotts Bluff, et. al.*, 13 CIR 270 (2000); and *Crete Education Ass’n v. Saline County School District No. 76-0002, a/k/a Crete Public Schools*, 13 CIR 361 (2001). Therefore, decisions interpreting the NLRA may be helpful as guidance interpreting NEB. REV. STAT. § 48-824(1).

When a union becomes the exclusive representative of employees in a bargaining unit under the NLRA, it also incurs a duty to represent fairly all employees in the unit or craft or class. A union representative in the organized workplace negotiates with management exclusively on behalf of all employees in the bargaining unit, allowing individual rights to be sacrificed for collective reasons. Because of this potential tyranny of the majority, individual employees have a right to fair representation under Section 8(b)(1)(A) of the National Labor Relations Act. See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). Although couched in terms of statutory construction, the law of fair representation or duty of fair representation is essentially judge-made and primarily Supreme Court-fashioned as largely a creature of federal common law.

The Supreme Court first recognized the duty of fair representation in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 15 LRRM 708 (1944). Several black locomotive firemen alleged that the union representing them had agreed to a series of modifications of their collective bargaining agreement with the express purpose of eliminating the jobs of black workers. The Supreme Court determined that Congress clearly intended a duty of fair representation by conferring on the duly selected representatives the “plenary power... to sacrifice for the benefit of its members rights of the minority of the craft...” 323 U.S. at 199, 15 LRRM at 711. The Court found that the use of the word “representative” in all contexts throughout the statute to plainly connote the duty of that representative to act on behalf of all the employees it represents.

From the outset, the Court indicated that the duty of fair representation was not limited to a duty to refrain from racial discrimination. In *Wallace Corp. v. NLRB*, the Court commented on the union’s duties as exclusive agent:

By its selection as bargaining representative it has become the agent of all the employees charged with the responsibility of representing their interests fairly and impartially; otherwise employees who are not members of a selected union at the time its chosen by the majority would be left without adequate representation.

323 U.S. 248, 255, 15 LRRM 697, 701 (1944). In subsequent cases, the Supreme Court reiterated that the duty of fair representation was broader than a duty to refrain from racial discrimination. See e.g., *Railway Employees Department v. Hanson*, 351 U.S. 225, 232 38 LRRM 2099, 2101 (1955); *Radio Officers v. NLRB*, 347 U.S. 17, 47-48, 33 LRRM 2417, 2429 (1954). In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 31 LRRM 2548 (1953), the Court considered, for the first time, the merits of a duty of fair representation claim arising under the NLRA which did not involve race discrimination. In addition, *Huffman* was a turning point in the development of the duty of fair representation case law, because it was the first time the Court had occasion to consider union actions not involving intentional misconduct. *Huffman's* major import is its emphasis on the discretion of the bargaining representative to make reasonable distinctions among employees without running afoul of its statutory duty. The Court further indicated that in most cases it would not evaluate the substantive merits of the union's decisions. The Court concluded:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion.

The Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967) decided the standard for measuring a union's duty of fair representation. The Court held that "a breach of duty of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The Court's standard of a duty to avoid arbitrary, discriminatory, or bad faith conduct followed logically from its prior decisions which exhorted unions to exercise good faith, honesty, and reasonable, to act without hostility or arbitrary discrimination, and to base decisions on rel-

evant considerations which were not invidious, capricious, or arbitrary.

With regard to Nebraska law on the issue of duty of fair representation, the Commission has mentioned the issue in two past cases. In *In re South Sioux City Municipal Electrician's Association*, 3 CIR 318 (1977), the Commission commented that, a bargaining representative has an obligation to fairly represent all members of a unit without discrimination. See *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953). If the interests of the members of a unit were so diverse that performance of this obligation was a practical impossibility, such a variegated unit might well be improper. Through its analysis, the Commission determined that pursuant to the allegation of the union breaching its duty of fair representation, while there was some complaint about the representation the electricians had received, none of it rose to the dignity of a breach of the duty of fair representation.

Also, the duty of fair representation was discussed in *Marcy Delperdang v. United Electrical, Radio, and Machine Workers of America*, 13 CIR 400 (2001). In that case, the Respondent asserted that the Commission could not amend the Bargaining Unit unless the Commission finds the Respondent has breached its duty of fair representation. In *Delperdang*, the Commission did not find any evidence that would indicate a breach of the duty of fair representation by the Respondent. Moreover, the Petitioner had not alleged breach of representation duties and likewise had not produced any evidence that the Respondent had breached its duty of representation. The Commission, when amending a bargaining unit, stated it did not consider the factor of breaching the duty of fair representation, citing *Sheldon Station*. Nonetheless, the Commission found that the evidence in the *Delperdang* case did not point to a breach in representation. The Respondent had tried to represent all members in the group. Therefore, the Commission concluded the Respondent's actions were not wholly irrational or arbitrary. See *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 111 S. Ct. 1127, 113 L.Ed.2d 51 (1991).

The statutory provisions and case law of both federal and Nebraska law are comparable and should be followed. With regard to the jurisdiction issue, it is clear that the Commission has the authority to determine prohibited practices with regard to the specific issue of the duty of fair representation. Therefore, the Commission finds it does not lack subject matter jurisdiction and can proceed to the merits of this case, after we determine the statute of limitations question presented by the Respondent.

Statute of Limitations for Duty of Fair Representation Claims

The Respondent also argues that the Commission cannot hear any of the Petitioners' issues under NEB. REV. STAT. § 48-824 because they fall beyond the statute of limitations set forth under NEB. REV. STAT. § 48-825 (1). Petitioners, on the other hand, allege that the acts of the Respondent are ongoing and continue within the six months immediately preceding the filing of this Petition.

NEB. REV. STAT. § 48-825 (1) states:

A proceeding against a party alleging a violation of section 48-824 is commenced by filing a complaint with the Commission within one hundred eighty days after the alleged violation thereby causing a copy of the complaint to be served upon the accused party.

The issue of the statute of limitations under any duty of fair representation in Nebraska is one of first impression. Like the issue of jurisdiction above, the Commission will look to the NLRB for guidance in cases where its statutes are comparable or similar.

In *Del Costello v. Teamsters*, 462 U.S. 151, 113 LRRM 2737 (1983), the Supreme Court determined that Section 10(b) of the National Labor Relations Act applies to duty of fair representations claims. Section 10(b) of the NLRA provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of the copy thereof upon the person against whom such a charge is made..."

The limitation period for duty of fair representation claims begins to run when the cause of action accrues. Many federal courts have determined that accrual occurs when the employee discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. See e.g., *Galindo v. Stody Co.*, 793 F.2d 1502, 1509, 123 LRRM 2705, 2709 (9th Cir. 1986); *Howard v. Lockheed-Georgia Co.*, F.2d 612, 614, 117 LRRM 2784, 2785 (11th Cir. 1984); *Farr v. H.K. Porter Co.*, 727 F.2d 862, 864, 115 LRRM 3606, 3609 (5th Cir. 1984). Courts have been generally consistent in concluding that accrual occurs when the employee learns of the duty of fair representation breach rather than when the breach adversely affects the employee. However, in the instant case, the Petitioners allege that the Respondent has committed continuing violations that have occurred for years in the past and have continued up until the filing of this Petition and in certain instances still occur. Often, petitioners who find their claims barred by the statute of limitations allege that there is no real bar because they are

victims of “continuing violations”. They contend that each time a union and/or an employer acts in a way contrary to their interests, the breach continues. In cases of continuing conduct, “the statute of limitations ordinarily runs from the occurrence of each [discriminatory] act.” *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 101 (1st Cir. 1979). The continuing violation theory, however, cannot be used to defeat a statute of limitations defense where there clearly is a discrete act, which establishes damages accruing to the plaintiff. *Delaware State College v. Ricks*, 449 U.S. 250, 24 FEP CAS. 827 (1980); *United Air Lines v. Evans*, 431 U.S. 553, 14 FEP CAS. 1510 (1977). Courts have accepted the continuing violation theory in the duty of fair representation context, but predominately in cases where the union has discriminated on the basis of sex or race. For example, in *Jamison v. Olga Coal Co*, 335 F. Supp. 454, 4 FEP CAS. 532 (S.D. W. Va. 1971), an employee sued his employer and his union alleging that the employer had continuously failed to promote him because of his race, and the union failed to protest such practices or take any action to ensure equal job opportunities for its black members. The U.S. District Court for Southern West Virginia observed that since the employee had alleged “numerous instances of unfair or discriminatory representation of Black employees,” the evidence may prove “continuing discriminatory conduct on the part of the defendant unions ...[and] may very well involve instances of unfair representation as recent as the time of the filing of this complaint.” Similarly, in *Marlowe v. General Motor Corp.*, 489 F.2d 1057, 6 FEP CAS. 1083 (6th Cir. 1973), the Sixth Circuit accepted as true an employee’s claim of continuing violation in a suit alleging Title VII and duty of fair representation causes of action and denied the defendant’s motion to dismiss the action as untimely. The employee had alleged a conspiracy between his employer and union to establish and preserve a seniority system that limited employment and promotional opportunities of Jewish employees, “continuously occurring over the plaintiff’s period of employment ... and up to and including the present time or after the filing of the original complaint.”

In the instant case, the Petitioners have presented a significant amount of evidence that establishes a clear and continuing pattern of activity on the part of the union. Furthermore, the Respondent and Douglas County are currently in negotiations for their next two-year contract for the years of 2003 to 2005. The parties’ current contract expired in July of 2003 and they are operating under a contract continuation clause in the 2001 to 2003 contract. The union continues to have the ability to negotiate any issues that are mandatory subjects of bargaining. Therefore, no cause of action has accrued with regard to any negotiable issues. Furthermore, the issues are ongoing. The evidence presented at trial, like

in *Marlowe*, clearly established that the union's actions or lack thereof have continuously occurred over the petitioners' employment ... and up to and including the present time or after the filing of the original complaint. Therefore, we find that the remaining Petitioners' allegations are not barred by any expiration of the statute of limitations under NEB. REV. STAT. § 48-825(1).

Lack of Representation for Collective Bargaining (Issue A1 and Issue A2a)

The Petitioners claim that the Respondent has consistently refused to fairly represent the Petitioners in negotiations of the collective bargaining agreement governing the terms and conditions of their collective employment, as well as in matters of discipline and grievances which involve minority and female members of the bargaining unit. The Petitioners also argue the Respondent has failed to represent them in bargaining with respect to the use of female guards to supervise female prisoners, the subsequent denial of the normal seniority rights of female guards in the matters of bids for work shifts, vacation, forced overtime and similar matters, and for adequate relief for female guards so they can obtain timely relief to address various sanitary needs. The Respondent argues all of the Petitioners' issues are a result of staffing of the jail, a problem of management and one over which the Respondent claims it has no control.

With regard to the female relief issues, the evidence presented at trial demonstrates a complete lack of concern on the part of the Respondent to address and try to remedy the clearly abhorrent and discriminatory situation these women face on a daily basis. As the sole bargaining representative to *all* members of the bargaining unit, the Respondent is charged with the responsibility of representing their interests fairly and impartially. In finding that the Respondent has been discriminatory in its actions, the Commission is mindful that the union will never enjoy the complete satisfaction of all who are represented and accordingly, a wide range of reasonableness must be allowed to a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. However, in exercising its discretion, the Respondent cannot arbitrarily ignore female and/or non-member females that have valid reasonable concerns, especially those concerns about basic human needs and safety issues. Furthermore, the Respondent *does* have control over bargaining with Douglas County with respect to all mandatory subjects of bargaining, which include the basic working conditions such as timely restroom breaks and seniority rights. It is clear from the testimony that females

have been disproportionately affected with regard to seniority rights because of the impact of § 47-111 and the Respondent has never attempted to find a workable solution. The female employees' lack of opportunity to rotate throughout the jail and to be promoted within the facility has severely impacted their working conditions, without much representation from the union. The testimony of the Respondent's witnesses demonstrated that the female members of the union have fewer problems with regard to restroom breaks than the female non-members of the union; yet, nonetheless all female members of the bargaining unit, both members and non-members of the union, have disproportionately been affected. The evidence also demonstrated that the female non-members were not afforded the same consideration to speak in front of the union membership as other non-members. Therefore, because the evidence demonstrates that female issues have largely been ignored in bad faith on the part of the Respondent, the Commission finds the Respondent breached its duty of fair representation to the female Petitioners.

Actively Opposing and Harassing Female Petitioners (Issue A2b)

The Petitioners also allege that the Respondent, through its officers and directors, have engaged in prohibited practice violations of NEB. REV. STAT. § 48-824 by actively opposing and harassing female Petitioners in their efforts to obtain equal working conditions and opposing any attempt to secure changes in the terms and conditions of their employment. The Respondent denies this allegation.

After careful review of the evidence in the instant case, the Petitioners did not prove that the Respondent was actively opposing or harassing female Petitioners in their efforts to obtain equal working conditions and any attempt to secure changes in the terms and the conditions of their employment. Instead, most of the evidence surrounds the Respondent's inaction, as opposed to any active opposition or harassing efforts. Therefore, we find the Petitioners' evidence did not prove any breach of duty of fair representation or any action on the part of the Respondent with regard to active opposition or harassment.

Lack of Advocacy For Grievances and Disciplinary Matters and Discouragement of Membership (Issues A2d and A3)

The Petitioners allege that the Respondent, through its officers and directors, have engaged in prohibited practice violations of NEB. REV. STAT. § 48-824 in failing and refusing to advocate for female and minority members of the bargaining unit who are confronted with grievances and disciplinary matters, as well as discouraging membership in the

union by minorities and females.

The Respondent argues that with regard to issue A3, Mr. Nelson has failed to state a breach of a duty of fair representation or prohibited practice on the part of the Union with respect to any right he holds under the Industrial Relations Act both within and outside the time limitations for this Petition.

In review of the evidence presented at trial, the Petitioners did not prove the issue of discouragement of membership on the part of the Respondent. The Petitioners argue that the Respondent discouraged membership and then demanded financially prohibitive retroactive dues payment. The evidence demonstrates the opposite. The union president's testimony indicated that the union voted to send an olive branch of amnesty to all employees. Furthermore, the Petitioners presented no evidence that certain employees were required to pay back past dues and other non-members were not required to pay past dues. Therefore, we find no breach of duty of fair representation with regard to the issue of membership.

In the instant case, with regard to the issue of lack of representation for grievances and disciplinary hearings, the Petitioners simply did not provide any evidence that showed certain employees were treated differently than other employees in hearings for representation for grievances or disciplinary hearings. Therefore, we find no breach of the duty of fair representation for lack of representation for grievances and disciplinary hearings.

Membership in the Union

The union is not required to treat members and non-members the same with respect to union meetings. Employees who are members of the union have certain benefits by virtue of their union membership; such as the right to manage and represent the union, attend meetings, vote for officers, and ratify contracts. Furthermore, non-members do not have a right to vote on what proposals or interests a union will bring to the bargaining table. Participation in the union's decision-making process that defines the proposals or interests that a union brings to the bargaining table is a benefit of being a dues-paying member. However, the proposals or interests of the union cannot discriminate against non-members because the union has a duty to represent all employees in the bargaining unit without discrimination and without regard to union membership. Furthermore, in those circumstances where a union has the final decision on what a particular condition of employment will be, the

union must treat members and non-members the same in the union's internal decision-making process. Basically, an exclusive representative may not treat non-union unit employees differently from dues-paying union members in matters over which the union has exclusive control and where the non-members have no other choice for representation. *Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina*, 28 FLRA No. 118, 28 FLRA 908 (1987) (*Fort Bragg*).

The Petitioners in the instant case have chosen not to be members of the Respondent's Union. That choice has consequences that prevent the Petitioners from being effective in their efforts to obtain equal working conditions for all employees. While it is clear that the Respondent cannot treat the Petitioners differently in certain situations because of their lack of union membership, race, or gender, the Petitioners are foregoing their right to be decision-makers in the union's governing process.

Remedial Authority

The Petitioners request that the Commission enter an order requiring the Respondent to cease and desist from continuing to discriminate and the Respondent shall not oppose, but instead must actively support, equal working conditions for male and female members of the bargaining unit. The Petitioners' also request an award of attorney's fees. The Respondent argues the Petitioners' request for attorneys fees should be stricken from the prayer in the Petition because there are no provisions allowing for the award of attorneys fees in the Industrial Relations Act.

The Commission has the authority under the plain language of the statute to issue cease and desist orders following findings of prohibited practices and has done so in the past. In *Ewing Education Ass'n v. Holt County School District No. 29*, 12 CIR 242 (1996) (en banc), the Commission found that the school district committed a prohibited practice when it unilaterally changed a condition of employment contained in a collective bargaining agreement. After entering into a collective bargaining agreement, the school district unilaterally changed the bargaining unit's health insurance options. As a remedy, the Commission ordered the school district to cease and desist from charging insurance fees, to reimburse the fees withheld, and to post a notice to employees promising not to commit the same prohibited practices.

The Commission also found a prohibited practice in *State Law Enforcement Bargaining Council v. State of Nebraska*, 13 CIR 169 (1998) (applying the State Employees Collective Bargaining Act). In

this case, the Commission's remedy was an order for the Respondent to "cease and desist of and from the prohibited practices found herein". *Id.* at 176 (emphasis added).

The federal courts have developed significant case law dealing with the issue of remedies in duty of fair representation cases. The Supreme Court addressed this issue in *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967). *Vaca* states, that the "appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach." 386 U.S. at 196. The NLRB also has numerous cases dealing with remedies for breaches of the duty of fair representation. To remedy instances of breach of the duty of fair representation, the NLRB has entered broad orders requiring the union to cease and desist from its improper conduct and to take affirmative steps to make the charging party whole; and it has regularly ordered the offending union to process or arbitrate grievances that it has wrongfully refused to handle. *Marine Engineers, Unlicensed Div. Dist. 1 (Mormac Marine Transp.)*, 312 NLRB 944, 145 LRRM 1059 (1993). For example, in an unfair labor practice proceeding brought against only the union, the NLRB ordered the union to pay the charging party for all lost earnings that resulted from the union's failure to process the grievance. It also ordered a union: (1) to ask for reinstatement of an employee whose grievance it failed to process; (2) to ask that the employer waive any time limitations barring the processing of the grievance; (3) to process the grievance diligently and in good faith; and (4) to make the employee economically whole until the employee is reinstated, or obtains substantially equivalent other employment, or until the grievance is processed to a proper conclusion. *Chemical Workers Local 190 (FMC Corp.)*, 251 NLRB 1535, 105 LRRM 1504 (1980).

While the federal case law has not provided the Commission with a similar factual scenario to which the Commission could easily determine the appropriate remedy, it does provide the Commission with basic guidelines. As shown above, federal remedies with the circumstances of the particular breach allow the Courts to make the aggrieved parties whole again. In the instant case, an order requiring that good faith bargaining resume, and that the offending party cease and desist from committing the prohibited practices found by the Commission, is within this authority. Furthermore, the female Petitioners' also should be allowed an opportunity to present their grievances directly to the Union membership, because the Union has treated these women differently than other non-members. The Union should in good faith discuss a workable solution with the female bargaining unit members. Therefore, having found that the Respondent has engaged in prohibited labor practices by ignor-

ing females and/or non-member females that have valid reasonable concerns for basic human needs, safety issues, seniority rights, and shift rotations, we find that it must be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Industrial Relations Act. In taking the affirmative action in meeting with these aggrieved employees, the Union should be mindful to treat the females the same as the male bargaining unit employees and attempt in good faith to find a solution, recognizing the problems these female employees face on a ongoing basis and considering the negative impact of § 47-111 on the general working conditions for these female employees. Finally, the Commission declines to determine an award of attorney's fees based upon the facts presented in this case.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED
that:**

1. Respondent shall cease and desist from any further discrimination in its representation of women.
2. The Union shall uphold its duty to fairly represent women whether or not they are members or non-members.
3. Respondent shall allow a fair opportunity for the women to present their issues to the union membership as a whole.

All panel judges join in the entry of this order.

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SOUTH SIOUX CITY EDUCATION)	Case No. 1067
ASSOCIATION, an Unincorporated)	
Association,)	
)	
Petitioner,)	FINDINGS AND
)	ORDER
v.)	
)	
DAKOTA COUNTY SCHOOL)	
DISTRICT NO. 22-0011, a/k/a)	
SOUTH SIOUX CITY COMMUNITY)	
SCHOOLS, a Political Subdivision of)	
the State of Nebraska,)	
)	
Respondent.)	

Filed September 15, 2004

APPEARANCES:

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For Respondent: Kelley Baker
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Before: Judges Blake, Orr and Burger.

BLAKE, J:

NATURE OF THE PROCEEDINGS:

South Sioux City Education Association (hereinafter, "Petitioner" or "Association") filed a wage petition on February 6, 2004, seeking resolution of an industrial dispute for the 2003-2004 contract year. The Asso-

ciation is a labor organization formed by teachers employed by Dakota County School District No. 22-0011, a/k/a South Sioux City Community Schools (hereinafter, "Respondent" or "District") for the purpose of representation in matters of employment relations. The District is a political subdivision of the State of Nebraska and a Class III school district. The Respondent employed 273 staff members with an FTE of 268.66 for the 2003-2004 school year.

The Commission of Industrial Relations (hereinafter, "Commission") held a Trial on June 1, 2004. At Pretrial and Trial the parties submitted the following issues for determination:

1. Array of comparable employers.
2. Base salary.
3. Method of calculating health insurance benefit and placement of South Sioux City Teachers.
4. Whether to delete or revise the following clauses in the negotiated agreement:
 - a. Delete the Recognition Statement on Page 1 of the negotiated agreement.
 - b. Delete the Continuation Statement on Page 1 of the negotiated agreement.
 - c. Revise Paragraph 1(D) regarding the initial placement of newly hired teachers based on prevalent practice.
 - d. Delete Paragraph 2(A) and (B) regarding Extra Duty Assignments.
 - e. Delete the portion of Paragraph 3 regarding Compensation to Cover Another Teacher's Class that states: "Every effort must be made to hold these to a minimum..."
 - f. Delete Paragraph 4 regarding Professional Staff Continuing Credit.
 - g. Delete Paragraph 7 regarding Continuation of Insurance Benefits.

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- h. Delete Paragraph 8(G) regarding payment for unused personal leave days.
- i. Delete Paragraph 9 regarding Association Business Leave.
- j. Delete Paragraph 10(B) regarding the Sick Leave Bank.
- k. Delete Paragraph 11 regarding AIDS Notification.
- l. Delete Paragraph 12 regarding Building Plan For Student Violence.

JURISDICTION:

The Commission has jurisdiction over the parties and subject matter of this action pursuant to NEB. REV. STAT. § 48-818 (Reissue 1998) which provides in part:

...the Commission of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions...

ARRAY:

The Association proposes eight school districts for their array. The District proposes that seven school districts, all seven of which are proposed by the Association, are appropriate for the array. The common array members are Hastings, Columbus, Fremont, Ralston, Norfolk, Elkhorn and Kearney. The contested array member proposed by the Association is Blair. In determining a proper array, the parties agree that the work, skill, and working conditions of South Sioux City Community School's teachers are sufficiently similar for comparison under NEB. REV. STAT. § 48-818 (Reissue 1998) to the following array members: Hastings, Columbus, Fremont, Ralston, Norfolk, Elkhorn and Kearney. With regard to Blair, the Respondent has stipulated with the Petitioner that with respect to work, skill and working conditions Blair is comparable to South Sioux City under NEB. REV. STAT. § 48-818; however, the Respondent limited its stipulation objecting to the alleged discretionary placement of faculty in shortage area teaching.

The Association's Proposed Array

The Association proposes an array of eight school districts: Hastings, Columbus, Fremont, Ralston, Norfolk, Elkhorn, Blair, and Kearney. The issue before the Commission is whether Blair should be included in the Commission's array with the seven other common array members.

The District's Proposed Array

The District proposes an array of seven school districts which include Hastings, Columbus, Fremont, Ralston, Norfolk, Elkhorn, and Kearney. These seven common members used by both the District and the Association meet the Commission's size and geographic proximity guidelines. The Commission has held that arrays consisting of six to eight members are appropriate. *O'Neill Education Ass'n v. Holt County School District No. 7*, 11 CIR 11 (1990); *Red Cloud Education Ass'n v. School District of Red Cloud*, 10 CIR 120 (1989); *Logan County Education Ass'n v. School District of Stapleton*, 10 CIR 1 (1988); *Trenton Education Ass'n v. School District of Trenton*, 9 CIR 201 (1987).

The Commission's Array

When choosing an array of comparable employers, the Commission applies a well-established size guideline of one-half to twice as large. See *Scotts Bluff County School District No. 79-0064 v. Lake Minatare Education Ass'n*, 13 CIR 256 (1999); *Yutan Education Ass'n v. Saunders County School District No. 0009*, 12 CIR 68 (1994); *Crawford Teachers Ass'n v. Dawes County School District No. 0071*, 11 CIR 254 (1991); *Red Cloud Educ. Ass'n v. School Dist. of Red Cloud*, 10 CIR 120 (1989). Employers falling outside this guideline are often excluded from arrays; however, the size criteria used by the Commission is a general guideline and not a rigid rule. *Nebraska Public Employees Local Union 251 v. Sarpy County*, 13 CIR 50 (1998); *Nebraska Public Employees Local Union 251 v. County of York*, 13 CIR 128 (1998); 13 CIR 157 (1998); 12 CIR 309 (1997); 12 CIR 248 (1997). Nonetheless, since the size guideline is based on objective criteria, it provides predictability and should not be lightly disregarded when a sufficient number of comparables, which meet the guidelines, exist. See *School District of West Point v. West Point Education Ass'n*, 8 CIR 315 (1986); *Richland Teachers Education Ass'n v. Colfax County School District No. 0001*, 11 CIR 286 (1992). The common array members are Hastings, Columbus, Fremont, Ralston, Norfolk, Elkhorn, and Kearney. The contested array member proposed by the Association is Blair. Even in such cases, the Commission does not disregard the size and geographic guidelines. See *Id.* Blair

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is the second most geographically proximate school district and is clearly within the Commission's one-half to twice the size criteria. See Table 1. The parties also stipulated that the district of South Sioux City and the district of Blair are comparable under NEB. REV. STAT. § 48-818 with respect to work, skill and working conditions. However, the District limited its stipulation, objecting to the alleged discretionary placement of the faculty in shortage area teaching.

In reviewing Exhibit 5, it is clear that only three teachers from the South Sioux City School District teach in shortage areas. Those three teachers minimally impact the difference between the Respondent and the Petitioner with regard to the staff index factor as seen in Exhibit 48. The additional difference in the staff index factor in Exhibit 48 is due to slight differences in the placement of teachers; similar differences occur in all of the seven other array schools. In sum, such an issue has little impact on work, skill, or working conditions. Therefore, without a factor that significantly impacts the work, skill or working conditions, we find that Blair is a comparable school district and shall be included in the array.

FRINGE BENEFITS:

Calculating Fringe Benefits

The Respondent disagrees with the Petitioner's method of placing South Sioux City teachers on the array schools of Blair, Elkhorn, Hastings and Ralston, for their specific health insurance benefits. Specifically, the Respondent disagrees with the placement of those teachers in South Sioux City that receive the "cash option" at South Sioux City and are not given the cash option (with the exception of Ralston in specific instances) at the four array schools. The Respondent argues that the Commission should interpret its holding in *Educational Service Unit No. 13 Education Ass'n v. Educational Service Unit No. 13*, ("ESU 13"), 14 CIR 1 (2002), by determining the teacher's "economically rational choice" as not being the highest dollar cost premium to the district, but instead as a choice of supplemental insurance.

The Petitioner alleges if the Commission were to adopt the Respondent's methodology for calculating health insurance benefits it would, in effect, abrogate all of the Commission's past holdings on this issue.

Under NEB. REV. STAT. § 48-818, we must decide wages based on overall compensation.

In establishing wage rates the commission shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees.

The Commission and the Nebraska Supreme Court have dealt with numerous cases in the past dealing with total compensation and the fringe benefit issue. In both *Omaha Ass'n of Firefighters v. City of Omaha*, 194 Neb. 436, 441, 231 N.W. 2d 710 (1975) and *Lincoln Fire Fighters Ass'n v. City of Lincoln*, 198 Neb. 174, 252 N.W. 3d 607 (1977), the Nebraska Supreme Court underscores the importance of establishing "overall compensation" when determining wage cases under NEB. REV. STAT. § 48-818.

This issue has also appeared numerous times before the Commission, and the Commission's inference for determining total compensation with respect to fringe benefits has been developed through four primary cases. The first case was *Crawford Teachers Ass'n v. Dawes County School Dist. No. 0071*, 11 CIR 254 (1991). In *Crawford*, the Crawford School District provided their teachers with compensation in addition to their salary at the rate of 12.5% under a cafeteria plan which the teachers could use to purchase group health or dental insurance, or the teachers could refuse the insurance, keeping the cash for themselves. None of the array schools offered a cafeteria plan providing such fringe benefits; however, each of the array schools offered group insurance in which the employer paid most, if not all, of the premium. In *Crawford* neither party wished to change Crawford's method of providing the benefits, nonetheless the parties could not agree on the percentage of the teacher's salary Crawford paid to its teachers. The Commission found that to arrive at the percentage, it was necessary to calculate the cost of health insurance at each school in the array as it applied to the Crawford teacher. This was because that, although the health insurance itself was not an issue, the total teacher compensation was at issue and fringe benefits needed to be considered in determining total teacher compensation. The Commission placed those teachers not taking health insurance in Crawford as taking health insurance in the other array schools. Therefore, in determining total teacher compensation, the Commission had to fully take into account the impact of the costs of the health insurance on each base salary.

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The second case was *Scotts Bluff County School Dist. No. 79-0064 a/k/a Lake Minatare Public School v. Lake Minatare Educ. Ass'n*, 13 CIR 256 (1999). The Lake Minatare School District provided no benefits to its teachers, while all but one of the array school districts did provide benefits. The Commission found in its determination that the Lake Minatare teachers should have a higher base salary because the Lake Minatare teachers were not provided benefits, allowing the Commission to find a comparable total compensation package for Lake Minatare. In sum, the Commission recognized that base salary and health insurance under the Commission's formula were both seen as dollars in determining total compensation.

In the third case, *ESU 13*, 14 CIR 1 (2002) and 14 CIR 34 (2002), the Educational Service Unit No. 13 had a flexible fringe benefit plan in which employees took an annual sum of money for benefits either in cash, in payment of dependent insurance premiums, or in payment of single health insurance premium with the balance in cash. The Respondent argued that where an array Educational Service Unit did not provide cash, those employees that took cash at ESU 13 should not be placed with any insurance benefits at that array Educational Service Unit. The Commission disagreed, and found that to arrive at the percentage of the teacher's salary that met § 48-818's requirement of overall compensation the Commission must place the teachers as taking the maximum level of fringe benefits to which they would be entitled to at the various array Educational Service Units. The Commission noted that due to the overwhelming prevalence of indexed salary schedules in public schools, for decades the Commission has used the mathematical model of determining total compensation. This method allows the Commission to consistently compare and determine total compensation in a manner which is fairly predictable and stable. This method does not require knowledge or speculation of what election the individual employees would actually take.

The Commission, in *ESU 13*, generally did not consider deposition testimony of employees concerning the benefit choices they would make at the proposed array schools, and placed employees based on the economically rational choice to accept the maximum fringe benefits available. The Commission concluded that this is the logical, fair and consistent method of comparing fringe benefits as part of overall compensation.

Finally in *Metropolitan Technical Community College Education Ass'n v. Metropolitan Community College Area*, 14 CIR 127 (2003), the Commission followed its holding in *ESU 13*, whereby each employee

would be placed on the array institution's salary schedules with the maximum fringe benefits as the employee's "economically rational choice". Therefore, in following the precedent set forth in *ESU 13*, the Commission felt the maximum fringe benefit would most closely follow the total compensation method required by § 48-818.

In the instant case, the Respondent argues that the Commission should determine the employees' economically rational choice based on the value of the benefit to the teachers, not on the cost of the benefit. Assuming that those employees at South Sioux City that already take cash would only take insurance as a secondary health benefit, the Respondent further argues that the maximum benefit would be worth about \$2,000 to the employee if they were to take a secondary health insurance coverage. The Respondent applied this methodology to Ralston, Elkhorn, and Hastings and found that only Ralston provides less cash-in-lieu of than the hypothetical \$2,000 secondary insurance policy. The Respondent, finding that Ralston's cash policy was too low for all South Sioux City teachers to take, determined that in Ralston, 55 percent of the Ralston teachers take insurance and 45 percent take the cash-in-lieu of insurance. Thus, the Respondent placed 55 percent of the South Sioux City teachers that take cash at South Sioux City on the insurance plan at Ralston and placed 45 percent as taking the cash.

Under the guidelines set forth by the Legislature under § 48-818, the Commission has consistently determined salaries for school districts across the state by using a wage-setting formula as set forth in *Centennial Education Ass'n v. School District No. 67-R of Seward Co.*, 1 CIR Case No. 44 (1971). In *Centennial*, the Commission held:

Section 48-818. . . also directs the court to take into consideration the overall compensation presently received by the employees. . . . A \$6,400 base with index increments of 5 x 4. . . places Centennial at the approximate midpoint in terms of overall compensation among the spectrum of the comparable school districts shown in the evidence. It also aligns Centennial comparably with the York School District as the total teacher compensationThe present case was initiated on behalf of all teachers in the Centennial School District. All teachers are paid on the same index schedule. They also receive the same insurance and other fringe benefits. As we held in *Milford Education Association v. School District of Milford*, Case No. 43 Findings and Order filed July 15, 1971, it is the total teacher compensation which should be compared with the salary schedules and benefits of other

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comparable school districts . . . The effect of actual placement on an index schedule must be considered in carrying out the provisions of § 48-818. To make this evaluation the total teacher salaries of comparable school districts must be compared . . .

Fremont Education Ass'n v. School District of Fremont, 1 CIR Case No. 50, 50-1-2 (1972) (quoting *Centennial*, 1 CIR Case No. 44 (1971)).

The Commission's approximately 33-year-old teacher wage-setting equation utilizes total compensation figures and total staff index factors, accounting for variances in benefits and experience. The Commission's equation places the party's teachers on the array members' schedules. Instead of requiring the party district to pay the same actual dollar amount as the array school districts, the Commission requires the party school district to pay the same amount that the array school districts would pay if they employed the party district's teachers. In a typical wage case in which benefits differ between schools, the Commission's equation has historically accounted for these differences and assures that the teachers are paid at a comparable total compensation level in accord with NEB. REV. STAT. § 48-818. This is why the comparable base salary is not usually at the actual base salary midpoint.

The Nebraska Supreme Court stamped this equation with its approval in *Crete Education Ass'n v. School District of Crete*, 193 Neb. 245, 258 (1975), holding:

It appears from the record that the Court of Industrial Relations in this case established the new salary base for the teachers at the approximate midpoint of the total compensation paid by the schools selected by it for comparison, according to its customary practice. The result reached would appear to be fair, proper, and equitable and in full accord with the discretionary powers vested in that court.

Throughout the last thirty-three years the Commission has consistently included fringe benefits as part of base salary, in order to determine wages under § 48-818. Specifically, health insurance in past cases was converted into dollars in determining a school district's base salary. In essence, health insurance in teacher wage cases is an integral part of the total dollars paid to teachers in their base salaries. The wisdom underlying the formula recognizes that different array schools have different environments which impact the overall compensation provided to their teachers. For instance, some schools provide fewer dollars in benefits

and more in base salary while other districts provide fewer dollars in base salary and more dollars in benefit dollars. This model works, due to the fact that school districts generally pay salary and benefits fairly uniformly. School districts that are comparable with respect to work, skill and working conditions may use a different salary schedule, but they generally do use a schedule. They may have slightly different benefit packages, or even no benefits, but the model can effectively and fairly deal with these scenarios. The consistency and predictability of this model encourages settlement of many salary disputes. However, the formula is not perfect, as it is a simple mathematical formula based on a hypothetical situation. The problem arises when the form of the benefit packages begins to vary to the point that it becomes difficult to compare flexible benefit packages to more traditional benefit packages.

As stated above, in *ESU 13* employees were offered a flexible benefit plan providing an annual sum for benefits. Each employee could choose to take this benefit in cash, payment of various insurance premiums, or a mixture. In *ESU 13*, numerous depositions were offered to prove the reason a particular teacher in the unit made his or her choice, and what they might choose at a proposed array institution. We discouraged this practice, as it was apparent that this evidence was likely to be extremely costly, speculative and lacking in sufficient foundation.

Evidence, in the instant case, was presented indicating that witnesses had considered teachers' tax consequences, "break points", and personal family situations in determining where to propose placement. Evidence as to what a teacher might choose from a flexible benefit plan at an array school is not helpful, as it is speculation. Neither are attempts at determining tax treatments for the individuals, or speculation about a spouse's insurance coverage in the array community.

When determining health insurance choices, teachers utilize many possible variables in choosing a particular benefit choice, with most of those decisions ending in the greatest possible economic benefit for that particular teacher. There is no concrete method with which to sort such choices, when all parties involved rely on a hypothetical situation to begin with. On the other hand, the Commission for thirty-three years has simplified those choices into a single mathematical formula which is based solely on dollars and cents to arrive at a dollar number which the Commission and the Nebraska Supreme Court have termed "overall compensation." This method avoids the numerous problems of the methods urged by the Respondent. In order for an employee to be able to answer a question as to what they would actually choose in an array school, it would need to be shown that the employee had information on

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which to make such a choice, including reasonably accurate knowledge of the benefit and basis for a rational personal choice. Some employees might make a choice that we would not judge to be rational. Developing and testing such foundation and decision making processes would require extremely time consuming and costly efforts, with little benefit to the process. Supplanting the employees' choices with the determinations of a school administrator or economics expert may make the matter less complex and less time consuming, but it would not make the determinations any more valid or helpful. There are far too many personal and financial issues which go into individual decisions for the Commission to place any weight on such efforts. To adopt such methodology would result in the Commission entering into an endless evidentiary quagmire or accepting determinations on little more than bare speculation. This would not promote the goals of consistency and predictability. Further, it would not promote efforts to reach agreement through negotiations. While the Commission's developed model is not a perfect model, it does provide the parties to this litigation a predictable method by which the parties can predict what the Commission will do and thus encourage settlement.

This discussion is not intended to add a doctrine, and certainly does not create a presumption, or shift the burden of proof. Each case must be determined from the facts, and the best effort made to fairly make the placements in these benefits package situations. However, testimony that an employee would take a fringe benefit less than that for which he or she is eligible, if hypothetically employed in a comparable school with a different benefits array, is not supported by sufficient foundation, and is thus not helpful in the decision the Commission must make.

In this case, the Commission agrees with the Petitioner's method of assigning teachers to the health benefit for which they qualify, supplying those teachers with the greatest dollar benefit. This method is based upon all past decisions of the Commission and the Nebraska Supreme Court. The method historically followed by the Commission is based on sound reasoning and policy, and promotes consistency in the bargaining process. See, *Centennial*, 1 CIR 44 (1971). Therefore, the Commission declines to change its method for determining health insurance benefits in cases where some employees take cash-in-lieu of insurance.

Mootness

The Petitioner urges the Commission to determine all issues, other than the determination of schedule compensation pending before the Commission, moot. Respondent maintains the issues raised by the

Respondent are not moot simply because the school year is over, claiming that the Association should not be rewarded for delaying the filing of its petition by being allowed to avoid a determination based on the prevalent practice of terms and conditions of employment for the 2003-2004 contract year. The Respondent also argues that the issues presented in the case falls under an exception to the mootness doctrine.

This Commission has continually refused to rule on certain fringe benefits when the contract year has passed. A determination as to a benefit that has no carryover into the next contract year would constitute an advisory opinion outside the Commission's jurisdiction. See *Papillion-LaVista Education Ass'n v. School District of Papillion-LaVista*, 10 CIR 18, 22-23 (1988), *Fraternal Order of Police Lodge No. 23 v. The City of Holdrege, Nebraska*, 9 CIR 257, 262 (1988), *Trenton Educ. Ass'n v. School Dist. of Trenton*, 9 CIR 201, 204-205 (1987), *Winnebago Education Ass'n v. School District of Winnebago*, 8 CIR 138, 146-148 (1985). See also *District No. 8 Elementary Teachers Ass'n v. School District No. 8, Dodge County*, 8 CIR 126 (1985), *School District No. 125 v. Curtis Education Ass'n*, 7 CIR 96 (1983). Furthermore, while the Commission recognizes the exception to the mootness rule, it clearly does not apply in this case. As cited by the Respondent in *State of South Dakota v. Hazen*, 914 F.2d 147 (1995) in describing the exception to the mootness doctrine for cases, "capable of repetition, yet evading review" the federal district court found that:

...we must find the presence of two factors before the exception may be applied: 1) the Corps' action must be "in its duration too short to be fully litigated prior to its cessation or expiration" and (2) there must be a "reasonable expectation" that the appellee states will be "subjected to the same action again."

If either party in this case would have filed near the middle or beginning of the school year, all issues in the case could have easily been decided before the expiration of the school year. See *Yutan Educ. Ass'n v. Saunders Co. School Dist., a/k/a Yutan Public Schools*, 12 CIR 68 (1994) and *Nemaha Valley Education Ass'n v. Johnson County School District*, 12 CIR 83 (1994). Furthermore, under NEB. REV. STAT. § 48-811:

Except as provided in the State Employees Collective Bargaining Act, any employer, employee or labor organization, or the Attorney General of Nebraska on his or her own initiative or by order of the Governor, when any industrial dispute exists between parties as set forth in Section 48-810,

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may file a petition with the Commission of Industrial Relations invoking its jurisdiction.

Once an industrial dispute has occurred, the Respondent has equal rights under the statute to file a wage case at any time before the expiration of the contract year. Thus, for purposes of this determination and in keeping with past Commission practice, any dispute over the 12 itemized agreement clauses listed above at Paragraph number 4 of Issues is considered moot for the 2003-2004 contract year.

BASE SALARY:

Table 2 sets forth the relevant information for determining the appropriate base salary. The midpoint of the total compensation \$12,365,702 minus the cost of fringe benefits \$1,438,619 equals \$10,927,083 which, when divided by the new total staff index factor of 403.88, equals a base salary of \$27,056 for the 2003-2004 school year.

IT IS THEREFORE ORDERED THAT:

1. Respondent shall pay the teachers a base salary of \$27,056 for the 2003-2004 school year.
2. All other terms and conditions of employment for the 2003-2004 school year shall be as previously established by the agreement of the parties and by Orders and Findings of the Commission.
3. Adjustments in compensation resulting from this order shall be paid in a single lump sum payable within thirty (30) days of this final order, if possible.

All judges join in the entry of this order.

TABLE 1

INFORMATION ON PROPOSED COMPARABLES

School District	Size	Miles
Kearney	4,648	185
Fremont	4,535	72
Norfolk	4,185	60
Blair	2,272	66
Elkhorn	3,320	83
Columbus	3,473	88
Ralston	3,131	90
Hastings	3,255	166
South Sioux City	3,496	0

Exhibit 2

TABLE 2

OVERALL COMPENSATION ANALYSIS

School	Contract Days	Staff Index	Base Salary	Benefit Costs	Schedule Costs	Total Costs
Blair	187	405.4352	\$25,605	\$2,237,470	\$10,436,683	\$12,674,153
Elkhorn	187	411.3888	\$25,400	\$2,111,866	\$10,505,154	\$12,617,020
Hastings	185	414.7618	\$24,352	\$2,207,078	\$10,264,068	\$12,471,146
Columbus	186	403.4650	\$26,460	\$1,598,656	\$10,790,476	\$12,389,132
Fremont	185	426.4082	\$25,038	\$1,482,041	\$10,849,539	\$12,331,581
Ralston	190	441.5250	\$23,930	\$1,872,214	\$10,454,475	\$12,326,689
Kearney	185	416.7411	\$24,023	\$2,072,341	\$10,173,718	\$12,246,059
Norfolk	186	402.0307	\$25,825	\$1,418,525	\$10,494,082	\$11,912,607
South Sioux City	188	403.8752	\$27,056	\$1,438,619	\$10,927,083	\$12,365,702
		MEAN		\$12,371,048		
		MEDIAN		\$12,360,357		
		MIDPOINT		\$12,365,702		

Exhibit 6

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SOUTH SIOUX CITY EDUCATION))	Case No. 1067
ASSOCIATION, an Unincorporated))	
Association,))	
	)	FINAL ORDER
Petitioner,))	
)	
v.))	
)	
DAKOTA COUNTY SCHOOL))	
DISTRICT NO. 22-0011, a/k/a))	
SOUTH SIOUX CITY COMMUNITY))	
SCHOOLS, a Political Subdivision of))	
the State of Nebraska,))	
)	
Respondent.))	

Filed November 17, 2004

APPEARANCES:

For Petitioner: Mark D. McGuire
 McGuire and Norby
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 Lincoln, NE 68508

For Respondent: Kelley Baker
 Harding, Shultz & Downs
 800 Lincoln Square
 121 S. 13th Street
 P.O. Box 82028
 Lincoln, NE 68501-2028

Before: Judges Blake, Orr and Burger.

BLAKE, J:

After the trial of this matter, the Commission entered a Findings and Order on September 15, 2004. The Respondent timely filed a Request for Post-Trial Conference as provided for in NEB. REV. STAT. § 48-816(7)(d), which allows the Commission to hear from the parties on those portions of the recommended findings and order which are not

based upon or which mischaracterize evidence in the record. A Post-Trial Conference was held October 5, 2004. The Petitioner was represented by its attorney, Mark D. McGuire. The Respondent was represented by its attorney, Kelley Baker. The parties waived the time requirement for issuing Final Order.

The Respondent's Request for Post-Trial Conference raised three areas of objection to the Commission's Order of September 15, 2004. Those areas are dealt with as follows:

1. **Calculating Fringe Benefits.** The objection regarding the method of calculating fringe benefits claims that the Commission disregarded the evidence pertaining to the option to take cash-in-lieu of health insurance at certain array school districts. The Respondent urged the Commission to take into account the South Sioux City Teachers' actual choices to take cash and the economic value of the cash option at the array schools which do not offer a cash option equal to the cost of health insurance. The resulting placement decisions urged by Respondent were based primarily upon the judgment of the Respondent's business manager as to rational choice. We declined to decide this recurring issue on such questionable evidence.

The Respondent's objection to our Order of September 15, 2004 is that if the Commission disregards the cash-in-lieu of health insurance options and uses the maximum benefit at the array schools, then the Commission should likewise assume that the teachers would have taken the maximum allowable benefit at South Sioux City.

This issue of comparing benefits has been problematic due to the lack of uniformity of health insurance/cash option benefits, and the resulting lack of ability to make direct comparisons. The education associations typically argue that the teachers must all be placed in our computations according to the benefit, which is the most expensive, regardless of whether the teachers have actually chosen that benefit. The school districts respond that the teachers who have actually selected the lesser benefit must be placed as if they would take that lesser benefit at the array school, regardless of the differences in the levels of health insurance and the differences in the amounts of cash offered.

In *Educational Service Unit No. 13 Educ. Ass'n v. Educational Service Unit No. 13*, 14 CIR 1 (2002) and 14 CIR 34 (2002) ("ESU 13"), the Commission was faced with comparing an election at the subject school district to take the health insurance benefit as either family coverage, individual coverage plus cash, or all cash. The total benefit cost

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remained the same. The question, as to those teachers who had taken a cash option, was how to compute their benefit at an array school which did not offer a cash option. The Commission was asked to calculate the cost of health insurance benefits by using the same elections the employees in question had actually made, and further, where there was no comparable election in the array school, to calculate the benefit received as zero. In concluding in *ESU 13* that each employee would make an economically rational choice to accept the maximum fringe benefits available to him or her, we were basing such conclusion on an inference from the competent evidence in the case.

The inference of greatest economic benefit promotes predictability. Predictability is one of the important goals in the area of public labor relations and negotiations. However, we must not adhere to that worthy standard to the point of sacrificing logic and fairness as disclosed by the evidence.

In the case now before us, South Sioux City teachers who chose the cash option were placed in the Blair, Elkhorn, Hastings, and Ralston schedules as if they had all taken the maximum health insurance benefits. A cash option is offered at each of those schools, but in each such school that cash option is less than the cash option offered at South Sioux City. The cash option at South Sioux City is \$5,077.00. At Blair that option is \$5,000.00. The cash option is \$3,200.00 at Elkhorn, and \$2,940.00 at Hastings. The cash option is \$1,000.00 at Ralston. Our Order of September 15, 2004 disregarded the cash options at each of these four schools.

We conclude that the inference of economically rational choice of the greatest benefit should not be followed in placing those teachers who selected a cash option at the subject school when the cash option is sufficiently similar to the option offered at the subject school. In this case, we find that the cash options offered at Blair, Elkhorn, and Hastings are sufficiently similar to the cash option at South Sioux City, while the cash option at Ralston is not sufficiently similar. Table 2 has been revised and is included with this Order as Table 2A, to reflect the amendments made by this Final Order.

This determination is not an abandonment of *ESU 13*. We continue to believe the case was decided correctly, but conclude that our discussion simply went further than was necessary. The evidence in this case requires a refinement of the process in comparing total compensation to recognize cash options at the array schools as legitimate placements if they are sufficiently similar. Mindful always that we are dealing with a

mathematical model, we believe the decision to utilize those cash option benefits which we determine to be sufficiently similar to the subject schools will result in a more accurate comparison of total compensation.

2. **Mootness in Continuation Statement.** Only the 2003-2004 school year is before the Commission in this case, and we have entered no Order regarding the 2004-2005 school year. The Respondent's request in this respect has not shown any portion of the Commission's Findings and Order of September 15, 2004 which is not based upon or which mischaracterizes evidence in the record.

3. **Movement on Schedule.** At the Post-Trial Conference on October 5, counsel for Petitioner and Respondent stated that they are in agreement as to their understanding and that there is no further issue regarding the previously established agreement of the parties in this regard.

The matter of Petitioner's request for assessment of fees and costs pursuant to Commission Rule 29(c) was also heard on October 5, 2004, with counsel for Petitioner and Respondent. Having considered the arguments by counsel for the parties, the Commission finds that the request for attorney fees should be and hereby is denied.

IT IS THEREFORE ORDERED that Respondent's request to amend the order of September 15, 2004 is sustained in part and overruled in part and such Order shall be as stated herein. It is the final order of the Commission that:

1. After recalculation of the benefits as stated above for the employees who selected the cash option, Respondent shall pay a base salary of \$26,574.00 for the 2003-2004 school year.

2. Table 2A reflects the corrections made in this Final Order.

3. All other terms and conditions of employment for the 2003-2004 school year shall be as previously established by the agreement of the parties and by orders and findings of the Commission.

4. Adjustments and compensation resulting from this Order shall be paid in a single lump sum payable within thirty (30) days of this Final Order, if possible.

All judges join in the entry of this order.

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TABLE 2A

OVERALL COMPENSATION ANALYSIS

School	Contract Days	Staff Index	Base Salary	Benefit Costs	Schedule Costs	Total Costs
Blair	187	405.4352	\$25,605	\$1,747,483	\$10,436,683	\$12,184,166
Elkhorn	187	411.3888	\$25,400	\$1,390,162	\$10,505,154	\$11,895,316
Hastings	185	414.7618	\$24,352	\$1,465,574	\$10,264,068	\$11,729,642
Columbus	186	403.4650	\$26,460	\$1,598,656	\$10,790,476	\$12,389,132
Fremont	185	426.4082	\$25,038	\$1,482,041	\$10,849,539	\$12,331,581
Ralston	190	441.5250	\$23,930	\$1,872,214	\$10,454,475	\$12,326,689
Kearney	185	416.7411	\$24,023	\$2,072,341	\$10,173,718	\$12,246,059
Norfolk	186	402.0307	\$25,825	\$1,418,525	\$10,494,082	\$11,912,607
South Sioux City	188	403.8752	\$26,574	\$1,438,619	\$10,732,387	\$12,171,006
				MEAN	\$12,126,899	
				MEDIAN	\$12,215,113	
				MIDPOINT	\$12,171,006	

COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1075

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

COUNTY OF GAGE, NEBRASKA;)	Case No. 1075
and REX ADAMS, DAVID T.	)	Rep. Doc. 385
ANDERSON, MARK E.)	
HYBERGER, SHIRLEY)	
GRONEWALD, HARLAN A.	)	FINDINGS AND
HAGEMEIER, DAVID L. SWAVELY	)	ORDER
AND ALLEN GRELL, in their official)	
capacities,)	
)	
Petitioners,)	
)	
v.)	
)	
GENERAL DRIVERS & HELPERS)	
UNION LOCAL NO. 554, affiliated)	
with THE INTERNATIONAL)	
BROTHERHOOD OF TEAMSTERS,)	
CHAUFFEURS, WAREHOUSEMEN)	
AND HELPERS OF AMERICA,)	
)	
Respondent.)	

Filed June 28, 2004

APPEARANCES:

For Petitioner:	Jerry L. Pigsley Harding, Shultz & Downs 800 Lincoln Square 121 S. 13th Street P.O. Box 82028 Lincoln, NE 68501-2028
For Respondent:	M.H. Weinberg Weinberg & Weinberg, P.C. 9290 West Dodge Road-Suite 201 Omaha, NE 68112

Before: Judges Burger, Orr, and Lindahl

BURGER, J:

NATURE OF THE PROCEEDINGS:

On April 21, 2004, the County of Gage and the members of the Board of Supervisors, in their official capacities (“Petitioners” or “County”) filed a decertification petition, requesting that an election be held to determine whether the General Drivers & Helpers Union Local No. 554, (“Respondent” or “Union”) should cease to be the representative of the bargaining unit members. Petitioners also requested a temporary order suspending its duty to bargain pending the outcome of the election. The Respondent filed an answer alleging that the Petitioner had not appropriately described the unit for a decertification election, because, the unit sought to be decertified is not the same as the recognized unit. The Respondent also alleged that the authorization cards were invalid as they were the product of threats or promises of agents of the Petitioner, made for and on behalf of the Petitioner. Respondent also requested a temporary order requiring Petitioner to continue bargaining, and alleged that bargaining should continue between the Petitioner and those unit employees who still desired the Union to continue to represent them after an adverse election.

On April 28, 2004, the Clerk of the Commission entered her report, finding that a total of 52% of the employees in the bargaining unit have indicated that they no longer desire to be represented by the Respondent, and that Petitioner had made a sufficient showing of interest to entitle it to an election.

A hearing was held on both the Petitioners’ and Respondent’s Request for Temporary Relief filed as part of the preliminary proceeding on May 4, 2004. At the hearing, the Commission denied both Requests for Temporary Relief, set the case for Pretrial, and scheduled Trial for June 18, 2004. At the Pretrial conference the issues were identified as follows:

- A. Description of the bargaining unit, for purposes of conducting an election.
- B. Whether any authorization cards were obtained by threats or promises made by agents of management.
- C. The appropriate remedy if authorization cards were obtained by threats or promises made by agents of management.
- D. The impact of Respondent’s request for bargaining order surviving an adverse election, and the duty of the Petitioner to bargain pending an election.

On the eve of trial, the parties submitted a joint Stipulation resolving or reserving most issues. This stipulation left the Commission with the question of the impact of the Respondent's request for a bargaining order surviving an adverse election, and the duty of the Petitioner to bargain pending the election. Trial was held on these issues June 18, 2004.

The Stipulation between counsels resolved disputes over the appropriate description of the bargaining unit, the members of the unit entitled to vote, and the sufficiency of Petitioner's showing of interest. The Stipulation was approved, and an on site election was separately ordered by the Commission on June 18, 2004.

For the reasons stated below, the Commission declines to order the parties to bargain, or to cease from bargaining, pending the election. The Commission also concludes that Respondent's Request for a Bargaining Order for those employees desiring Respondent's representation after an adverse election is not ripe for adjudication.

DISCUSSION:

Request for Temporary Order on Bargaining

The Petitioners argue that the Commission has authority and should issue a temporary order suspending the County's obligation to bargain pending the outcome of a decertification election. Respondent argues to the contrary that the Commission should issue a temporary order requiring the County to bargain with the Respondent pending the outcome of the election.

The Commission has authority upon its own initiative, and by request of the parties, to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties' property and public interest involved pending final determination. See *University Police Officers Union v. University of Neb.*, 203 Neb. 4, 277 N.W.2d 529 (1979). However, this authority is clearly a discretionary act of the Commission. In *County of Dakota v. AFSCME Local 2049-A*, 7 CIR 89 (1983), the Commission granted an order suspending bargaining, pending a decertification election. However, this decision on whether a temporary order is necessary to preserve and protect the status of the parties, property, and public interest is dependant on a case-by-case factual determination. In *Southeast Community College Education Ass'n v. Southeast Community College Area and Southeast Community College Faculty Ass'n*, 13 CIR 160 (1998), the currently certified bargaining union sought to have its members ratify a contract agreement it had reached after a filing requesting decertification by a challenging union.

COUNTY OF GAGE, ET. AL. V. GENERAL DRIVERS & HELPERS
UNION LOCAL NO. 554

15 CIR 42 (2004)

Case No. 1075

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The Commission determined that it would add to the confusion and disruption if the incumbent union were allowed to continue to seek ratification, and enter into a contract which may immediately become null and void by the challenging union being certified. The Commission issued an order restraining attempts at ratification pending the election. However, the Commission also determined that the incumbent union could not be restrained or in any way inhibited from explaining and promoting to their members the terms and conditions of employment that they had negotiated. The Commission concluded that the public interest was best served by holding the election as soon as possible.

In this case, we decline to either suspend or require a temporary order to bargain. The public interest appears better served through ordering an election to occur as soon as possible to resolve the issue of decertification of the Union.

Request for Bargaining Order Following Decertification Election

The Respondent argues that Nebraska Law is unique in allowing a non-exclusive bargaining agent to handle grievance and legal matters even if there is an exclusive bargaining agent and, therefore, the Respondent can continue to represent those employees who wish to be represented by the Union even after adverse election.

We conclude that the question of whether unit employees desiring representation by Respondent after a decertification election is not ripe for decision. The result of the disputed election cannot be presumed. We have consistently stated in the past that, "If there is no dispute pending before the Commission, we will not issue an advisory opinion or an opinion intended to provide future guidance to the parties." See *City of Omaha v. Nebraska Public Employees Local No. 251*, 10 CIR 233 (1990). If the Commission were to decide this issue before an election had taken place, its opinion would be solely advisory. Presented with a representation petition, after a decertification, the Commission could then attempt to determine whether the proposed unit was appropriate, as required by NEB. REV. STAT. § 48-838. The Commission concludes that this issue is not ripe for determination, and therefore denies the Respondent's request.

IT IS THEREFORE ORDERED that both the Petitioners' and the Respondent's Requests for Temporary Orders are hereby denied. Respondent's Request for a Bargaining Order following the decertification election is denied as not ripe for determination.

All panel judges join in the entry of this order.

COMMISSION OF INDUSTRIAL RELATIONS

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

BEATRICE EDUCATION	)	Case No. 1077
ASSOCIATION, an Unincorporated)	
Association,)	
	)	FINDINGS AND
Petitioner,	)	ORDER
)	
v.)	
)	
GAGE COUNTY SCHOOL)	
DISTRICT NO. 34-0015, a/k/a)	
BEATRICE PUBLIC SCHOOL)	
DISTRICT, a Political Subdivision of)	
the State of Nebraska,)	
)	
Respondent.)	

Filed December 17, 2004

APPEARANCES:

For Petitioner: Mark D. McGuire
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For Respondent: Rex R. Shultze
 Perry, Guthery, Haase, & Gessford
 233 South 13th Street
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 Lincoln, NE 68508

Before: Judges Orr, Blake and Burger.

ORR, J:

NATURE OF THE PROCEEDINGS:

Beatrice Education Association (hereinafter, "Petitioner" or "Association") filed a wage petition on May 20, 2004, seeking resolution of an industrial dispute for the 2003-2004 contract year. The Association is a labor organization formed by teachers employed by Gage County

School District No. 34-0015, a/k/a Beatrice Public Schools (hereinafter, "Respondent" or "District") for the purpose of representation in matters of employment relations. The District is a political subdivision of the State of Nebraska and a Class III school district. The Respondent employed 167 staff members with an FTE of 165.575 for the 2003-2004 school year.

The Commission of Industrial Relations (hereinafter, "Commission") held a Trial on October 7, 2004. The issues presented at Trial are contained within the Commission's Report of Pretrial filed on September 3, 2004.

JURISDICTION:

The Commission has jurisdiction over the parties and subject matter of this action pursuant to NEB. REV. STAT. § 48-818 (Reissue 1998) which provides in part:

...the Commission of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions...

ARRAY:

The Association proposes fifteen school districts for their array. The District proposes eight school districts, seven of which are proposed by the Association. The common array members are Hastings, Columbus, Blair, Elkhorn, Crete, Ralston and Plattsmouth. The contested array members proposed by the Association are Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, and Aurora. The contested array member proposed by the District is Norfolk. In determining a proper array, the parties agree that the work, skill, and working conditions of Beatrice Public School's teachers are sufficiently similar for comparison under NEB. REV. STAT. § 48-818 (Reissue 1998) to the following array members: Hastings, Columbus, Blair, Elkhorn, Crete, Ralston, and Columbus. With regard to Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, and Aurora, the Respondent argues that these schools' health benefits are not comparable with Beatrice's health benefits and therefore the schools are not sufficiently comparable under § 48-818. The issue before the Commission is whether

Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5 and Aurora should be included in the Commission's array with the other seven common array members and whether Norfolk should be included in the array.

When choosing an array of comparable employers, the Commission applies a well-established size guideline of one-half to twice as large. See *Scotts Bluff County School District No. 79-0064 v. Lake Minatare Education Ass'n*, 13 CIR 256 (1999); *Yutan Education Ass'n v. Saunders County School District No. 0009*, 12 CIR 68 (1994); *Crawford Teachers Ass'n v. Dawes County School District No. 0071*, 11 CIR 254 (1991); *Red Cloud Education Ass'n v. School District of Red Cloud*, 10 CIR 120 (1989). Employers falling outside this guideline are often excluded from arrays; however, the size criteria used by the Commission is a general guideline and not a rigid rule. *Nebraska Public Employees Local Union 251 v. Sarpy County*, 13 CIR 50 (1998); *Nebraska Public Employees Local Union 251 v. County of York*, 13 CIR 128 (1998); 13 CIR 157 (1998); 12 CIR 309 (1997); 12 CIR 248 (1997). Nonetheless, since the size guideline is based on objective criteria, it provides predictability and should not be lightly disregarded when a sufficient number of comparables, which meet the guidelines, exist. See *School District of West Point v. West Point Education Ass'n*, 8 CIR 315 (1986); *Richland Teachers Education Ass'n v. Colfax County School District No. 0001*, 11 CIR 286 (1992). Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, Aurora, and Norfolk are all geographically proximate to Beatrice and are all clearly within the Commission's one-half to twice the size criteria. See Table 1. Furthermore, the Commission has in the past approved arrays of sixteen schools. See *Lynch Education Ass'n v. Boyd County School District No. 0036*, 11 CIR 25 (1990).

The District suggests that the array schools of Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, and Aurora are not sufficiently similar under NEB. REV. STAT. § 48-818 because those array schools do not provide any cash-in-lieu of insurance. The Respondent relies on *Millard Education Ass'n v. School District of Millard*, 5 CIR 425 (1982), which stated that the cost of insurance should be excluded from total compensation in computing the total compensation. The Respondent also suggests that it is losing the benefit of the bargain if the Commission were to use array schools without cash-in-lieu of insurance options.

In *Educational Service Unit No. 13 Education Ass'n v. Educational Service Unit No. 13*, "ESU 13", 14 CIR 1 (2003), the Commission

included schools in its array that did not provide cash-in-lieu of insurance, to be compared with Educational Service Unit No. 13, which did provide cash-in-lieu of insurance. The Commission has also included schools in arrays that did provide health insurance benefits with schools that had no direct health insurance benefits such as in the cases of *Crawford Teachers Ass'n v. Dawes County School District No. 0071*, (“Crawford”), 11 CIR 254 (1991) and *Scotts Bluff County School District No. 17-0064 v. Lake Minatare Education Ass'n*, (“Lake Minatare”) 13 CIR 256 (2000).

After careful review of teacher wage negotiations over the past thirty years, the Commission has consistently used health insurance in its calculations of total compensation and has not excluded array choices because of the lack of cash-in-lieu of insurance. NEB. REV. STAT. § 48-818 mandates that the Commission use the costs of health insurance benefits in its calculation of total compensation. If the Commission were to accept the logic of the Respondent's argument, the Commission would have to exclude other array schools because of their differences in benefits. For example, Columbus does not provide employer paid long-term disability and Beatrice does provide employer paid long-term disability, making Columbus dissimilar from Beatrice under the general logic of the Respondent's argument. Furthermore, once a case is filed with the Commission, both parties place at risk what they perceive as their past bargained for benefit. The Commission finds that neither side has proven their contested array member should be excluded from the Commission's array. Therefore, Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, Aurora, and Norfolk are all comparable under NEB. REV. STAT. § 48-818 with respect to work, skill and working conditions and likewise should be included along with the schools of Blair, Columbus, Crete, Elkhorn, Hastings, Plattsmouth, and Ralston in the array.

FRINGE BENEFITS:

Calculating Fringe Benefits

The Petitioner argues that the Commission should determine the election of the cash-in-lieu of option for calculating fringe benefits in this case using the methodology set forth in *ESU 13*. The Petitioner also urges the Commission to place teachers who take cash-in-lieu of insurance at Beatrice as taking the highest benefit possible to them at each array school, including those schools which also offer cash-in-lieu of insurance. The Respondent argues that such methodology is flawed and that the Commission should only consider choosing an array in which

each school offers cash-in-lieu of insurance. The Respondent also urges the Commission to place each Beatrice “cash-in-lieu of insurance” teacher as taking cash-in-lieu at the array schools who offer it, regardless of the amount offered at the array school.

In our Final Order in *South Sioux City Education Ass'n v. Dakota County School District No. 22-0011, a/k/a South Sioux City Community School, "South Sioux City"*, 15 CIR 37, (Entered November 17, 2004) we noted that in *ESU 13* the Commission was faced with comparing an election at the subject school district to take the health insurance benefit as either dependent coverage, individual coverage plus cash, or all cash. However, none of the array schools had a cash option similar to Educational Service Unit No. 13. In *ESU 13*, the Respondent urged the Commission to place all those individuals as taking zero dollars for their health insurance benefits. The Commission concluded that each employee would make an economically rational choice to accept the maximum fringe benefits available to him or her and not to choose zero health insurance benefits. We further developed our rationale in *South Sioux City's* Final Order by concluding that the inference of the economically rational choice of the greatest benefit should not be followed in placing those teachers who selected a cash option at a subject school when the cash option is sufficiently similar to the option offered at the subject school.

In the instant case, the array schools of Norris, Waverly, Seward, Nebraska City, York, Gretna, South Central Nebraska Unified School District No. 5, and Aurora offer no cash option. The Beatrice teachers placed on those eight schools' salary schedules will be placed as taking the maximum benefit available to them.

We conclude that if an array school provides a cash option to their teachers and that cash option is sufficiently similar to the subject school's cash option, we will place the subject school teachers as taking the cash option at the array school. If an array school does not offer a cash option, or that cash option is not sufficiently similar to the subject school's cash option, we will place the subject school's teachers as receiving the maximum insurance benefit for which they are qualified (dependent or individual coverage). We also find that the cash options at the array schools of Blair, Crete, Elkhorn, Columbus, Norfolk, Hastings and Plattsmouth are sufficiently similar to the cash option provided at Beatrice, while the cash option at Ralston is not sufficiently similar. See Table 2. We conclude that it is appropriate to compare cash options when we have determined those options to be sufficiently similar to the subject school.

Mootness

The Petitioner urges the Commission to determine all issues, other than the determination of total compensation, base salary and employer contributions towards fringe benefits, moot. Respondent maintains its issues regarding vertical movement on the salary schedule, fringe benefits, including the prevalence of employer level of coverage of employer provided health insurance, including deductible amount and employer premium contribution, and elimination of the provisions in the 2002-2003 contract that deal with Teacher Improvement, Personnel Files, and Professional growth, are not moot.

This Commission has continually refused to rule on certain fringe benefits when the contract year has passed. See *South Sioux City*, CIR 15 23, (Entered September 15, 2004). Any dispute over benefits other than total compensation, base salary, and employer contributions towards fringe benefits are moot for the 2003-2004 contract year.

BASE SALARY:

Table 3 sets forth the relevant information for determining the appropriate base salary. The midpoint of the total compensation \$7,854,384 minus the cost of fringe benefits \$941,542 equals \$6,912,842 which, when divided by the total staff index factor of 251.86, equals a base salary of \$27,447 for the 2003-2004 school year.

IT IS THEREFORE ORDERED THAT:

1. Respondent shall pay the teachers a base salary of \$27,447 for the 2003-2004 school year.
2. All other terms and conditions of employment for the 2003-2004 school year shall be as previously established by the agreement of the parties and by the Orders and Findings of the Commission.
3. Adjustments in compensation resulting from this order shall be paid in a single lump sum payable within thirty (30) days of this final order, if possible.

All judges join in the entry of this order.

TABLE 1
INFORMATION ON PROPOSED COMPARABLES*

School District	Size	Miles
Aurora	1,330	78
Blair	2,272	94
Columbus	3,473	87
Crete	1,523	27
Elkhorn	3,320	76
Gretna	1,741	66
Hastings	3,255	89
Nebraska City	1,309	55
Norfolk	4,185	127
Norris	1,690	21
Plattsmouth	1,706	69
Ralston	3,131	75
Seward	1,304	48
So. Central Neb. Uni. Dist. #5	1,173	72
Waverly	1,661	47
York	1,330	61
Beatrice	2,259	0

*Exhibit 1

TABLE 2
INFORMATION ON ARRAY CASH OPTIONS

School District	Cash Option
Aurora	0*
Blair	\$5,000.00
Columbus	\$5,880.00
Crete	\$4,687.56
Elkhorn	\$3,200.00
Gretna	0*
Hastings	\$2,940.00
Nebraska City	0*
Norfolk	\$5,280.00
Norris	0*
Plattsmouth	\$5,257.08
Ralston	\$1,000.00
Seward	0*
So. Central Neb. Uni. Dist. #5	0*
Waverly	0*
York	0*
Beatrice	\$3,816.00

*Zero dollars denotes no cash option available at the array school

TABLE 3
OVERALL COMPENSATION ANALYSIS

School	Contract Days	Staff Index	Base Salary	Benefit Costs	Schedule Costs	Total Costs
Beatrice	186	251.8625	\$27,447	\$ 941,542 ²	\$6,912,842	\$7,854,384
York	187	271.9157	\$25,000	\$1,404,966	\$6,761,541	\$8,166,507
Norrs	186	251.9100	\$27,000	\$1,343,780	\$6,801,570	\$8,145,350
Waverly	186	258.0127	\$26,600	\$1,281,633	\$6,863,136	\$8,144,770
Gretna	188	254.2174	\$26,400	\$1,329,221	\$6,639,942	\$7,969,163
Nebraska City	187	261.4525	\$25,325	\$1,313,625	\$6,603,533	\$7,917,158
Ralston	190	288.2988	\$23,930	\$1,162,924	\$6,753,747	\$7,916,671
Aurora	185	272.4100	\$23,650	\$1,398,669	\$6,477,321	\$7,875,990
Blair	187	260.1310	\$25,605	\$1,230,716 ¹	\$6,625,036	\$7,855,752 ¹
Elkhorn	187	267.1580	\$25,400	\$1,082,252 ¹	\$6,749,525	\$7,831,777 ¹
SCNUD #5	185	263.7410	\$24,300	\$1,342,587	\$6,443,549	\$7,786,136
Plattsmouth	187	261.6260	\$25,000	\$1,257,592 ¹	\$6,505,673	\$7,763,265 ¹
Columbus	186	256.1007	\$26,460	\$ 985,164	\$6,776,424	\$7,761,588
Seward	186	269.0208	\$23,600	\$1,405,327	\$6,348,890	\$7,754,217
Crete	185	253.7266	\$25,850	\$1,108,384	\$6,594,286	\$7,702,670
Hastings	185	268.2534	\$24,352	\$1,121,201 ¹	\$6,567,817	\$7,689,018 ¹
Norfolk	186	258.8878	\$25,825	\$ 874,236 ¹	\$6,685,776 ³	\$7,560,012 ³
		Mean		\$7,865,003		
		Median		\$7,843,765		
		Midpoint		\$7,854,384		

1 Exhibit 62

2 Total benefit amount taken from Exhibit 3, although we were unable to validate the amount contained in Adj. LTD + B

3 Exhibit 61

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

UNITED FOOD AND COMMERCIAL)	Case No. 1081
WORKERS DISTRICT LOCAL 22,)	
)	
Petitioner,)	FINDINGS AND
)	ORDER
v.)	
)	
COUNTY OF HALL, NEBRASKA,)	
A Political Subdivision,)	
)	
Respondent.)	

Filed March 24, 2005

APPEARANCES:

For Petitioner: Michael J. Stapp
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Kansas City, KS 66101

For Respondent: Jerry L. Pigsley
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800 Lincoln Square
121 S. 13th Street
Lincoln, NE 68501

Before: Judges Blake, Burger, and Lindahl.

BLAKE, J:

NATURE OF THE PROCEEDINGS:

United Food and Commercial Workers District Local 22, (hereinafter, "Petitioner") filed a Petition pursuant to NEB. REV. STAT. §§ 48-811, 48-819.01, and 48-825 (Reissue 1998), claiming that Hall County (hereinafter, "Respondent") committed a prohibited practice by unilaterally implementing terms and conditions of employment without bargaining in good faith and without reaching impasse. The Petitioner seeks to have the Commission conclude that the Respondent violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f); to order the Respondent to cease and desist from engaging in such prohibited practices; to order the

Respondent to engage in good faith negotiations with the Petitioner over items listed in the Petition; to order the Respondent to make the Petitioner and all bargaining unit employees whole for any loss and expense incurred by them including, but not limited to, the reimbursement of the health care premium fees thus far withheld; reimbursement of attorneys' fees and costs; and finally, to order the Respondent to post a notice to employees promising not to commit the prohibited practices.

The Respondent's Answer alleges that the Respondent has negotiated in good faith with the Petitioner on mandatory subjects of bargaining and then lawfully implemented changes in terms and conditions of employment after the parties had bargained to impasse.

The issue presented at trial was whether the Respondent's actions constituted a prohibited practice under NEB. REV. STAT. § 48-816(5), § 48-824 (1), (2)(a), (e), and (f) by refusing to negotiate in good faith and/or unilaterally implementing changes in the terms and conditions of employment before impasse had been reached. For the reasons stated below, the Commission finds that the Respondent declared impasse prematurely and that such declaration was a per se failure to bargain in good faith and was therefore a prohibited practice under NEB. REV. STAT. § 48-816(5), § 48-824 (1), (2)(e), and (f).

FACTS:

The Commission first certified the Union's bargaining unit on February 19, 1998. In the initial contract, the union bargaining unit included the sergeants. However, the sergeants were taken out of the bargaining unit in subsequent negotiation sessions. The current bargaining unit consists of the job classifications of Correctional Officers, Correction Industry Supervisors, and Corporals. Prior to the Respondent's unilateral implementation of changes in terms and conditions of employment, the parties have successfully bargained to resolve three prior contracts. The third of these three contracts was ratified on December 17, 2002, when the Union and the County executed a collective bargaining agreement for the period of July 1, 2002 through June 30, 2004. The bargaining for this contract lasted for at least six sessions. The bargaining continued past the previous contract's expiration on June 30, 2002, by six months.

In order to initiate bargaining for the upcoming contract starting in July of 2004, the County first requested to negotiate on approximately March 26, 2004. Along with this request, the County sent proposed ground rules for negotiating, although as evidenced by testimony at trial neither party followed these new ground rules. The first negotiation ses-

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sion between the Union and the County occurred on May 11, 2004. At the May 11 meeting, the County and the Union exchanged proposals. The exchange of proposals took approximately two hours. The discussion on the proposals centered on brief explanations of each side's requested changes to the 2002-2004 bargaining agreement.

The County's proposal presented on May 11 included a change in health insurance premiums for employees hired prior to January 1, 2001 who pay two-party and family premiums. In the first fiscal year of July 1, 2004 through June 30, 2005, those employees would be required to pay 5% of their premium and in the following year those employees would be required to pay 10% of their premium. The County offered a 1% raise in the first fiscal year and a 2% raise in the second fiscal year. The County also proposed to change the overtime pay of the bargaining unit members, eliminating current overtime pay procedures at a cost of approximately \$1,000 to each employee.

The Union's proposal presented on May 11 included changes in discipline and discharge; leave provisions; holidays; meals, lodging, and mileage allowance; uniforms and equipment; wages; hours of work; and health and dental benefits. At the end of the first negotiating session, the Union gave the County an information request, to which the County partially responded on June 15, 2004.

The second and final negotiation session occurred on June 22, 2004. The County and the Union spent approximately one hour discussing the County's proposal. The parties then caucused for less than one-half hour. After the caucus, the County submitted its final offer to the Union, along with several other documents regarding the increasing cost of health care and comparability. The final offer (Exhibit 50) consisted of an abbreviated description of changes to the contract, with handwritten cross-outs and revisions. It merely referenced contract articles and sections, with statements of accepting the employer's and the employees' proposed changes, with such references as "modified." It consisted of two short paragraphs. At best, it was unclear regarding proposed modifications that would be made to the current contract, which would expire on June 30, 2004. The Union did not ask any questions regarding the final offer, but there was very little time to do so before they were asked to leave. Furthermore, neither side discussed in detail or asked any questions regarding the Union's proposal at any time during the June 22, 2004 meeting, other than a comment by the County's attorney that the County had looked at the Union's proposal and rejected it.

The Union was advised near the conclusion of the June 22 meeting

that they had until 12:00 a.m. on the morning of June 29, 2004 to accept or reject the County's final offer. The County then informed the Union that it had another group coming in next and the Union would have to leave the room. The Union was never notified until prior to halfway through the June 22, 2004 meeting that this would be the last bargaining session between the parties. However, it is clear from the testimony that the County was determined to conclude its bargaining by its last June County board meeting.

The Union's negotiators met with their committee and set up an explanation meeting for the bargaining unit employees on Thursday, June 24, 2004 regarding the County's final offer. After the explanation meeting held on Thursday, the Union voted on Monday, June 28, 2004, unanimously rejecting the County's proposal. The Union then faxed its rejection of the County's offer on June 30, 2004 and requested that the parties continue bargaining to resolve their differences. The County implemented its final offer at its board meeting on June 29, 2004 and notified the Union by a letter dated Tuesday, June 29, 2004. On July 27, 2004, the Union's representative attended the Hall County Board of Supervisors meeting and during an open forum stated that he felt the negotiations were not conducted in good faith, especially since they had always resolved their differences in the past.

The County also negotiated with three other unions in concurrence with this union. Of those three contracts, the County came to an agreement with one bargaining unit (the sheriff's bargaining unit) and declared impasse with two other bargaining units (the public defender's bargaining unit and the public works bargaining unit). On September 20, 2004, the Union filed its prohibited practice petition with the Commission and on November 22, 2004 the public works bargaining unit filed its prohibited practice petition with the Commission.

DISCUSSION:

The Petitioner argues that the Respondent violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f), by unilaterally implementing terms and conditions of employment without bargaining in good faith and without reaching impasse. The Respondent argues that it lawfully implemented changes in terms and conditions of employment of those employees represented by the Union which were mandatory subjects of bargaining after (a) the parties had bargained to impasse, (b) the terms and conditions implemented were contained in a final offer, and (c) the implementation occurred before a petition regarding the year in dispute had been filed with the Commission. Both the Petitioner and the Respondent

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have cited past case law from the Commission and the National Labor Relations Board, (hereinafter, "NLRB") in support of their positions and both parties argue the Commission has the authority to use past NLRB case law in addition to past Commission case law.

The Commission has found in the past that the National Labor Relations Act, (hereinafter "NLRA") and the Nebraska Industrial Relations Act, (hereinafter "NIRA" or "IRA") are similar. In *Fraternal Order of Police, Lodge 41 v. The County of Scotts Bluff, et al.*, 13 CIR 270 (2000), the Commission found that the federal and the state statutes were substantially similar in dealing with prohibited practices. Section 8(a)(5) of the NLRA was found to be nearly identical to § 48-824(2)(e) of the IRA. Both statutes require all parties to bargain collectively in good faith with respect to mandatory subjects of bargaining. However, unlike the statutory comparison found in *County of Scotts Bluff*, in *Ewing Education Ass'n v. Holt County School District No. 29*, 12 CIR 242 (1996), the Commission analyzed whether § 48-824(2)(e) had been violated by a unilateral change in a term of employment found in an existing collective bargaining agreement. In determining whether federal cases could be used as guidance, the Commission found that § 8(d) includes at least one provision that is not included in the IRA. The Commission found that in *Ewing Educ. Ass'n* the difference in the statute related to whether the collective bargaining agreement was currently in existence. The Commission held that because this provision does not exist in the IRA, under Nebraska public sector labor law, a unilateral change in the terms and conditions of an **existing** collective bargaining agreement is not by definition a failure or refusal to bargain. The Commission concluded:

Prior to the passage of what has now become § 48-824 et seq., our Supreme Court held that a duty to bargain exists only after a Petition has been filed with this Commission or a request for bargaining has been made. *Kuhl v. Skinner*, 245 Neb. 794, 515 N.W.2d 641 (1994). While the addition of § 48-824 to the [IRA] may have extended the duty to bargain beyond that found in *Kuhl*, we are not prepared to find that a duty to bargain exists in this case.

Id. at 245.

However, the Commission determined that the differences set forth in § 8(d), which is not found in the IRA, was not applicable to the set of facts in *County of Scotts Bluff*. In sum, the Commission noted that the legislative history of the IRA's § 48-824 clearly states that the purpose of the section is to provide public sector employees with the same pro-

tection from unfair labor practices that most private sector employees enjoy under the NLRA and to make refusing to negotiate in good faith on mandatory bargaining topics a prohibited practice. LB 382, 94th Leg., 1st Sess., 1995. Therefore, in *County of Scotts Bluff*, the Commission found that the corresponding sections of the IRA and NLRA making it unlawful for parties to refuse to negotiate in good faith over mandatory bargaining topics are sufficiently similar for the NLRB decisions to be useful as guidance in interpreting §§ 48-824 (1), (2)(a) and (e) of the IRA. While the Commission found in *Crete Education Ass'n v. Saline County School District No. 76-0002, a/k/a Crete Public Schools*, 13 CIR 361 (2001), *affirmed in relevant part*, 265 Neb. 8, 654 N.W. 166 (2002) that the provisions in the NLRA are not identical to § 48-824 (f), the Commission did determine that the concept of exclusive representation was fairly common between both Acts.

In reviewing these past decisions, we determine that it is appropriate for the Commission to refer to case law from the NLRB. NLRB cases as well as our own past case law will be utilized in determining whether or not the Respondent committed a prohibited practice in this case.

Impasse

The Petitioner argues that it is the Respondent's burden to prove whether or not an impasse in fact existed at the time of the unilateral implementation by the Respondent. The Commission has found in prior cases that the burden of proving impasse remains on the party claiming negotiations have reached impasse. *County of Scotts Bluff*, 13 CIR at 284; See also, *PRC Recording Co.*, 280 NLRB 615 (1986), enforced, 836 F.2d 289 (7th Cir. 1987); *The Baytown Sun*, 255 NLRB 154 (1981). Therefore, the Respondent has the burden of proving impasse in the instant case.

The Respondent argues that it was correct in implementing its final offer because the parties had indeed reached impasse. Conversely, the Petitioner argues the parties were not at impasse as they were willing to make additional concessions, had not had sufficient time or sufficient opportunities to negotiate their contract proposals or to understand the proposals set forth by the Respondent.

The duty to bargain does not require a party "to engage in fruitless marathon discussions at the expense of frank statement and support" of one's positions. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404, 30 LRRM 2147 (1952). In other words, where there are irreconcilable differences in the parties' positions after good faith negotiations, the law

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recognizes the existence of an impasse. Furthermore, numerous NLRB cases have recognized that impasse is possible as to one but not all issues, triggering a continuing duty to bargain on other issues unless the issue precipitating the impasse is overriding enough to justify a finding of impasse as to all issues. See e.g., *Patrick & Co.*, 248 NLRB 390, 103 LRRM 1457 (1980), *enforced*, 644 F.2d 889, 108 LRRM 2175 (9th Cir. 1981); *Providence Med. Ctr.*, 243 NLRB 714, 102LRRM 1099 (1979); *Chambers Mfg. Corp.*, 124 NLRB 721, 44 LRRM 1477 (1959), *enforced*, 278 F.2d 715, 46 LRRM 2316 (5th Cir. 1960); *Pool Mfg. Co.*, 70 NLRB 540, 18 LRRM 1364 (1946), *remanded*, 24 LRRM 2147 (5th Cir. 1949), *vacated*, 339 U.S. 577, 26 LRRM 2127 (1950); *Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 n. 13, 67 LRRM 3032 (D.C. Cir. 1968), *aff'g sub nom. Taft Broadcasting Co.*, 163 NLRB 475, 64 LRRM 1386 (1967).

The Commission defines impasse as when the parties have reached a deadlock in negotiations. *County of Scotts Bluff*, 13 CIR at 284; See, e.g., *PRC Recording Co.*, 280 NLRB at 640 (for impasse to occur, both parties must be unwilling to compromise); *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973-74, *enforced as modified*, 906 F.2d 1007 (5th Cir. 1990) (futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse); *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989), *enforced*, 924 F.2d 1078 (D.C. Cir. 1991) (exhaustion of the collective-bargaining process is required for impasse to exist). The Commission found in *County of Scotts Bluff* that the factors to be considered in determining whether the parties are at impasse included: "number of meetings, length of meetings, period of negotiations, whether either party has expressed a willingness to modify its position, whether a mediator has been called in (a sign of deadlock), the importance of the issues over which the parties disagree (the more important the issue, the more likely an impasse), and the understanding of the parties regarding the state of negotiations." Douglas E. Ray et al., *Understanding Labor Law 208* (Matthew Bender & Co. 1999) (citation omitted); See, David G. Epstein, Comment, *Impasse in Collective Bargaining*, 44 Tex. L. Rev. 769 (1966) as well as the additional factors that may include the parties' bargaining history, continuation of bargaining, union animus, the extent of the difference or opposition, duration of hiatus between bargaining meetings, and other actions inconsistent with impasse. John T. Neighbours et al., *The Developing Labor Law*, 299, 300 (3rd ed. 1998 Cum. Supp.) (citations omitted).

The National Labor Relations Board also considers additional factors, for the existence of an impasse is very much a question of fact. *Carpenter Sprinkler Corp v. NLRB*, 605 F.2d 60, 102 LRRM 2199 (2d Cir.

1979). These may include a strike by the union; the fluidity of a party's position; continuation of bargaining; statements or understanding of the parties concerning impasse; union animus evidenced by prior or concurrent events; the nature and importance of the issues and the extent of difference or opposition; past bargaining history; a demonstrated willingness to consider the issue further; the duration of hiatus between bargaining meetings; the number and duration of bargaining sessions; and other actions inconsistent with impasse.

For example, usually the more meetings had by the union and the employer, the better the chance of a finding that an impasse has occurred. *Fetzer Television v. NLRB*, 317 F.2d 420, 53 LRRM 224 (6th Cir. 1963). See also, *Servis Equip. Co.*, 198 NLRB 266, 80 LRRM 1704 (1972) (no impasse on wages when parties met only twice and union was not given enough advance notice of employer's action to respond.); *Supak & Sons Mfg. Corp.*, 192 NLRB 1228, 78 LRRM 1289 (1971), enforced 470 F.2d 998, 82 LRRM 2560 (4th Cir. 1973) (no impasse on wages when employer did not make its counteroffer until last regular bargaining session); *American Automatic Sprinkler Sys.*, 323 NLRB 920, 155 LRRM 1195 (1997) (no valid impasse where employer declared impasse after only three meetings and misled union during bargaining); *Microdot, Valley Mould Div.*, 288 NLRB 1015, 128 LRRM 1134 (1988) (no bona fide impasse when employer made "final offer" that included proposals requiring further study, gave union only 3 days to respond, and stated it would accept no counteroffers).

In *County of Scotts Bluff*, the Commission set forth the general factors in determining whether impasse existed at the time of unilateral implementation, and also set forth our interpretation on public policy in encouraging parties to settle bargaining between themselves in the *County of Scotts Bluff*. The Commission stated:

The collective bargaining process is a continuing process, which the parties must learn to use to supplement or replace litigation before the Commission. It remains the Commission's position that good faith negotiation is the preferred method for resolution of differences concerning wages, hours and other terms and conditions of employment. Public employers and the bargaining agents for their employees have a duty to bargain in good faith in an attempt to resolve their differences both before, and after, they bring their disputes to the Commission. Successful collective bargaining is less expensive for the parties, less disruptive of public service, more flexible in terms of available solutions, and more

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likely to promote harmony between public employers and their employees. The public interest is not served by public officials and administrators or the agents of public employees who are unwilling or unable to pursue collective bargaining in good faith.

The Commission also cited *NLRB v. Katz*, 369 U.S. 736 (1962) (equating pre-impasse unilateral changes to flat refusals to negotiate), stating that unilateral changes to mandatory terms and conditions of employment made before impasse are **per se** violations of the party's duty to bargain in good faith. In other words, the Commission determined that a finding of actual bad faith is not necessary.

The Commission also found in the *County of Scotts Bluff*, that the distinction between the different categories of bargaining subjects is important, because rules allowing parties to bargain in good faith to impasse, and then to unilaterally implement changes, apply only to mandatory bargaining subjects and not to management prerogatives. In sum, the Commission determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission. See, *Geneva Education Ass'n v. Fillmore County School District 75*, 10 CIR 238 (1989); *General Drivers & Helpers Union, Local No. 554 v. Saunders County*, 6 CIR 313 (1982); *Lincoln County Sheriffs' Employees Ass'n Local 546 v. County of Lincoln*, 5 CIR 441 (1982). If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a **per se** violation of the duty to bargain in good faith.

In applying the above set forth factors in *County of Scotts Bluff*, the Commission found the parties were at partial impasse. The parties had bargained over wage increases, vacation leave, educational incentives, and longevity for more than one year. As to these terms, the Commission found that the parties were at impasse. The Commission commented that in *International Board of Electrical Workers, Local No. 1536 v. City of Fairbury*, 9 CIR 317, 318:

The Commission encourages parties to bargain and settle disputes themselves[,] and if it appears that further bargaining would be fruitful, we will send them back to the bargaining table as we are authorized to do under Section 48-816(1).

Having bargained for over a year on these terms, the Commission found that further bargaining would be futile and would further frustrate the public policy of timely resolution of disputes. The parties were found to have reached impasse on wage increases, vacation leave, educational incentives, and longevity because they were reasonably comprehended within respondent's pre-impasse proposals. The Commission, however, found that the respondent in that case had raised numerous other mandatory subjects of bargaining for the first time in its June 15, 1999 proposal.

The petitioner in *County of Scotts Bluff* was found not have been able to adequately respond to any of these subjects. Since virtually no bargaining had occurred on the terms raised on June 15, 1999, and the parties were not at impasse thereon, Respondent's unilateral implementation of these changes constituted a refusal to bargain in violation of §§ 48-824(1) and (2)(e).

In using those same factors, the NLRB in *Marriott In-Flite Service*, 258 NLRB 755, 108 LRRM 1287 (1981), found no impasse when premium pay and free meal benefits were instituted after 37 negotiation sessions, but neither party had made a wage offer and there were still 26 open items, many of which had not been seriously discussed. The NLRB found it persuasive that few, if any, economic proposals had been made as well as the fact that the unilateral changes were implemented less than two weeks after the employer insisted that no further meetings would be held unless and until the Union agreed to employer's "final offer."

Generally, under the NLRB, once a genuine impasse is reached the parties can concurrently exert economic pressure on each other. The union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate between the parties, changes the circumstances of the bargaining atmosphere, and revives the parties' duty to bargain. Thus, in the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973). However, under NEB. REV. STAT. § 48-802 no public employee in the State of Nebraska may disrupt the proper functioning and operation of government service by strike, lockout, or other means.

While the Commission need not continue to force the parties to

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engage in fruitless marathon discussions at the expense of frank statement and support of their positions, collective bargaining is less expensive for the parties, less disruptive of public service, more flexible in terms of available solutions, and more likely to promote harmony between public employers and their employees. As stated above, a union in Nebraska does not have the ability to strike and cannot exert economic pressure on the employer, so the Commission must be very mindful of each set of circumstances to determine whether an impasse has indeed been reached. Whether a bargaining impasse exists is a matter of judgment and will be different based on the facts of each case. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists.

The Respondent argues in the instant case that impasse does indeed exist. The Respondent also argues that its inflexible position is not in bad faith but is instead considered as "hard bargaining." The Respondent suggests that further bargaining on any of the issues would be futile, as the Union did not present the County with a single counterproposal that would have suggested future bargaining would be fruitful. The Respondent also states that the Commission should not eviscerate the County's right to implement at impasse, described by Respondent as one of its powerful economic tools for achieving its contract terms.

The Petitioner argues that the Respondent took a predetermined and inflexible position to achieve acceptance of all of its own proposals as quickly as possible, regardless of whether there was legitimate impasse. The Petitioner contends that if the Commission finds the parties were at impasse on one issue, that impasse does not suspend obligation to bargain on further issues. The Petitioner further argues that the Respondent, in unilaterally implementing its final offer, withdrew one of its concessions that it had already made and also that two entirely new proposals were presented at the second and last bargaining session. Finally, the Petitioner argues that the Respondent's offer was incomprehensible.

Some difficulty exists in establishing the "inherently vague and fluid... standard" applicable to an impasse reached by hard and steadfast bargaining, as distinguished from one resulting from an unlawful refusal to bargain. Nevertheless, the real issue in this case is whether or not impasse did in fact exist when the Respondent implemented its final offer.

As stated above, in reviewing the evidence to determine whether an impasse exists, the Commission considers a number of factors designed to measure whether bargaining has run its course. Several factors used in deciding this issue clearly point to a lack of impasse between the parties in the instant case. The first factor is the lack of meetings between the parties. The County and the Union had only two meetings before the County declared impasse. The County and the Union had a clear past history of bargaining for at least six negotiation sessions to iron out their differences and these sessions lasted well into the new bargaining year. The parties had never before declared impasse, and had always vigorously attempted to resolve their differences at the bargaining table, rather than through the use of economic pressures or taking a case to the Commission.

The second factor suggests that the length of the bargaining meetings was sorely inadequate, not only because of the quantity of hours spent in negotiation, but also because of the quality of use of those hours to negotiate. The parties met for a total of approximately four hours for a two-year contract negotiation. The first session lasted two hours and lacked little actual negotiation, but was rather more akin to an information session. The second session also lasted two hours and the only proposal seriously discussed at any great length was the County's proposal. The Union's proposal was completely dismissed by the County, not because of hard bargaining, but because of what must be seen as an unwillingness to listen to the opposing side's position. The Union was never afforded any opportunity to argue any of its positions on any of its proposals. Furthermore, the final offer presented by the County was unclear at best. The Union's bargaining team spent significant time during and after negotiations trying to decipher the one-paragraph document. The lack of time afforded to the Union to decipher the County's proposal contributed to the inability to understand the County's final offer.

The third factor we consider is whether either side indicated a willingness to modify its position. The evidence strongly suggests the Union's willingness to modify its position. The Union reiterated its desire to continue negotiations even after the County declared impasse on the Union. While this expression occurred after the County declared impasse, prior to impasse the County gave the Union very little opportunity to present its position or to present a willingness to modify its position. A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective positions. See *Hi-Way*

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Billboards, Inc. However, it is clear that in the instant case the Union was never afforded the opportunity to present a willingness to move from its respective position because of the strict timetable established by the County.

The final and most decisive factor in this case was the understanding of the parties regarding the state of negotiations. The evidence demonstrates with clarity that the driving force throughout this entire negotiation process centered around the County's timetable or the expiration of the past contract. The County's desire to reach an agreement or impasse before the end of the contract year was never expressed directly to the Union prior to the last negotiation session. The parties had repeatedly bargained past the end of the contract year in prior contract negotiations. The County's desire to end the negotiations on June 30, 2004 was also not expressed in their proposed ground rules or request to bargain. Furthermore, the conclusion is inescapable, from the evidence, that for all practical purposes, by May 25, 2004 the County intended to accomplish a change that would require all County employees to contribute to health insurance. Health insurance is a mandatory subject of bargaining and the County cannot usurp the Union's authority as the sole bargaining representative for its employees. Impasse is a deadlock in negotiations with both sides unwilling to compromise. It is not futility, not just frustration or gamesmanship. *County of Scotts Bluff*, 13 CIR 270 (2000). The instant case demonstrates the County's use of gamesmanship, or the calendar, to achieve its goals. The County suggests that this is a refusal to agree case. However, the facts indicate that this is indeed a refusal to bargain case. The parties do not have to bargain ad infinitum, but rather they must enter into meaningful negotiations without a predetermined "end" date.

Hard Bargaining:

The Respondent argues that its position of "hard bargaining" by seeking to modify, alter and eliminate positions in the old contract is not contrary to past Commission case law and past NLRB law. To support its decision, the Respondent cites the case of *Roman Iron Works*, 275 NLRB 449 (1985) and *International Brotherhood of Electrical Workers v. McCook Public Power District*, 3 CIR 117, 119 (1976).

At the outset, it is noted that the Industrial Relations Act, which defined the duty to bargain in NEB. REV. STAT. § 48-816(5), does not compel either party to a collective bargaining relationship to agree to a proposal or to make a concession. Thus, insofar as mandatory subjects of bargaining, the Act does not require either party to yield or compro-

mise its position. While the Commission does not disagree that hard bargaining is lawful under both the NLRB and the Commission, hard bargaining is essentially defined as a situation where one of the parties takes a position and maintains it. In further reviewing the Respondent's cite case *Roman Iron Works*, we note the delicate balance between hard bargaining versus sham bargaining or bargaining without good faith. *Roman Iron Works* states:

Although it is not illegal for a company to engage in hard bargaining, Section 8(a)(5) of the Act nevertheless requires the company to bargain in good faith which is essentially defined as a willingness to enter into a contract. *NLRB v. Insurance Agents Union*, 361 U.S. 477 (1960). Thus, although a company, may use its relative strength to press for contract terms favorable to itself, it may not use its strength to engage in futile or sham negotiations with the intention of never reaching an agreement.

The employer engaged in hard bargaining in *Roman Iron Works* by a reduction of the wage offer during bargaining, denial of a union request for employee addresses, insistence on a right to subcontract, and a demand for significant cost reductions. The Board found, however, that the employer also met frequently with the union, made complete contract proposals, and made several significant concessions, and concluded that the employer did not engage in bad faith bargaining.

The Respondent did not engage in hard bargaining in the instant case. Instead, the Respondent was driven by the calendar, with little recognition given to the Petitioner's positions. Under federal law, hard bargaining is an economic pressure tool used by the employer. Likewise, the economic pressure tools of striking or boycotts can be used by the union employees under federal law. However, it is clear that public employees in Nebraska do not have the same ability to exert pressure upon the employer through the use of the strike. The Respondent argues the Petitioner can exert similar economic pressure to achieve the changes it desires for the current fiscal year by filing a wage petition. While the Commission agrees that a wage case can exert direct economic pressure on the parties, both parties can use that pressure equally, as the employer and the union are both allowed to file petitions in front of the Commission. In the instant case, the Respondent used this tool by threatening the Petitioner that if the parties went to the Commission, the Petitioner would lose its case.

The Commission is mindful that it is not eviscerating the Respon-

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dent's right to hard bargaining. Employers must walk a fine line between hard bargaining and bad faith bargaining. Hard bargaining is strenuous, tedious and frustrating, but as seen in *Roman Iron Works*, is earnest with frequent meetings with the Union and complete contract proposals. Often in cases where the employer has successfully utilized hard bargaining to justify its rigid position, there is a clear failure of the Union to recede from its position or to grant concessions. The Union in the instant case offered to grant concessions and was never afforded an adequate opportunity to present any of its positions in the first instance. Therefore, we decline to find the Respondent did, in fact, use hard bargaining effectively in the instant case to create impasse. Clearly, impasse never existed since the Petitioner was never afforded an adequate opportunity to present its proposal, because the Respondent was intent on finishing before the expiration of the past contract.

Hard bargaining is not a tool the Respondent can use to cut short negotiations by predetermining that negotiations will end at a certain time regardless of the length or nature of those negotiations. Hard bargaining is not bargaining in bad faith and inflexibility in a position is not always bad faith bargaining. However, bargaining must be based upon a good faith effort and not a predetermined agenda set by one side in the negotiations. While hard bargaining and unilateral implementation are tools which can be used, they are not weapons to be used in place of actual bargaining. Public policy strongly encourages the parties to settle their differences. The public interest is not effectively served by public officials and administrators who are unwilling or unable to pursue collective bargaining in good faith.

Ultimately, the Respondent's premature declaration of impasse was a per se failure to bargain in good faith and was therefore a prohibited practice under NEB. REV. STAT. 48-824 (1), (2)(e) and (f). Accordingly, while we have not specifically addressed all of the Petitioner's claims, a finding of bad faith bargaining makes extensive discussion further unnecessary.

Remedial Authority

The Petitioner seeks to have the Commission conclude that the County violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f); order the Respondent to cease and desist from engaging in the prohibited practices; order the Respondent to engage in good faith negotiations with the Petitioner over items listed in the Petition; order the Respondent to make the Petitioner and all bargaining unit employees whole for any loss and expense incurred by them including, but not limited to, reimbursement

of the health care premium fees thus far withheld; reimbursement of attorneys' fees and costs; and finally, to order the Respondent to post a notice to employees promising not to commit any of the found prohibited practices.

Under the NLRB, the usual remedy for an employer's refusal to bargain in violation of Section 8(a)(5) is an order (1) to cease and desist from refusing to bargain, and (2) upon request, to bargain collectively regarding rates of pay, hours, and other conditions of employment. See e.g. *Power Inc.*, 311 NLRB 599, 145 LRRM 1198 (1993), *enforced*, 40 F.3d 409, 147 LRRM 2833 (D.C. Cir. 1994); *Burgie Vinegar Co.*, 71 NLRB 829, 19 LRRM 1055 (1946). In addition to ordering the employer to bargain on the matters at issue, the Board usually will order that the status quo ante be restored and that employees be made whole for any benefits that the employer has unilaterally discontinued. *Beacon Journal Publ'g Co. v. NLRB*, 401 F.2d 366, 69 LRRM 2232 (6th Cir. 1968) and 417 F.2d 1060, 72 LRRM 2639 (6th Cir. 1969); *General Tel. Co. of Fla.*, 144 NLRB 311, 316, 54 LRRM 1055 (1963), *enforced as modified*, 337 F.2d 452, 57 LRRM 2211 (5th Cir. 1964); *American Lubricants Co.*, 136 NLRB 946, 947-48, 49 LRRM 1888 (1962). On the other hand, if the change involved the granting of a benefit, the Board's order will require rescission of the beneficial change only if the union seeks such rescission. *Great W. Broadcasting Corp.*, 139 NLRB 93, 51 LRRM 1266 (1962).

The Commission's authority to issue remedies after finding a failure or refusal to bargain in good faith can be seen in *County of Scotts Bluff*, wherein the Commission entered a cease and desist order, and ordered a recommencement of good faith negotiations.

The Supreme Court has interpreted the Commission's remedial authority broadly. In *IAFF Local 831 v. City of North Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), the Court upheld the Commission's award of interest against a party who had bargained in bad faith. The Court held that § 48-819.01 provided the Commission's authority to award interest even though it does not specifically mention awarding interest. In *International Operating Engineers Local 571 v. City of Plattsmouth*, 265 Neb. 817 (2003), the Supreme Court found that the Commission was correct in returning the union employee to the status quo by ordering reinstatement and the payment of his normal wages, including interest from the date he was laid off, less any net interim earnings. However, under *Crete Educ. Ass'n v. Saline Cty School Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002), the Supreme Court found that an order to post a notice is not in line with the public policy underlying the

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Nebraska Industrial Relations Act and likewise reversed the Commission's decision to require the parties to post such a notice.

The Commission has authority to issue status quo orders under §§ 48-816, 48-819.01, 48-823 and 48-825(2) and to issue a remedy following a finding of a violation to bargain in good faith. These statutes authorize the Commission to issue appropriate remedies that will effectuate the policies of the Industrial Relations Act, adequately provide relief to the injured party, and lead to the resolution of the industrial dispute. An order requiring that good faith bargaining resume and that the offending party cease and desist from committing the prohibited practice found by the Commission is clearly within its authority, and will be therefore ordered. An order requiring the employer to post a notice is clearly not within the Commission's authority according to the Supreme Court in *Crete Educ. Ass'n*. Therefore, the Commission will not require the Respondent to post a notice.

With regard to the issue of attorney's fees, the Respondent's misconduct was not flagrant, aggravated, persistent, and pervasive. See *International Union of Operating Engineers 571 v. Cass County*, 14 CIR 259 (2004). The Respondent was the party to seek timely commencement of negotiations, and the Respondent was responsive to the Petitioner. The Respondent's negotiations did not rise to the level of flagrant bad faith to justify an award of attorney's fees. Accordingly, attorney's fees are not awarded.

The last remedy not previously addressed by the Commission is the Petitioner's request for the reimbursement of benefits including, but not limited to, health insurance premiums paid out by the employees upon the Respondent's unilateral implementation. In order to return the parties to the status quo, the Commission would have to rescind all of the County's unilateral changes. This would include both benefits which were discontinued such as health insurance, and the granting of benefits, such as the employees' wage increase. While the discontinuation of benefits does not pose a practical or public policy concern, the retroactive decrease of granting such benefits as the employees' wages does pose such a concern.

The Commission has pointed out the complexity of practical problems and public policy considerations in requiring employees to repay back wages. See *Nebraska Public Employees Local Union 251 v. Otoe County*, 12 CIR 177 (1996). In *Otoe County*, the Commission stated that it has found in the past that for employees to be required to repay excessive wages or to require future wages to be still further reduced by the

already paid excess would create severe hardships on employees and place severe strain on the employer-employee relationship. The Commission also cautioned that the lowering of wages should not be lightly undertaken. Furthermore, the NLRB clearly does not decrease wages unless asked to do so, and does not require rescission of the beneficial change unless the Union seeks such rescission.

While the Respondent's conduct was not flagrant, aggravated, persistent and pervasive, it was a clear violation of its duty to bargain in good faith. Therefore, the Commission finds the Respondent should make all employees whole for any and all losses incurred as a result of the Respondent's unlawful unilateral implementation of its final offer. The Respondent shall transmit all fringe benefit withholdings, with interest at the legal rate in effect for judgments entered on this date, except as agreed upon in the previous collective bargaining agreement. The Commission does not require the employees to reimburse the Respondent for any benefits they have received since the unilateral implementation. Furthermore, the Respondent shall not rescind the wage increase granted to the employees until a good faith agreement has been reached between the Petitioner and the Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED
that:

The Respondent, County of Hall, shall

1. Cease and desist from:

- (a) Failing and refusing to bargain in good faith with the Union Local 22 as the collective bargaining representative of its employees in the certificated unit.
- (b) Unilaterally implementing any so-called "final" proposal without first bargaining to impasse.
- (c) Unlawfully withholding any benefits as a result of the County's prohibited practices including, but not limited, to the health insurance premium percentage from employees who were employed prior to January 1, 2001.
- (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Industrial Relations Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Industrial Relations Act:
- (a) Reimburse such health insurance premiums improperly withheld, since July 1, 2004 plus interest at the rate of 4.63%, which is the Nebraska judgment rate now in effect.
 - (b) Continue to pay the wage increase granted to the employees as of July 1, 2004 until a good faith agreement has been reached between the Union and the County.
3. The parties shall recommence negotiations over these issues within thirty (30) days, and shall negotiate in good faith until an agreement has been reached or further order of the Commission.

All panel judges join in the entry of this order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

UNITED FOOD AND COMMERCIAL)	Case No. 1081
WORKERS DISTRICT LOCAL 22,)	
)	
Petitioner,)	ORDER NUNC
)	PRO TUNC
v.)	
)	
COUNTY OF HALL, NEBRASKA,)	
A Political Subdivision,)	
)	
Respondent.)	

Filed April 25, 2005

APPEARANCES:

For Petitioner:	Michael J. Stapp Blake & Uhlig, P.A. 753 State Avenue, Suite 475 Kansas City, KS 66101
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COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1081

For Respondent: Jerry L. Pigsley
Harding, Shultz, & Downs
800 Lincoln Square
121 S. 13th Street
Lincoln, NE 68501

Before: Judges Blake, Burger, and Lindahl.

BLAKE, J:

The Commission, having convened, finds that the Findings and Order entered in this case on March 24, 2005 contains an inadvertent error on page 24, that should be corrected.

IT IS THEREFORE ORDERED that the portion of page 24 of the Findings and Order entered on March 24, 2005, which reads:

- (c) Unlawfully withholding any benefits as a result of the County's prohibited practices including, but not limited, to the health insurance premium percentage from employees who were employed prior to January 1, 2001.

Is hereby corrected to read:

- (c) Unlawfully withholding any benefits as a result of the County's prohibited practices including, but not limited, to the health insurance premium percentage from employees who were employed prior to July 1, 2000.

All panel judges join in the entry of this order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

LOCAL UNION 571,	)	Case No. 1082
INTERNATIONAL UNION OF)	
OPERATING ENGINEERS, AFL-CIO,	)	FINDINGS AND
	)	ORDER
Petitioner,)	
)	
v.)	
)	
THE COUNTY OF DOUGLAS, and)	
ROGER MORRISSEY, Douglas)	
County Assessor,)	
)	
Respondents.)	

Filed January 20, 2005

APPEARANCES:

For Petitioner: Thomas F. Dowd
Dowd, Howard & Corrigan, L.L.C.
1411 Harney Street
Suite 100
Omaha, NE 68102

For Respondent: James R. Thibodeau
Douglas County Deputy Attorney
909 Civic Center
Omaha, NE 68183

Before: Judges Burger, Orr, and Blake

BURGER, J:

NATURE OF THE PROCEEDINGS:

International Union of Operating Engineers Local 571, (hereinafter, "Petitioner") filed a Petition pursuant to NEB. REV. STAT. § 48-824(1) (Reissue 1998), claiming that Douglas County and its Assessor, Roger Morrissey (hereinafter, "Respondents"), committed a prohibited practice by unilaterally terminating a policy of furnishing vehicles to appraisers in connection with the performance of their duties. The Petitioner seeks

to restrain and enjoin the Respondents from requiring them to use their personal vehicles in performance of such duties until or unless the Petitioner has agreed to the same or the Commission of Industrial Relations has entered an order in connection with a Section 48-818 proceeding.

The Respondents Answer admitted it eliminated the practice of providing a county vehicle to assessor employees, and alleged the use of such vehicles was not, and has never been, a reasonably expected benefit, term or condition of employment to which the employees were entitled via contract, statute or any other means.

The issue presented at trial was whether the Respondents' unilateral change in the policy of furnishing vehicles to appraisers was a prohibited labor practice, a reserved management prerogative as a matter of law, or a permissible action under the collective bargaining agreement. For the reasons stated, the Commission finds that the issue of eliminating county vehicles was a mandatory subject of bargaining, which was not bargained over in good faith to impasse. The Petitioner did not waive the right to bargain over the elimination of the county vehicles. The Respondents action was a violation of NEB. REV. STAT. § 48-424(1).

FACTS:

On or about September 8, 2004, the Douglas County Fleet Management Council (acting as an agent of the County of Douglas) voted to reallocate all county-owned automobiles that had been assigned to the office of the assessor for the use of the assessor's employees, to other county departments. The employees of the assessor's office were notified of this decision in a memo from the Douglas County Assessor Roger Morrissey on approximately September 9, 2004. The memo stated that the employees in the office of the assessor who previously had access to a county-owned vehicle were required to use their personal vehicles to perform their appraisal duties and were to be paid for the use of their personal vehicles at the statutory rate set forth in Article 22 of the Collective Bargaining Agreement between the parties. The Petitioner requested temporary relief in the form of a status quo order to prevent the Respondents from implementing its September 9th memorandum. The Commission of Industrial Relations granted this relief.

At trial, the witnesses testified about the past history surrounding the use of county vehicles in the County Assessor's Department. Historically, from approximately 1960 until 1975 the appraisers in the Assessor's office were furnished county vehicles. These vehicles were picked-up every morning at a garage in downtown Omaha and then brought

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back to the garage overnight for storage again until the next workday. Then, beginning in 1975, the appraisers were allowed to take the county-furnished vehicles home with them, if they signed a contract maintaining responsibility for the vehicle. This practice continued until approximately 1999, when not all the appraisers were able to use the county vehicles because the office was short of cars. The vehicles were then assigned to the appraisers based on their seniority in the department. During this time period, whenever an appraiser was interviewed for a job, they were told they would be furnished a county vehicle to drive back and forth to work. Both past and present county employees testified to the advantages of the system of allowing the assessor employees a county vehicle. With the unlimited access to the county vehicle, the employees were able to remain at work in the field until quitting time. The ability to use the county vehicle was asserted to be a considerable benefit to the county assessor employees. The assessor employees would not have to purchase additional insurance coverage because they used a vehicle fully insured by the county and not their own personal vehicle. Employees of the assessor's office also testified that out-of-pocket expenses for fuel driving to and from work would be a considerable loss of benefits. One witness testified that several appraiser's employees only have one car in their family, and would have to purchase an additional car if they were required to use their own personal vehicle. Another witness testified that the county considers the cars a fringe benefit, because, the county issued documents requiring the assessor employees to report income tax based on the use of the county vehicles.

These practices continued to occur without a contract or a union until 2001. In 2001, a union was formed and voluntarily recognized. During the next three years, the Union and the County negotiated a one-year contract, and a subsequent two-year contract. The Petitioner's witnesses testified that the Union negotiated for collective bargaining language on use of county vehicles to protect the assessor employees' rights to use a county vehicle, and that the County wanted to include a provision on vehicles in order to limit the amount of mileage paid to the assessor's employees who used their own vehicles. Out of nine contracts the Union employees have with Douglas County, only this unit's contract contains the automobile provision. Both sides stated they are in negotiations for the next contract year because their current agreement expired on June 30, 2004. The Petitioner and the Respondents agree that the union was not approached prior to the letter received by the assessor's employees. In the process of contract negotiations, the County has developed job descriptions for the assessor employees, the Real Estate Lister Assessor, who is an assistant to an appraiser, is required to have a valid driver's license and their own mode of transportation. The job descriptions of

appraisers only require a valid driver's license. The County stated that they did not consider job descriptions in changing its policy of furnishing vehicles to the assessor's office. Instead, the Respondents witnesses stated that the County was implementing this change to save money, and extend the life of each vehicle.

DISCUSSION:

Mandatory Subjects of Bargaining

The issue presented is whether the Respondents unilateral action in terminating the County policy of furnishing vehicles to appraisers employed by the assessor's office for performance of their duties constituted a prohibited labor practice, was a reserved management prerogative as a matter of law, or a permissible action under the collective bargaining agreement. The first question is whether the elimination of furnishing vehicles to appraisers is a management prerogative, or, a mandatory subject of bargaining. There are three categories of collective bargaining subjects: mandatory, permissive, and prohibited. *International Union of Operating Engineers Local 571 v. City of Plattsmouth*, 14 CIR 89 (2002). Affirmed. 265 Neb. 817 (2003). The IRA only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1). Permissive subjects are legal subjects of bargaining, which do not fit within the definition of mandatory subjects. See, *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958). Either party may raise a permissive subject during bargaining, but the other party is not required to bargain over permissive subjects. *Id.* Finally, prohibited subjects are topics which the law forbids the parties from agreeing upon. The Commission in *Service Employees International Union, Local No. 226 v. School District No. 66*, 3 CIR 514 (1978), used a relationship test in determining bargaining issues. "Whether an issue is one for bargaining under the Court of Industrial Relations Act depends upon whether it is primarily related to wages, hours and conditions of employment of the employees, or whether it is primarily related to formulation or management of public policy." *Id.* at 515; See also *Coleridge Education Ass'n v. Cedar County School District No. 14-0541, a/k/a Coleridge Community Schools*, 13 CIR 376 (2001).

In situations where our statutory provisions are substantially similar to the National Labor Relations Act ("NLRA"), and the issue is not definitively settled in Nebraska, we may look to the National Labor Relations Board ("NLRB") for guidance. The NLRB and United States Supreme Court interpretation of "wages" and "conditions of employment" under the NLRA can serve as a guide to what constitutes nego-

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tiable subjects under Nebraska law. *Norfolk Education Ass'n v. School District of Norfolk*, 1 CIR No. 40 (1971). The Nebraska Supreme Court has repeatedly held that “[d]ecisions under the NLRB are helpful where there are similar provisions under the Nebraska statutes”, *Nebraska Public Employees v. Otoe City*, 257 Neb. 50, 63, 595 N.W. 2d 237 (1999) (quoting *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 12, 277 N.W. 2d 529, 535 (1979)). We have also held that Sections 8(a), 9(a), and 8(d) of the NLRA are substantially similar to NEB. REV. STAT. § 48-824. See *Fraternal Order of Police Lodge 41 v. County of Scotts Bluff, et. al.*, 13 CIR 270 (2000); and *Crete Education Ass'n v. Saline County School District No. 76-0002, a/k/a Crete Public Schools*, 13 CIR 361 (2001). In this case, decisions interpreting the NLRA may be helpful as guidance interpreting NEB. REV. STAT. § 48-824(1).

The Commission has also had several cases that have discussed terms and conditions of employment, and mandatory subjects of bargaining. The first case which discussed terms and conditions of employment was the case of *Seward Education Ass'n v. School District of Seward*, 1 CIR 34 (1971). Affirmed. 188 Neb. 772, 199 N.W. 2d 752 (1972). In *Seward*, the Commission did not adopt a general legal definition or rule interpreting the phrase “terms and conditions of employment.” Instead, the Commission based its determination on the issues presented through evidence at trial as proper subjects of bargaining. The Commission found from the evidence that the subjects of salary schedule, professional leave and dues to professional organizations (related to subject area), noon duty, dress code, and school calendar, constituted a pending industrial dispute at this time, and were proper subjects for negotiations between the parties under the statutes.

In *Omaha Police Union Local 101 v. The City of Omaha*, 7 CIR 179 (1984), the Union contended that the assignment of parking stalls constituted a condition of employment and the police chief's decision to reallocate the stalls should therefore have been bargained with the Union. According to the Union, the assignment of these stalls without the agreement and approval of the Union constituted a unilateral change in conditions of employment in violation of NEB. REV. STAT. § 48-816. In *Omaha Police Union Local 101*, we determined that the assignment of parking stalls was a term or condition of employment. The Commission reasoned that while the language of the Industrial Relations Act did not follow exactly the language of the National Labor Relations Act (29 U.S.C. 158(d)), which requires good faith negotiations regarding “other terms and conditions of employment”, the Act did refer specifically to conditions of employment or conditions of work in §§ 48-801(6), 48-

801(7), 48-837, and 48-816. Analyzing past case decisions, the Commission looked at *Norfolk Educ. Ass'n*, 1 CIR No. 40, where the Commission states that "our state statutes ... resemble the National Labor Relations Act ... on the issue of negotiable subjects," and "Since it seems apparent that the Nebraska Legislature had the same purpose in mind as the Congress in determining what should be considered mandatory subjects for collective bargaining, held that court and board interpretations of 'wages' and 'conditions of employment' under the National Labor Relations Act can serve as a guide for interpretation of what constitute negotiable subjects under the Nebraska law." The Commission in *Omaha Police Union Local 101* also considered the case of *City of Grand Island v. American Federation of State, County and Municipal Employees*, 186 Neb. 711, 185 N.W. 2d 860 (1971). In the *City of Grand Island*, the Nebraska Supreme Court gave consideration to ... decisions under the federal law in resolving an appropriate bargaining unit issue.

There is no definition of "conditions of employment" in the National Labor Relations Act, but the courts and National Labor Relations Board have given this language a broad interpretation, so as to include such remote subjects as maintenance of trucks, lease arrangements between employers and owner-drivers, issuance of an employees manual, the size and composition of a grievance committee, and employee payment system. "Conditions of employment" has also been interpreted to be more inclusive than the term "working conditions" as used in the Railway Labor Act, *Inland Field Co. v. NLRB*, 170 Fed.2d 347, and in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 8 LC 51, the United States Supreme Court stated that the statutory collective bargaining duty includes bargaining "about the exceptional as well as the routine" matters affecting wages, hours, and other conditions of employment.

Although less experienced than the NLRB in this area of interpretation, the CIR has determined that the following subjects are conditions of employment: dues to professional organizations, Noon duty, and dress code, grievance procedures; Contact time (time actually spent by an instructor with a student); and subcontracting of janitor work.

As stated in *Omaha Police Union Local 101*, a condition of employment should have an effect and an economic impact on the employee's job assignment. It does not include certain subjects normally considered

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prerogatives of management, such as business schedules, company policy, plant locations, and supervisors. In *Omaha Police Union Local 101*, the Commission also quoted the NLRB decision of *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 50 LC 19, 384, which states the Supreme Court said that “nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such management decisions which lie at the core of entrepreneurial control...”

In sum, the Commission reasoned in *Omaha Police Union Local 101*, that the police chief’s unilateral decision to reserve parking stalls to certain members of the bargaining unit (captains and lieutenants) had some economic impact on the members of the bargaining unit though the impact was not as great as is suggested by the Union at trial. Nevertheless, the Commission found that though the effect of this parking stall assignment might be slight, it dealt directly with the relationship between the employer and the employees, affecting the employees’ job benefits, and did not involve a decision which lay at the core of entrepreneurial control. The Commission found it to be a condition of employment.

Although this case was decided in the context of a complaint that this action was a failure to bargain in good faith, as required by NEB. REV. STAT. § 48-816, its analysis of what is a term and condition of employment remains valid.

The NLRB has also held that the use of company vehicles for transportation to and from work involves working conditions, and therefore is a mandatory subject of bargaining. *Eagle Material Handling of New Jersey*, 224 NLRB 1529, 1532-33 (1976) and *Ford Motor Co. v. NLRB*, 441 U.S.488, 99 SCT 1842, 60 Led. 2d 420 (1979). Other public labor relation boards have also found the use of company vehicles a mandatory subject of bargaining. See *Teamsters Local Union No. 48 v. Town of Jay*, Maine Labor Relations Board, No. 80-02 (1979) and *Town of Wilton v. Wilton Municipal Employees Union Local 1303-160 of Council 4, AFSCME, AFL-CIO*, Connecticut Board of Labor Relations, Dec. No. 2779 (1990).

The provision of county vehicles to assessor employees was a mandatory subject of bargaining, and not a management prerogative.

The Respondents next argue that the management rights clause in Article 15 allows the County to reallocate the use of the county vehicles without discussing it with the Union prior to implementation. The management rights clause states:

Except where limited by express provisions of this agreement, nothing herein shall be construed or interpreted to restrict, limit, or impair the right, powers and authority of the county and assessor heretofore possessed and hereinafter granted by virtue of law, regulations or resolution. These rights, powers and authority include, but are not limited to, the right to manage and supervise all of its operations and establish work rules, regulations and other terms and conditions of employment not inconsistent with the specific terms of this agreement.

The Petitioner argues that the history, the union contract, and current lack thereof, as well as the job performance programs, all indicate that the subject of eliminating the furnishing of county vehicles is indeed a mandatory subject of bargaining. The job performance program issued by Roger Morrissey states what management expects of its assessors and what the assessors can expect of their management. "The administration will provide access to a county car, computer and access to building permit data." Article 22 in the automobile provision of the last negotiated agreement states:

Assessor employee will share assigned county cars for filed work in the real and personal property departments. When approved in advance by management, employees may use their personal vehicles to complete work assignments. When using personal vehicles, employees will complete forms prescribed by management and submit same for mileage reimbursement. The reimbursement rate will be the standard current rate as established by Douglas County.

For approximately forty-four (44) years, the County has furnished vehicles to the majority of employees in the assessor's office. This has clearly been established by the Petitioner as a benefit to its union members and makes a significant economic impact on their employment with the Douglas County Assessor's Department. We find the unilateral elimination of furnishing county vehicles was indeed a mandatory subject of bargaining which the Respondents changed without any notice to the Union, or bargaining between the parties.

Remedial Authority

The Petitioner requests that the Respondent be ordered to maintain the status quo until such time as we have ruled, and after such ruling, provide attorney's fees to the Petitioner.

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The Commission has the authority under the plain language of the statute to issue cease and desist orders following findings of prohibited practices and has done so in the past. In *Ewing Education Ass'n v. Holt County School District No. 29*, 12 CIR 242 (1996) (en banc), the Commission found that the school district committed a prohibited practice when it unilaterally changed a condition of employment contained in a collective bargaining agreement. After entering into a collective bargaining agreement, the school district unilaterally changed the bargaining unit's health insurance options. As a remedy, the Commission ordered the school district to cease and desist from charging insurance fees, to reimburse the fees withheld, and to post a notice to employees promising not to commit the same prohibited practices.

The Commission also found a prohibited practice in *State Law Enforcement Bargaining Council v. State of Nebraska*, 13 CIR 169 (1998) (applying the State Employees Collective Bargaining Act). In this case, the Commission's remedy was an order for the Respondent to "**cease and desist** of and from the prohibited practices found herein". *Id.* at 176 (emphasis added).

Finally, in *International Union of Oper. Engrs. Local 572*, 265 Neb 817 (2003), the Supreme Court found the Commission's cease and desist order fully appropriate.

In the instant case, an order requiring that good faith bargaining resume, and that the offending party cease and desist from committing the prohibited practices found by the Commission, is within our authority. The Respondent shall reinstate and maintain the practice of providing vehicles at its pre-September 9th level, unless and until the Respondent has negotiated a change in the practice with the Petitioner.

Although the failure to bargain with Petitioner over a mandatory subject of bargaining can undermine the bargaining process, the evidence does not reflect that Respondent's action was taken with that purpose, and intent. Rather, it appears to have been action which was taken without consideration of its obligation to bargain over the issue. Accordingly, we deny the Petitioner's request for assessment of attorney's fees as a part of the remedy.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED
that:

1. Respondent shall cease and desist from enforcing any implementation of changes in the furnishing of county vehicles to assessor

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employees within the Petitioner's bargaining unit, which we find is a mandatory subject of bargaining.

- 2. The Respondent shall reinstate and maintain the practice of providing vehicles at its pre-September 9th level, until the Petitioner and Respondent have negotiated a resolution of the practice, or a subsequent order of the Commission.
- 3. The parties shall recommence good faith negotiations over these issues within thirty (30) days.

All panel judges join in the entry of this order.

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BARGAINING COUNCIL,)	Rep. Doc. No. 388
)	
Petitioner,)	
)	FINDINGS AND
v.)	ORDER
)	
STATE OF NEBRASKA,)	
)	
Respondent.)	

Filed May 3, 2005

APPEARANCES:

For Petitioner:	Vincent Valentino
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For Respondent: Jon Bruning
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Before: Judges Lindahl, Blake, and Burger.

LINDAHL, J:

NATURE OF THE PROCEEDINGS:

The State Law Enforcement Bargaining Council (hereinafter, "Petitioner" or "Union") filed a Petition on October 13, 2004, seeking an order to clarify or amend a collective bargaining unit comprised of State of Nebraska law enforcement employees as set forth in NEB. REV. STAT. § 81-1373 (1)(g) holding powers of arrest, including Nebraska State Patrol officers and sergeants, game wardens, fire marshal personnel, and similar classes. The State of Nebraska (hereinafter, "Respondent") filed an Answer on November 3, 2004, asserting as an affirmative defense that six positions in the Game and Parks Commission are considered supervisors under NEB. REV. STAT. § 48-816(3) (Reissue 1998), and therefore should be excluded from the proposed bargaining unit.

The Commission of Industrial Relations (hereinafter, "Commission") held a hearing on February 11, 2005, to determine the said issue.

FACTS:

The State Law Enforcement Bargaining Council is recognized by the State of Nebraska and certified by the Commission. As the exclusive representative for the Law Enforcement Bargaining Unit set forth in NEB. REV. STAT. § 81-1373 (1)(g), the State Law Enforcement Bargaining Council currently bargains for eight job positions. These positions consist of the following: State Patrol Trooper, State Patrol Investigation Officer, State Patrol Sergeant, State Patrol Investigation Sergeant, Game and Parks Conservation Officer, Fire Marshal Deputy, Liquor Control Inspector, and State Patrol Carrier Enforcement Officer.

The Game and Parks Commission has a defined organizational chart

in their policy manual. The organizational chart starts with the Secretary of the Department, Rex Amack, who heads the Game and Parks Commission, overseeing all of the Game and Parks Commission departments. The Secretary is the ultimate decision-maker on hiring, firing, and discipline within the agency. The Game and Parks Commission is then split into four Assistant Directors for Administration, Parks, Fish and Wildlife, and Affirmative Action. The head of the Fish and Wildlife Division is Kirk Nelson. Under Mr. Nelson there are five Division Administrators for Law Enforcement, Wildlife, Fisheries, Federal Aid, and Realty and Environmental Services. Ted Blume heads the Division for Law Enforcement. The Game and Parks Commission Law Enforcement Division is organized similarly to the Nebraska State Patrol, as it is a para-military division. Under Mr. Blume, there are two Assistant Division Administrators: Craig Stover and Wes Loos. Under Assistant Administrator Stover, there are two Conservation Officer Supervisors for Districts 3 and 5. Under Assistant Administrator Loos, there are three Conservation Officer Supervisors for Districts 1, 4, and 6 as well as a Staff Supervisor. Each of the Conservation Officer Supervisors has between eight and ten Conservation Officers in his district. The Staff Supervisor does not have any Conservation Officers directly under her except during their training, when she does oversee their progress.

The Petitioner desires to place six additional employees into the Law Enforcement Bargaining Unit, which already includes Conservation Officers from the Game and Parks Commission. The additional employees who seek to be placed in the already established bargaining unit consist of five Conservation Officer Supervisors and one Staff Supervisor. The individuals who occupy the five positions of Conservation Officer Supervisor are James Zimmerman, Roger Thompson, Duane Arp, Jerry Pecha, and Thomas Zimmer. The Staff Supervisor position is currently held by Dana Miller. These six positions are not currently part of any other bargaining unit.

The Staff Supervisor position currently occupied by Dana Miller performs different duties than her counterparts (the Conservation Officer Supervisors). Approximately fifty percent of her duties involve the coordination of homeland security for the Game and Parks Commission. She spends approximately five percent of her time training new Conservation Officers, who are employed at the rate of approximately one new trainee per year. The Conservation Officers in training are located in Grand Island, Nebraska and Ms. Miller is located in Valentine, Nebraska. As part of her duties, she performs an evaluation of the training employees that go through the initial training program. After completing these evaluations, she sends them to her supervisor for his input

and approval. The rest of her time is spent keeping track of certifications of all the Conservation Officers and Conservation Officer Supervisors, which includes entering and maintaining computer records, setting up training meetings, initiating permit renewals, and serving as a liaison for the wildlife rehabilitation organizations. Ms. Miller has no direct ability to purchase anything greater than three hundred dollars for her divisional area. The vast majority of her expenditures must receive prior approval from her supervisor, Assistant Administrator Loos. The position of Staff Supervisor is an hourly position. In November of 2004, the position changed from an exempt status to a non-exempt status under the new provisions of the Fair Labor Standards Act. The reason Ms. Miller was determined to be non-exempt under the FLSA was because she did not supervise more than two employees on a regular or customary basis. Furthermore, Ms. Miller cannot work more than forty hours per week without the permission of her supervisor. Assistant Administrator Loos or Administrator Blume must approve the majority of her decisions.

The Conservation Officer Supervisors perform a different function under the Law Enforcement Division of the Game and Parks Commission. The majority of the Conservation Officer Supervisors' duties are performed in the field, often working side-by-side with the Conservation Officers, giving them guidance and direction in their work. Both Conservation Officers and Conservation Officer Supervisors assist in fish and wildlife census and rescue operations. Both write tickets and arrange local meetings to explain regulations, changes, or proposed programs. They also both prepare and present radio and television programs and establish and maintain contact with newspapers and local media. Conservation Officers and Conservation Officer Supervisors assist one another in planning and preparing fair and sports show exhibits. Conservation Officers and Conservation Officer Supervisors work flexible hours, enforce game laws, appear and testify in court, and use confidential informants, who are paid with senior management approval.

Conservation Officer Supervisors review the Conservation Officers' twenty-eight day reports, making sure the Conservation Officers' reports are mathematically accurate. Conservation Officer Supervisors can only authorize overtime when those hours are relatively insignificant (one or two hours of overtime) or the Conservation Officer Supervisors' district has had an emergency, such as a boating accident. However, even in those emergency situations the Conservation Officer Supervisor often relays such information on to his Assistant Administrator. Each year, the Conservation Officer Supervisors perform evaluations on the Conservation Officers in their district. Those evaluations are set up pursuant to supervisory mandates and are thoroughly reviewed and finalized by

Assistant Administrators, and sometimes by Administrator Blume as well.

There are also strict guidelines for the authorization of expenditures. The Conservation Officer Supervisors must purchase tires per the state contract guidelines. Purchases totaling more than three hundred dollars must have prior senior management approval. Unless it is a minor press release, senior management must clear all press releases. The Conservation Officer Supervisors have quarterly meetings with their supervisors. In those meetings, the Conservation Officer Supervisors are given information to disseminate to the Conservation Officers, so that everyone is compliant with rules and regulations. Senior management does not consistently follow the Conservation Officer Supervisors' recommendations. On a regular basis, the senior management makes independent decisions, and then disseminates these decisions on to the Conservation Officer Supervisors to pass along to the Conservation Officers. Examples of such independent decision making occurs when the Administrator chooses where duty stations are to be placed or when large special detail assignments are to occur.

The Conservation Officer Supervisors liken themselves to a working foreman. The observation of the Conservation Officers by the Conservation Officer Supervisors is not a day-to-day occurrence. Sometimes the Conservation Officer Supervisors do not observe the Conservation Officers even once a week and occasionally the Conservation Officer Supervisors will not observe the Conservation Officers even once a month. A Conservation Officer's work generally requires a greater level of independent judgment much like a State Patrol Officer's work requires. Conservation Officer Supervisors strictly follow their standard operating procedures, most of which are set forth in great detail by their senior management.

In February of 2003, the Game and Parks Commission attempted, through their senior management, to obtain a reclassification for their Conservation Officer Supervisors in an effort to raise their pay grade. The Conservation Officer Supervisors were asked to fill out a comprehensive position questionnaire. In a supervisory meeting, the Conservation Officer Supervisors were given significant direction as to the information that should be placed in the comprehensive position questionnaire. After the Conservation Officer Supervisors had initially completed their questionnaires, the questionnaires were then passed on to senior management. Administrator Blume instructed the Conservation Officer Supervisors to include all of the staff salaries and value of equipment as part of each Supervisor's district expenditures. After all of the

changes were made by senior management, the comprehensive position questionnaires were sent to the State Personnel Division. In May of 2003, the State Personnel Division denied the Game and Parks Conservation Officer Supervisors a change in pay grade. In October of 2004, the State Bargaining Council filed its petition with the Commission to clarify or amend the bargaining unit.

DISCUSSION:

The Petitioner argues that the six positions are not supervisory and share a community of interest with those law enforcement officers currently included in the bargaining unit, such as the Sergeants of the Nebraska State Patrol. The Respondent argues that the Conservation Officer Supervisors and Staff Supervisor are “supervisors” pursuant to NEB. REV. STAT. § 48-801(9) and if the Commission finds the positions to be “supervisors,” those positions are not exempted under the specific exceptions in NEB. REV. STAT. §§ 81-1373(1)(g) and 48-816(3)(b) and (c).

We confine our analysis to the two issues presented by the parties at Trial: whether these six positions are supervisory positions under NEB. REV. STAT. § 48-816(3)(a) (Reissue 2004) and whether the Conservation Officer Supervisors and the Staff Supervisor are considered “similar classes” to be included with the Sergeants in the bargaining unit.

Section 48-801(9) provides, in relevant part, that:

Supervisor shall mean any employee having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

This statutory definition is disjunctive and therefore, to be classified as a supervisor, an employee need only have one of the types of authority specified in the statute. *International Union of Operating Engineers Local 571 v. Cass County*, 14 CIR 118 (2002). The status of a supervisor is determined by an individual’s duties, not by title or job classification. The employee must exert the power to act as an agent of the employer in relations with other employees and to exercise independent judgment of some nature in order to establish one’s status as a “supervisor.”

It is important to distinguish between truly supervisory personnel, who are vested with “genuine management prerogatives,” and employees such as “straw bosses, leadmen, and set-up men, and other minor supervisory employees” who are entitled to join collective bargaining units even though they perform “minor supervisory duties.” *Id. Neligh Ass’n Group v. City of Neligh*, 13 CIR 305, 307-308 (2000) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). Consistent with the language and purpose of the definition’s independent judgment requirement, the NLRB has long distinguished between a “superior workman or lead man who exercises the control over less capable employees. . . [and] a supervisor who shares the power of management.” *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959).

Under these standards, it is the Commission’s opinion that none of the six positions (District One Conservation Officer Supervisor, District Three Conservation Officer Supervisor, District Four Conservation Officer Supervisor, District Five Conservation Officer Supervisor, District Six Conservation Officer Supervisor, and Staff Supervisor) of the Nebraska Game and Parks Commission are statutory supervisors as defined in § 48-801(9). Our analysis is as follows:

Staff Supervisor

The Staff Supervisor performs a very different function from the Conservation Officer Supervisors in the Nebraska Game and Parks Commission. Likewise, in analyzing whether or not she is a supervisor, she should be treated separately in order to make such a determination. Staff Supervisor Dana Miller runs the day-to-day operations of the training of new employees for the Game and Parks Law Enforcement Division. However, this function of her job is only a very small portion of her duties. Ms. Miller rarely has face-to-face contact with the new employees in training. While she does perform evaluations of the training employees, those evaluations have distinct parameters for her to follow in assessing each new hire’s abilities. Each evaluation is thoroughly and independently reviewed and often changed by senior management. She does not effectively recommend actions for any of the new employees in training. Ms. Miller does not possess the authority to hire, fire, suspend, lay-off, recall or promote.

Ms. Miller is responsible for managing the proper completion of training and updating certifications. Although she manages this function, her function is routine and clerical in nature. When the exercise of supervisory authority by an employee is of a routine nature, such employee

should not be excluded as a supervisor in determining an appropriate bargaining unit. *International Brotherhood of Electrical Workers, Local 1250 v. Northwest Rural Public Power District*, 5 CIR 74 (1980).

Ms. Miller's supervisory authority is routine and is not such as to render her a supervisor under the tests applied by our past decisions and/or those decisions of the Nebraska Supreme Court. Nor are her interests so conflicting with those of the other employees already in the bargaining unit as to warrant her exclusion from the bargaining unit. The purpose for excluding supervisors from being in units with those whom they supervise is to minimize potential conflicts of interest. See *Nebraska Ass'n of Public Employees v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976). Ms. Miller is more closely aligned with labor than with management. Both she and the employees she supervises are paid as hourly employees. Including Ms. Miller in the bargaining unit will not create a conflict of interest, as she has no policy-making authority. Ms. Miller does not possess any § 48-801(9) supervisory authority. Therefore, the Staff Supervisor should be included in the bargaining unit.

Conservation Officer Supervisor

While the Conservation Officer Supervisors perform a different function than the Staff Supervisor position, the Conservation Officer Supervisors do not possess the authority to hire, fire, suspend, lay-off, recall or promote. The Conservation Officer Supervisors often work side-by-side with the Conservation Officers. To the extent that the Conservation Officer Supervisors direct the other Conservation Officers, their direction is routine in nature. On a daily basis, the Conservation Officer Supervisors perform the same work as his fellow Conservation Officers. Often those Conservation Officer Supervisors have a relatively high activity report as compared to the Conservation Officers located in their district. The Conservation Officer Supervisor's main function is to disseminate information to their local Conservation Officers, most notably because of the great distance geographically between the headquarters and the satellite district locations. These Conservation Officer Supervisors relay instructions, follow procedures, conform to contractual language, and perform the routine clerical work of double-checking the math in weekly schedules and in work activity reports. While the Conservation Officer Supervisors do perform evaluations of Conservation Officers, those evaluations have distinct parameters for them to follow in assessing the Conservation Officer's work. Each evaluation is thoroughly and independently reviewed and changed by senior management. To the extent that the Conservation Officer Supervisors direct

other employees, their direction is routine in nature. The fact that an individual is identified as a supervisor, is not necessarily dispositive of supervisory status.

The Petitioner also presented testimony from an Investigative Services Sergeant. The Investigative Services Sergeant, who is currently in the Law Enforcement Bargaining Unit, testified that the position of Conservation Officer Supervisor was very equivalent to his position in the current bargaining unit. Both the Sergeant and Conservation Officer Supervisors write evaluations for their employees and confer with those employees about work. Both also perform comparable acts such as project diary reports in their daily activities. Both the Sergeants and other Nebraska State Patrol personnel in the existing bargaining unit perform joint law enforcement efforts, much like the special duty assignments of the Conservation Officers and Conservation Officer Supervisors. Therefore, the Commission finds that the positions are comparable.

Furthermore, the Petitioner presented a witness who has a significant amount of expertise in the area of job comparability, who testified at trial. The expert witness testified that an essential job function requires 30% to 50% of the worker's time. The Conservation Officer Supervisors spend the majority of their time performing activities identical to Conservation Officers, such as patrolling, writing tickets, testifying and giving information programs. They spend only a small portion of their time in areas unable to be compared to Conservation Officers. The expert witness also stated that a lot of the job was standard operating procedure, performed without the exercise of independent judgment. It is clear from the entirety of the testimony that the Conservation Officer Supervisors are more closely aligned with labor than with management. After careful review of the facts, it is clear that Conservation Officer Supervisors do not possess § 48-801(9) supervisory authority. Therefore, the Conservation Officer Supervisors should be included in the bargaining unit.

Given the highly integrated nature of the Game and Parks Commission Law Enforcement Division and the widespread interaction between the Conservation Officers and Conservation Officer Supervisors on special duty assignments, the Commission finds that the bargaining unit including the Conservation Officer Supervisors and the Staff Supervisor is an appropriate unit. Including these employees in the unit does not create a conflict of interest and avoids undue fragmentation of bargaining units. "Clearly, it is the intent of the Legislature that fragmentation of bargaining units within the public sector is to be avoided." *Sheldon Station Employee's Ass'n v. Nebraska Public Power District*, 202 Neb. 391, 396, 275 N.W.2d 816, 819 (1979). "It [undue fragmentation] fos-

ters proliferation of personnel necessary to bargain and administer contracts on both sides of the bargaining table. It destroys the ability of public institutions ... to develop, administer, and maintain any semblance of uniformity or coordination in their employment policies and practices.” *Id.* (quotation omitted).

Similar Classes-Exceptions

The Petitioner argues that the Conservation Officer Supervisors should be deemed a similar class under the first sentence in NEB. REV. STAT. § 81-1373(1)(g), which includes both “game wardens” and other “similar classes” of law enforcement personnel. We note that the statute does not specifically refer to the positions of either Conservation Officer or Conservation Officer Supervisor. However, it is our interpretation that the term “game warden” refers to the work that is actually performed by the Conservation Officers and the Conservation Officer Supervisors, even though the term “game warden” is not specifically included in the organizational structure of the Nebraska Game and Parks Commission.

In response to the Petitioner’s argument, the Respondent argues that pursuant to NEB. REV. STAT. § 48-816(3)(a) all supervisors should be excluded from bargaining units, except for the specific exceptions identified in NEB. REV. STAT. § 81-1373(1)(g) and NEB. REV. STAT. § 48-816(b) and (c). The Respondent assumes all supervisory employees not included specifically in such exceptions, are supervisors as defined by NEB. REV. STAT. 48-801(9) and cannot be included in a bargaining unit with employees that they supervise.

NEB. REV. STAT. § 48-816(3) provides at subsection (a) that supervisors are not to be included in a bargaining unit with non-supervisors, subject to specific exceptions stated in subsections (b) and (c). NEB. REV. STAT. § 81-1373(1)(g) specifically requires that the State employees’ law enforcement bargaining unit includes Nebraska State Patrol officers and sergeants, game wardens, fire marshal personnel, and similar classes. It goes on to provide, in the second sentence thereof, that sergeants, investigators, and patrol officers employed by the State Patrol are presumed to have a community of interest and shall be included in the bargaining unit notwithstanding any other provision of law.

The exceptions to non-inclusion of supervisors contained in § 48-816(3)(b) and (c) clearly do not apply. The Respondent argues that § 81-1373(1)(g) provides an additional specific exception to non-inclusion of supervisors, and that Conservation Officer Supervisors are excluded from this exception by the second sentence thereof.

Respondent suggests in its Brief that **if** the Commission finds the Conservation Officer Supervisors to be statutory supervisors, based on the argument that the Sergeants of the State Patrol and the Conservation Officer Supervisors of the Nebraska Game and Parks Commission are comparable, only then is analysis of the second sentence of § 81-1373(1)(g) applicable to the instant case. In this argument, the Respondent assumes that State Patrol Sergeants are supervisors specifically included in the bargaining unit by statutory construction and that the Conservation Officer Supervisors of the Nebraska Game and Parks Commission are specifically not included in the unit by statutory construction of the second sentence. Respondent relies upon the general principle of construction that the expression of one thing is the exclusion of another, or unius est exclusio alterius. *Chapin v. Neuhoff Broad.-Grand Island, Inc.*, 268 Neb. 520 (2004); *State Board of Agriculture v. State Racing Commission*, 239 Neb. 762, 478 N.W.2d 270 (1992).

However, the Commission has found, as set forth previously herein, that the Conservation Officer Supervisors and Staff Supervisor positions of the Nebraska Game and Parks Commission are not statutory supervisors. Therefore, the second sentence of § 81-1373(1)(g) has no application and the Commission need not construe the extent of any supervisory exception contained therein.

The Commission hereby finds that the positions of Staff Supervisor and Conservation Officer Supervisors of the Nebraska Game and Parks Commission should be included in the bargaining unit set forth in NEB. REV. STAT. § 81-1373(1)(g).

IT IS THEREFORE ORDERED that the certified bargaining unit for employees of the Petitioner be modified to include the positions of Staff Supervisor and Conservation Officer Supervisor.

All panel judges join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

COMMUNICATION WORKERS OF AMERICA, AFL-CIO,	)	Case No. 1086
)	
)	
Petitioner,	)	FINDINGS AND
	)	ORDER
v.)	
)	
COUNTY OF HALL, NEBRASKA,)	
A Political Subdivision,)	
)	
Respondent.)	

Filed March 24, 2005

APPEARANCES:

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Before: Judges Blake, Burger, and Lindahl.

BLAKE, J:

NATURE OF THE PROCEEDINGS:

Communication Workers of America, (hereinafter, "Petitioner") filed a Petition pursuant to NEB. REV. STAT. §§ 48-811, 48-819.01, and 48-825 (Reissue 1998), claiming that Hall County (hereinafter, "Respondent") committed a prohibited practice by unilaterally implementing terms and conditions of employment without bargaining in good faith and without reaching impasse. The Petitioner seeks to have the Commission conclude that the Respondent violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f); order the Respondent to cease and desist from engaging in such prohibited practices; order the Respondent to engage in good faith nego-

tiations with the Petitioner over items listed in the Petition; order the Respondent to make the Petitioner and all bargaining unit employees whole for any loss and expense incurred by them including, but not limited to, the reimbursement of the health care premium fees thus far withheld; order reimbursement of attorneys' fees and costs; and finally, order the Respondent to post a notice to employees promising not to commit any of the found prohibited practices.

The Respondent's Answer alleges that the Respondent has negotiated in good faith with the Petitioner on mandatory subjects of bargaining and then lawfully implemented changes in terms and conditions of employment after the parties had bargained to impasse.

The issue presented at trial was whether the Respondent's actions constituted a prohibited practice under NEB. REV. STAT. § 48-816(5), § 48-824 (1), (2)(a), (e), and (f) by refusing to negotiate in good faith and/or unilaterally implementing changes in the terms and conditions of employment before impasse had been reached. For the reasons stated below, the Commission finds that the Respondent declared impasse prematurely and that such declaration of impasse was a per se failure to bargain in good faith and was therefore a prohibited practice under NEB. REV. STAT. § 48-816(5), § 48-424 (1), (2)(e), and (f).

FACTS:

The Commission certified the Union's current bargaining unit on December 11, 1988. In the initial contract, the Union also bargained for other units including the veteran's service office, the building and grounds department, and the parks department. However, the Union currently represents only the public works department in Hall County. The current bargaining unit consists of the job classifications of all employees of the Hall County Public Works Department which includes the following seven job classifications: Equipment Operator, Mechanic, Traffic Signs Supervisor, Gravel Staker, Janitor, Typist/Receptionist, and Construction Technician. The Union is excluded from representing the Public Works Director, the Assistant Public Works Director, the Mechanic Supervisor and the Grading and Bridge Foreman. Prior to the Respondent's unilateral implementation of changes in terms and conditions of employment, the parties have successfully bargained during approximately the past fifteen years. The first negotiation session lasted approximately eighteen months and the other negotiation sessions have lasted between six and thirteen months, with five to eight sessions during those months. The last of these successful negotiations lasted for approximately ten sessions, and the contract was ratified in January of

2003, when the Union and the County executed a collective bargaining agreement for the period of July 1, 2002 through June 30, 2004. The bargaining for that contract began in May and lasted for approximately nine months.

In order to begin bargaining for the upcoming contract starting in July of 2004, the Union first received the County's request to negotiate on approximately March 26, 2004. Along with this request, the County sent proposed ground rules for negotiating. The first negotiation session between the Union and the County occurred on April 27, 2004. At the April 27 meeting, the County and the Union exchanged proposals. The exchange of proposals took approximately two hours. The discussion on the proposals centered on brief explanations of each side's changes in the 2002-2004 bargaining agreement. The Union's first proposal did not deal formally with wages. However, the proposal discussed such items as drug testing, sick leave payout, overtime pay, health insurance language, safety and truck language and FMLA language. The County's proposal included a change in health insurance premiums for employees hired prior to January 1, 2001 who pay two-party and family premiums. In the first fiscal year of July 1, 2004 through June 30, 2005, those employees would be required to pay 5% of their premium and in the following year those employees would be required to pay 10% of their premium. The employer offered a 1% raise in the first fiscal year and a 2% raise in the second fiscal year. At the end of the first negotiating session, the County asked questions about the Union's information request. The County then responded to this request on April 29, 2004. The County also asked if the Union could bring a formal wage proposal to the second meeting. The parties spent little time "negotiating" and more time presenting their proposals, during the first session.

The second session occurred on May 11, 2004. The County and the Union spent approximately two hours at the session. The Union did not present a formal wage proposal. The parties discussed the Union's proposal, and then the County caucused for approximately ten minutes. After the caucus, the County told the Union they felt that the Union should accept their April 27 proposal. The County did not give a written proposal to the Union at the second meeting.

Between the second and third negotiation session, several members of the bargaining unit attended a health insurance meeting. At the meeting, the County's health insurance representative announced that every employee who had elected family coverage in Hall County would be paying for a portion of his or her family health insurance. This information was read from a memorandum prepared by the office of the County

Clerk addressed to all [Hall] County employees, dated May 25, 2004. The employees asked for a copy of this memorandum from the health insurance representative. He allowed them to view his copy and told them if they wanted to receive their own copy they could contact the County Clerk. The employees contacted the County Clerk and received their own copy of the memorandum. The employees then contacted their union representative, because they were concerned that the health insurance benefits were to be changed without regard to the bargaining process.

The third and final negotiation session occurred on June 23, 2004. The County presented its proposal and the Union presented its proposal. Both sides asked questions regarding the opposing sides proposal. The County's proposal included an additional increase in the first years pay from 1% to 2%. The Union's proposal asked for a shorter pay scale in line with their wage study, as well as a one-year contract and a 3% pay increase. The Union asked a lot of questions regarding the County's first proposal on June 23, because the proposal was in short form. The County then presented its wage study and told the Union that the Union would lose if it took the County to the Commission. The parties then caucused for less than half an hour. After the caucus, the County submitted its final offer to the Union, along with several other documents regarding the increasing cost of health care and comparability. The final offer was a paragraph in length and was unclear regarding proposed modifications that would be made to the current contract, which would expire on June 30, 2004. The Union did not ask many questions regarding the final offer because there was very little time before they were asked to leave. The Union was then advised that they had until 12:00 a.m. on the morning of June 29, 2004 to accept or reject the County's final offer. The Union's negotiator informed the County that she would not be able to meet with the Union for a formal vote prior to June 29, 2004 because of other scheduling conflicts and asked to reschedule the deadline. The County refused to consider an extension of the deadline in order to assist the Union in its vote on the County's final offer. Until the end of the June 23, 2004 negotiation session, the Union was never notified that this would be the last bargaining session between the parties. There had been no such notice prior to that time. However, it is clear from the testimony that the County was determined to conclude its bargaining by its last June County board meeting.

The Union's negotiators met with their committee and set up an explanation meeting for the bargaining unit employees on Wednesday, June 30, 2004 regarding the County's final offer. In its committee meeting, the Union was confused about how to construe the employer's final

offer. The Union then drafted a letter asking additional questions regarding an explanation of the final offer, which was faxed to the County's attorney. The County's attorney responded with an additional explanation of the June 23 final offer, with changes to the language of Article 27 (Exhibit 22). After the meeting held on Wednesday, June 30, the Union voted, rejecting the County's proposal. The Union then wrote a letter on July 9, requesting that the parties continue bargaining to resolve their differences. The County implemented its final offer at its board meeting on June 29, 2004 and notified the Union by a letter dated Tuesday, June 29, 2004. Sometime after the Union voted on the County's final proposal as of June 25, 2004, on approximately July 1, 2004, the County sent a new final proposal, per the Union request, changing Attachment "B" to include a missing equipment operator, who had not been included in the June 25th final offer. On July 27, 2004, the Union's representative attended the Hall County Board of Supervisors meeting and during an open forum stated that he felt the negotiations were not conducted in good faith, especially since they had always resolved their differences in the past.

The County also negotiated with three other unions in concurrence with this union. Of those three contracts, the County came to an agreement with one bargaining unit (the sheriff's bargaining unit) and declared impasse with two other bargaining units (the public defender's bargaining unit and the correctional officers bargaining unit). On November 22, 2004 the Union filed its prohibited practice petition with the Commission and previously on September 20, 2004, the correctional officers union had filed its prohibited practice petition with the Commission.

DISCUSSION:

The Petitioner argues that the Respondent violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f), by unilaterally implementing terms and conditions of employment without bargaining in good faith and without reaching impasse. The Respondent argues that it lawfully implemented changes in terms and conditions of employment of those employees represented by the Union which were mandatory subjects of bargaining after (a) the parties had bargained to impasse, (b) the terms and conditions implemented were contained in a final offer, and (c) the implementation occurred before a petition regarding the year in dispute had been filed with the Commission. Both the Petitioner and the Respondent have cited past case law from the Commission and the National Labor Relations Board, (hereinafter, "NLRB") in support of their positions and both parties argue the Commission has the authority to use past NLRB case law in addition to past Commission case law.

The Commission has found in the past that the National Labor Relations Act, (hereinafter, "NLRA") and the Nebraska Industrial Relations Act, (hereinafter "NIRA" or "IRA") are similar. In *Fraternal Order of Police, Lodge 41 v. The County of Scotts Bluff, et al.*, 13 CIR 270 (2000) the Commission found that the federal and the state statutes were substantially similar in dealing with prohibited practices. Section 8(a)(5) of the NLRA was found to be nearly identical to § 48-824(2)(e) of the IRA. Both statutes require all parties to bargain collectively in good faith with respect to mandatory subjects of bargaining. However, unlike the statutory comparison found in *County of Scotts Bluff, in Ewing Education Ass'n v. Holt County School District No. 29*, 12 CIR 242 (1996), the Commission analyzed whether § 48-824(2)(e) had been violated by a unilateral change in a term of employment found in an existing collective bargaining agreement. In determining whether federal cases could be used as guidance, the Commission found that § 8(d) includes at least one provision that is not included in the IRA. The Commission found that in *Ewing Educ. Ass'n* the difference in the statute related to whether the collective bargaining agreement was currently in existence. The Commission held that because this provision does not exist in the IRA, under Nebraska public sector labor law, a unilateral change in the terms and conditions of an **existing** collective bargaining agreement is not by definition a failure or refusal to bargain. The Commission concluded:

Prior to the passage of what has now become § 48-824 et seq., our Supreme Court held that a duty to bargain exists only after a Petition has been filed with this Commission or a request for bargaining has been made. *Kuhl v. Skinner*, 245 Neb. 794, 515 N.W.2d 641 (1994). While the addition of § 48-824 to the [IRA] may have extended the duty to bargain beyond that found in *Kuhl*, we are not prepared to find that a duty to bargain exists in this case.

Id. at 245.

However, the Commission determined that the differences set forth in § 8(d), which is not found in the IRA, was not applicable to the set of facts in *County of Scotts Bluff*. In sum, the Commission noted that the legislative history of the IRA's § 48-824 clearly states that the purpose of the section is to provide public sector employees with the same protection from unfair labor practices that most private sector employees enjoy under the NLRA and to make refusing to negotiate in good faith on mandatory bargaining topics a prohibited practice. LB 382, 94th Leg., 1st Sess., 1995. Therefore, in *County of Scotts Bluff*, the Commission found that the corresponding sections of the IRA and NLRA mak-

ing it unlawful for parties to refuse to negotiate in good faith over mandatory bargaining topics are sufficiently similar for the NLRB decisions to be useful as guidance in interpreting §§ 48-824 (1), (2)(a) and (e) of the IRA. While the Commission found in *Crete Education Ass'n v. Saline County School District No. 76-0002, a/k/a Crete Public Schools*, 13 CIR 361 (2001), *affirmed in relevant part*, 265 Neb. 8, 654 N.W. 166 (2002) that the provisions in the NLRA are not identical to § 48-824 (f), the Commission did determine that the concept of exclusive representation was fairly common between both Acts.

In reviewing these past decisions, we determine that it is appropriate for the Commission to refer to case law from the NLRB. NLRB cases as well as our own past case law will be utilized in determining whether or not the Respondent committed a prohibited practice in this case.

Impasse

The Petitioner argues that it is the Respondent's burden to prove whether or not an impasse, in fact, existed at the time of the unilateral implementation by the Respondent. The Commission has found in prior cases that the burden of proving impasse remains on the party claiming negotiations have reached impasse. *County of Scotts Bluff*, 13 CIR at 284; See also, *PRC Recording Co.*, 280 NLRB 615 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987); *The Baytown Sun*, 255 NLRB 154 (1981). Therefore, the Respondent has the burden of proving impasse in the instant case.

The Respondent argues that it was correct in implementing its final offer because the parties had indeed reached impasse. Conversely, the Petitioner argues the parties were not at impasse as they were willing to make additional concessions, had not had sufficient time or sufficient opportunities to negotiate their contract proposals or to understand the proposals set forth by the Respondent.

The duty to bargain does not require a party "to engage in fruitless marathon discussions at the expense of frank statement and support" of one's positions. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404, 30 LRRM 2147 (1952). In other words, where there are irreconcilable differences in the parties' positions after good faith negotiations, the law recognizes the existence of an impasse. Furthermore, numerous NLRB cases have recognized that impasse is possible as to one but not all issues, triggering a continuing duty to bargain on other issues unless the issue precipitating the impasse is overriding enough to justify a finding of impasse as to all issues. See e.g., *Patrick & Co.*, 248 NLRB 390, 103

LRRM 1457 (1980), *enforced*, 644 F.2d 889, 108 LRRM 2175 (9th Cir. 1981); *Providence Med. Ctr.*, 243 NLRB 714, 102LRRM 1099 (1979); *Chambers Mfg. Corp.*, 124 NLRB 721, 44 LRRM 1477 (1959), *enforced*, 278 F.2d 715, 46 LRRM 2316 (5th Cir. 1960); *Pool Mfg. Co.*, 70 NLRB 540, 18 LRRM 1364 (1946), *remanded*, 24 LRRM 2147 (5th Cir. 1949), *vacated*, 339 U.S. 577, 26 LRRM 2127 (1950); *Television & Radio Artists v. NLRB*, 395 F.2d 622, 627 n. 13, 67 LRRM 3032 (D.C. Cir. 1968), *aff'g sub nom.*, *Taft Broadcasting Co.*, 163 NLRB 475, 64 LRRM 1386 (1967).

The Commission defines impasse as when the parties have reached a deadlock in negotiations. *County of Scotts Bluff*, 13 CIR at 284; See, e.g., *PRC Recording Co.*, 280 NLRB at 640 (for impasse to occur, both parties must be unwilling to compromise); *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973-74, *enforced as modified*, 906 F.2d 1007 (5th Cir. 1990) (futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse); *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989), *enforced*, 924 F.2d 1078 (D.C. Cir. 1991) (exhaustion of the collective-bargaining process is required for impasse to exist). The Commission found in *County of Scotts Bluff* that the factors to be considered in determining whether the parties are at impasse included: "number of meetings, length of meetings, period of negotiations, whether either party has expressed a willingness to modify its position, whether a mediator has been called in (a sign of deadlock), the importance of the issues over which the parties disagree (the more important the issue, the more likely an impasse), and the understanding of the parties regarding the state of negotiations." Douglas E. Ray et al., *Understanding Labor Law 208* (Matthew Bender & Co. 1999) (citation omitted); See, David G. Epstein, Comment, *Impasse in Collective Bargaining*, 44 Tex. L. Rev. 769 (1966) as well as the additional factors that may include the parties' bargaining history, continuation of bargaining, union animus, the extent of the difference or opposition, duration of hiatus between bargaining meetings, and other actions inconsistent with impasse. John T. Neighbours et al., *The Developing Labor Law*, 299, 300 (3rd ed. 1998 Cum. Supp.) (citations omitted).

The National Labor Relations Board also considers additional factors, for the existence of an impasse is very much a question of fact. *Carpenter Sprinkler Corp v. NLRB*, 605 F.2d 60, 102 LRRM 2199 (2d Cir. 1979). These may include a strike by the union; the fluidity of a party's position; continuation of bargaining; statements or understanding of the parties concerning impasse; union animus evidenced by prior or concurrent events; the nature and importance of the issues and the extent of difference or opposition; past bargaining history; a demonstrated willing-

ness to consider the issue further; the duration of hiatus between bargaining meetings; the number and duration of bargaining sessions; and other actions inconsistent with impasse.

For example, usually the more meetings had by the union and the employer, the better the chance of a finding that an impasse has occurred. *Fetzer Television v. NLRB*, 317 F.2d 420, 53 LRRM 224 (6th Cir. 1963). See also, *Servis Equip. Co.*, 198 NLRB 266, 80 LRRM 1704 (1972) (no impasse on wages when parties met only twice and union was not given enough advance notice of employer's action to respond); *Supak & Sons Mfg. Corp.*, 192 NLRB 1228, 78 LRRM 1289 (1971), enforced 470 F.2d 998, 82 LRRM 2560 (4th Cir. 1973) (no impasse on wages when employer did not make its counteroffer until last regular bargaining session); *American Automatic Sprinkler Sys.*, 323 NLRB 920, 155 LRRM 1195 (1997) (no valid impasse where employer declared impasse after only three meetings and misled union during bargaining); *Microdot, Valley Mould Div.*, 288 NLRB 1015, 128 LRRM 1134 (1988) (no bona fide impasse when employer made "final offer" that included proposals requiring further study, gave union only 3 days to respond, and stated it would accept no counteroffers).

In *County of Scotts Bluff* the Commission set forth the general factors in determining whether impasse existed at the time of unilateral implementation, and also set forth our interpretation on public policy in encouraging parties to settle bargaining between themselves. The Commission stated:

The collective bargaining process is a continuing process, which the parties must learn to use to supplement or replace litigation before the Commission. It remains the Commission's position that good faith negotiation is the preferred method for resolution of differences concerning wages, hours and other terms and conditions of employment. Public employers and the bargaining agents for their employees have a duty to bargain in good faith in an attempt to resolve their differences both before, and after, they bring their disputes to the Commission. Successful collective bargaining is less expensive for the parties, less disruptive of public service, more flexible in terms of available solutions, and more likely to promote harmony between public employers and their employees. The public interest is not served by public officials and administrators or the agents of public employees who are unwilling or unable to pursue collective bargaining in good faith.

The Commission also cited *NLRB v. Katz*, 369 U.S. 736 (1962) (equating pre-impasse unilateral changes to flat refusals to negotiate), stating that unilateral changes to mandatory terms and conditions of employment made before impasse are **per se** violations of the party's duty to bargain in good faith. In other words, the Commission determined that a finding of actual bad faith is not necessary.

The Commission also found in *County of Scotts Bluff*, that the distinction between the different categories of bargaining subjects is important, because rules allowing parties to bargain in good faith to impasse, and then to unilaterally implement changes, apply only to mandatory bargaining subjects and not to management prerogatives. In sum, the Commission determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) the parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission. See, *Geneva Education Ass'n v. Fillmore County School District 75*, 10 CIR 238 (1989); *General Drivers & Helpers Union, Local No. 554 v. Saunders County*, 6 CIR 313 (1982); *Lincoln County Sheriffs' Employees Ass'n Local 546 v. County of Lincoln*, 5 CIR 441 (1982). If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a **per se** violation of the duty to bargain in good faith.

In applying the above set forth factors in *County of Scotts Bluff*, the Commission found the parties were at partial impasse. The parties had bargained over wage increases, vacation leave, educational incentives, and longevity for more than one year. As to these terms, the Commission found that the parties were at impasse. The Commission commented that in *International Board of Electrical Workers, Local No. 1536 v. City of Fairbury*, 9 CIR 317, 318:

The Commission encourages parties to bargain and settle disputes themselves[,] and if it appears that further bargaining would be fruitful, we will send them back to the bargaining table as we are authorized to do under Section 48-816(1).

Having bargained for over a year on these terms, the Commission found that further bargaining would be futile and would further frustrate the public policy of timely resolution of disputes. The parties were found to have reached impasse on wage increases, vacation leave, educational

incentives, and longevity because they were reasonably comprehended within respondent's pre-impasse proposals. The Commission, however, found that the respondent in that case had raised numerous other mandatory subjects of bargaining for the first time in its June 15, 1999 proposal.

The petitioner in *County of Scotts Bluff* was found not to have been able to adequately respond to any of these subjects. Since virtually no bargaining had occurred on the terms raised on June 15, 1999, and the parties were not at impasse thereon, the Respondent's unilateral implementation of these changes constituted a refusal to bargain in violation of §§ 48-824(1) and (2)(e).

In using those same factors, the NLRB in *Marriott In-Flite Service*, 258 NLRB 755, 108 LRRM 1287 (1981), found no impasse when premium pay and free meal benefits were instituted after 37 negotiation sessions, since neither party had made a wage offer and there were still 26 open items, many of which had not been seriously discussed. The NLRB found it persuasive that few, if any, economic proposals had been made as well as the fact that the unilateral changes were implemented less than two weeks after the employer insisted that no further meetings would be held unless and until the Union agreed to employer's "final offer."

Generally, under the NLRB, once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other. The union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate between the parties, changes the circumstances of the bargaining atmosphere, and revives the parties' duty to bargain. Thus, in the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973). However, under NEB. REV. STAT. § 48-802, no public employee in the State of Nebraska may disrupt the proper functioning and operation of government service by strike, lockout, or other means.

While the Commission need not continue to force the parties to engage in fruitless marathon discussions at the expense of frank statement and support of their positions, collective bargaining is less expensive for the parties, less disruptive of public service, more flexible in terms of available solutions, and more likely to promote harmony

between public employers and their employees. As stated above, a union in Nebraska does not have the ability to strike and cannot exert economic pressure on the employer, so the Commission must be very mindful of each set of circumstances to determine whether an impasse has indeed been reached. Whether a bargaining impasse exists is a matter of judgment and will be different based on the facts of each case. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists.

The Respondent argues in the instant case that impasse does indeed exist. The Respondent also argues that its inflexible position is not in bad faith but is instead considered as "hard bargaining." The Respondent suggests that further bargaining on any of the issues would be futile, as the Union did not present the County with a single counterproposal that would have suggested future bargaining would be fruitful. The Respondent also states that the Commission should not eviscerate the County's right to implement at impasse, described by the Respondent as one of its powerful economic tools for achieving its contract terms.

The Petitioner argues that the Respondent took a predetermined and inflexible position to achieve acceptance of all of its own proposals as quickly as possible, regardless of whether there was legitimate impasse. The Petitioner states that certain statements made by the Respondent after one of the bargaining sessions indicate independent union animus. The Petitioner contends that if the Commission finds the parties were at impasse on one issue, that impasse does not suspend obligation to bargain on further issues. The Petitioner further argues that the Respondent failed to supply all of the information requested by the Petitioner and that the Respondent injected entirely new proposals at the third and last bargaining session. Finally, the Petitioner argues that the Respondent's offer was incomprehensible.

Some difficulty exists in establishing the "inherently vague and fluid... standard" applicable to an impasse reached by hard and steadfast bargaining, as distinguished from one resulting from an unlawful refusal to bargain. Nevertheless, the real issue in this case is whether or not impasse did, in fact, exist when the Respondent implemented its final offer.

As stated above, in reviewing the evidence to determine whether an impasse exists, the Commission considers a number of factors designed

to measure whether bargaining has run its course. Several factors used in deciding this issue clearly point to a lack of impasse between the parties in the instant case. The first factor is the lack of meetings between the parties. The County and the Union had only three meetings before the County declared impasse. The County and the Union had a clear past history of bargaining for at least five negotiation sessions to iron out their differences, and these sessions lasted well into the new bargaining year. The parties had never before declared impasse and had always vigorously attempted to resolve their differences at the bargaining table rather than through the use of economic pressures or taking a case to the Commission.

The second factor suggests that the length of the bargaining meetings was sorely inadequate, not only because of the quantity of hours spent in negotiation, but also because of the quality of use of those hours to negotiate. The parties met for a total of approximately six hours for a two-year contract negotiation. The first session lasted two hours and lacked little actual negotiation, but was rather more akin to an information session. The second session also lasted two hours and the parties spent the majority of the time reviewing the Union's proposal, which did not include a wage proposal. The Union's proposal was completely dismissed by the County, not because of hard bargaining, but because of what must be seen as an unwillingness to listen to the Union's position. Before the third and final meeting the employees were informed that their health insurance premiums would be increasing. The employees felt that because of the concurrent negotiation sessions, the County was usurping the Union's bargaining authority. The facts clearly indicate the County had decided by May 25, 2004 to implement its proposal on health insurance, although no formal action was taken by the County until its June 29 board meeting. The third and final negotiation session was the first time the parties spent any substantive time on wage proposals. After a brief caucus, the County presented its final offer, which was unclear at best. The Union's bargaining team spent significant time after negotiations trying to decipher the one-paragraph document. The lack of time afforded to the Union to decipher the County's proposal contributed to the Union's inability to understand the County's final offer. The Union sent several letters to the County for further explanation of the County's proposal. The County responded to these letters, changing its final offer each time to deal with the discrepancies. This back and forth exchange occurred prior to, and after, the County implemented its last best offer.

The third factor we consider is whether either side indicated a willingness to modify its position. The evidence strongly suggests the

Union's willingness to modify its position. The Union reiterated its desire to continue negotiations even after the County declared impasse with the Union. While this expression occurred after the County declared impasse, prior to impasse the County gave the Union very little opportunity to present its position or to present a willingness to modify its position. At trial, the Union's representative stated that they were willing to negotiate on the wage increase if the employer would reconsider the pay scale. A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective positions. See *Hi-Way Billboards, Inc.* However, it is clear that in the instant case the Union was never afforded the opportunity to move from its respective position because of the strict timetable established by the County.

The final and most decisive factor in this case was the understanding of the parties regarding the state of negotiations. The evidence demonstrates with clarity that the driving force throughout this entire negotiation process centered around the County's timetable or the expiration of the past contract. The County's desire to reach an agreement or impasse before the end of the contract year was never expressed directly to the Union prior to the last negotiation session. The parties had repeatedly bargained past the end of the contract year in prior contract negotiations. The County's desire to end the negotiations on June 30, 2004 was also not expressed in their proposed ground rules or request to bargain. Furthermore, the conclusion is inescapable from the evidence that, for all practical purposes, by May 25, 2004 the County intended that all County employees would contribute to health insurance. Health insurance is a mandatory subject of bargaining and the County cannot usurp the Union's authority as the sole bargaining representative for its employees. Impasse is a deadlock in negotiations with both sides unwilling to compromise. It is not futility, not just frustration or gamesmanship. *County of Scotts Bluff*, 13 CIR 270 (2000). The instant case demonstrates the County's use of gamesmanship, or the calendar, to achieve its goals. The County suggests that this is a refusal to agree case. However, the facts indicate that this is, indeed, a refusal to bargain case. The parties do not have to bargain ad infinitum, but rather they must enter into meaningful negotiations without a predetermined "end" date.

For example, in *Mary Ann's Bakery*, 267 NLRB 992, 994 (1997), the NLRB found that impasse did not occur, since the employer's contract offer was not accepted or rejected by the union membership. The NLRB further concluded that the Respondent seemed intent upon rushing to implement its proposal. The decision stated that it has long since been

settled that an employer may not unilaterally implement “rejected” proposals until they have, in fact, been rejected. See also *Royal Himmel Distilling Co.*, 203 NLRB 370 (1973). In the instant case, the Respondent also rushed to implement its proposal. The Respondent was unwilling to give the Petitioner several additional days in order to meet with its membership to accept or reject the Respondent’s final offer. The Union’s membership was unable to vote until June 30, 2004, rejecting the County’s proposal, which the County had already voted to implement on June 29, 2004. Clearly, the County unilaterally implemented its proposal prior to its rejection. While the County attempted to convey at trial that the Union was dilatory in arranging a meeting, the County gave the Union five days to arrange a meeting for all the membership, two days of which were weekend days. Furthermore, the Union’s representative clearly told the County such a meeting would be impossible prior to the County’s pre-scheduled board meeting. The Union was given no prior warning that the County was to conclude its negotiation by the expiration of the previous contract. The County clearly violated the Industrial Relations Act in its rush to implement its proposal.

Hard Bargaining:

The Respondent argues that its position of “hard bargaining” by seeking to modify, alter and eliminate positions in the old contract is not contrary to past Commission case law and past NLRB law. To support its decision, the Respondent cites the case of *Roman Iron Works*, 275 NLRB 449 (1985) and *International Brotherhood of Electrical Workers v. McCook Public Power District*, 3 CIR 117, 119 (1976).

At the outset, it is noted that the Industrial Relations Act, which defined the duty to bargain in NEB. REV. STAT. § 48-816(5), does not compel either party to a collective bargaining relationship to agree to a proposal or to make a concession. Thus, insofar as mandatory subjects of bargaining are concerned, the IRA does not require either party to yield or compromise its position. While the Commission does not disagree that hard bargaining is lawful under both the NLRB and the Commission, hard bargaining is essentially defined as a situation where one of the parties takes a position and maintains it. In further reviewing the Respondent’s cite case *Roman Iron Works*, we note the delicate balance between hard bargaining verses sham bargaining or bargaining without good faith. *Roman Iron Works* states:

Although it is not illegal for a company to engage in hard bargaining, Section 8(a)(5) of the Act nevertheless requires the company to bargain in good faith which is essentially

defined as a willingness to enter into a contract. *NLRB v. Insurance Agents Union*, 361 U.S. 477 (1960). Thus, although a company, may use its relative strength to press for contract terms favorable to itself, it may not use its strength to engage in futile or sham negotiations with the intention of never reaching an agreement.

The employer engaged in hard bargaining in *Roman Iron Works* by a reduction of the wage offer during bargaining, denial of a union request for employee addresses, insistence on a right to subcontract, and a demand for significant cost reductions. The Board found, however, that the employer also met frequently with the union, made complete contract proposals, and made several significant concessions, and concluded that the employer did not engage in bad faith bargaining.

The Respondent did not engage in hard bargaining in the instant case. Instead, the Respondent was driven by the calendar, with little recognition to the Petitioner's positions. Under federal law, hard bargaining is an economic pressure tool used by the employer. Likewise, the economic pressure tools of striking or boycotts can be used by the union employees under federal law. However, it is clear that public employees in Nebraska do not have the same ability to exert pressure upon the employer through the use of the strike. The Respondent argues that the Petitioner can exert similar economic pressure to achieve the changes it desires for the current fiscal year by filing a wage petition. While the Commission agrees that a wage case can exert direct economic pressure on the parties, both parties can use that pressure equally, as the employer and the union are both allowed to file petitions in front of the Commission. In the instant case, the Respondent used this tool by threatening the Petitioner that if the parties went to the Commission the Petitioner would lose its case.

The Commission is mindful that it is not eviscerating the Respondent's right to hard bargaining. Employers must walk a fine line between hard bargaining and bad faith bargaining. Hard bargaining is strenuous, tedious and frustrating, but as seen in *Roman Iron Works*, is earnest with frequent meetings with the Union and complete contract proposals. Often in cases where the employer has successfully utilized hard bargaining to justify its rigid position, there is a clear failure of the Union to recede from its position or to grant concessions. The Petitioner in the instant case offered to grant concessions and was never afforded an adequate opportunity to present any of its positions in the first instance. Therefore, we decline to find the Respondent did, in fact, use hard bargaining effectively in the instant case to create impasse. Clearly, impasse

never existed because the Petitioner was never afforded an adequate opportunity to discuss its proposal, since the Respondent was intent on finishing before the expiration of the past contract.

Hard bargaining is not a tool the Respondent can use to cut short negotiations by predetermining that negotiations will end at a certain time, regardless of the length or nature of those negotiations. Hard bargaining is not bargaining in bad faith, and inflexibility in a position is not always bad faith bargaining. However, bargaining must be based upon a good faith effort and not a predetermined agenda set by one side in the negotiation. While hard bargaining and unilateral implementation are tools which can be used, they are not weapons to be used in place of actual bargaining. Public policy strongly encourages the parties to settle their differences. The public interest is not effectively served by public officials and administrators who are unwilling or unable to pursue collective bargaining in good faith.

Ultimately, the County's premature declaration of impasse was a *per se* failure to bargain in good faith and was therefore a prohibited practice under NEB. REV. STAT. 48-824 (1), (2)(e) and (f). Accordingly, while we have not specifically addressed all of the Petitioner's claims, a finding of bad faith bargaining makes such an extensive further discussion unnecessary.

Remedial Authority

The Petitioner seeks to have the Commission conclude that the County violated §§ 48-816(5), 48-824(1), (2)(a), (e) and (f); order the Respondent to cease and desist from engaging in the prohibited practices; order the Respondent to engage in good faith negotiations with the Petitioner over items listed in the Petition; order the Respondent to make the Petitioner and all bargaining unit employees whole for any loss and expense incurred by them including, but not limited to, reimbursement of the health care premium fees thus far withheld; order reimbursement of attorneys' fees and costs; and finally, order the Respondent to post a notice to employees promising not to commit any of the found prohibited practices.

Under the NLRB, the usual remedy for an employer's refusal to bargain in violation of Section 8(a)(5) is an order (1) to cease and desist from refusing to bargain, and (2) upon request, to bargain collectively regarding rates of pay, hours, and other conditions of employment. See e.g. *Power Inc.*, 311 NLRB 599, 145 LRRM 1198 (1993), *enforced*, 40 F.3d 409, 147 LRRM 2833 (D.C. Cir. 1994); *Burgie Vinegar Co.*, 71

NLRB 829, 19 LRRM 1055 (1946). In addition to ordering the employer to bargain on the matters in issue, the Board usually will order that the status quo ante be restored and that employees be made whole for any benefits that the employer has unilaterally discontinued. *Beacon Journal Publ'g Co. v. NLRB*, 401 F.2d 366, 69 LRRM 2232 (6th Cir. 1968) and 417 F.2d 1060, 72 LRRM 2639 (6th Cir. 1969); *General Tel. Co. of Fla.*, 144 NLRB 311, 316, 54 LRRM 1055 (1963), *enforced as modified*, 337 F.2d 452, 57 LRMM 2211 (5th Cir. 1964); *American Lubricants Co.*, 136 NLRB 946, 947-48, 49 LRRM 1888 (1962). On the other hand, if the change involved the granting of a benefit, the Board's order will require rescission of the beneficial change only if the union seeks such rescission. *Great W. Broadcasting Corp.*, 139 NLRB 93, 51 LRRM 1266 (1962).

The Commission's authority to issue remedies after finding a failure or refusal to bargain in good faith can be seen in *County of Scotts Bluff*, wherein the Commission entered a cease and desist order and ordered a recommencement of good faith negotiations.

The Supreme Court has interpreted the Commission's remedial authority broadly. In *IAFF Local 831 v. City of North Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), the Court upheld the Commission's award of interest against a party who had bargained in bad faith. The Court held that § 48-819.01 provided the Commission's authority to award interest even though it does not specifically mention awarding interest. In *International Operating Engineers Local 571 v. City of Plattsmouth*, 265 Neb. 817 (2003), the Supreme Court found that the Commission was correct in returning the union employee to the status quo by ordering reinstatement and the payment of his normal wages, including interest from the date he was laid off, less any net interim earnings. However, under *Crete Educ. Ass'n v. Saline Cty. School Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002), the Supreme Court found that an order to post a notice is not in line with the public policy underlying the Nebraska Industrial Relations Act and likewise reversed the Commission's decision to require the parties to post such a notice.

The Commission has authority to issue status quo orders under §§ 48-816, 48-819.01, 48-823, and 48-825(2) and to issue a remedy following a finding of a violation to bargain in good faith. These statutes authorize the Commission to issue appropriate remedies that will effectuate the policies of the Industrial Relations Act, adequately provide relief to the injured party, and lead to the resolution of the industrial dispute. An order requiring that good faith bargaining resume and that the offending party cease and desist from committing the prohibited practice found by

the Commission is clearly within its authority, and will be therefore ordered. An order requiring the employer to post a notice is clearly not within the Commission's authority according to the Supreme Court in *Crete Educ. Ass'n*. Therefore, the Commission will not require the Respondent to post a notice.

With regard to the issue of attorney's fees, the Respondent's misconduct was not flagrant, aggravated, persistent, and pervasive. See *International Union of Operating Engineers 571 v. Cass County*, 14 CIR 259 (2004). The Respondent was the party to seek timely commencement of negotiations, and the Respondent was responsive to the Petitioner. The Respondent's negotiations did not rise to the level of flagrant bad faith to justify an award of attorney's fees. Accordingly, attorney's fees are not awarded.

The last remedy not previously addressed by the Commission is the Petitioner's request for the reimbursement of benefits including, but not limited to, health insurance premiums paid out by the employees upon the Respondent's unilateral implementation. In order to return the parties to the status quo, the Commission would have to rescind all of the County's unilateral changes. This would include both benefits which were discontinued such as health insurance, and the granting of benefits, such as the employees' wage increase. While the discontinuation of benefits does not pose a practical or public policy concern, the retroactive decrease of granting such benefits as the employees' wages does pose such a concern.

The Commission has pointed out the complexity of practical problems and public policy considerations in requiring employees to repay back wages. See *Nebraska Public Employees Local Union 251 v. Otoe County*, 12 CIR 177 (1996). In *Otoe County*, the Commission stated that it has found in the past that for employees to be required to repay excessive wages or to require future wages to be still further reduced by the already paid excess would create severe hardships on employees and place severe strain on the employer-employee relationship. The Commission also cautioned that the lowering of wages should not be lightly undertaken. Furthermore, the NLRB clearly does not decrease wages unless asked to do so, and does not require rescission of the beneficial change unless the Union seeks such rescission.

While the Respondent's conduct was not flagrant, aggravated, persistent and pervasive, it was a clear violation of its duty to bargain in good faith. Therefore, the Commission finds the Respondent should make all employees whole for any and all losses incurred as a result of the

Respondent's unlawful unilateral implementation of its final offer. The Respondent shall transmit all fringe benefit withholdings, with interest at the legal rate in effect for judgments entered on this date, except as agreed upon in the previous collective bargaining agreement. The Commission does not require the employees to reimburse the Respondent for any benefits they have received since the unilateral implementation. Furthermore, the Respondent shall not rescind the wage increase granted to the employees until a good faith agreement has been reached between the Petitioner and the Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

The Respondent, County of Hall, shall

1. Cease and desist from:
 - (a) Failing and refusing to bargain in good faith with the Union Local 22 as the collective bargaining representative of its employees in the certificated unit.
 - (b) Unilaterally implementing any so-called "final" proposal without first bargaining to impasse.
 - (c) Unlawfully withholding any benefits as a result of the County's prohibited practices including, but not limited, to the health insurance premium percentage from employees who were employed prior to January 1, 2001.
 - (d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under the Industrial Relations Act.
2. Take the following affirmative action necessary to effectuate the policies of the Industrial Relations Act:
 - (a) Reimburse such health insurance premiums improperly withheld, since July 1, 2004 plus interest at the rate of 4.63%, which is the Nebraska judgment rate now in effect.
 - (b) Continue to pay the wage increase granted to the employees as of July 1, 2004 until a good faith agreement has been reached between the Union and the County.

- 3. The parties shall recommence negotiations over these issues within thirty (30) days, and shall negotiate in good faith until an agreement has been reached or further order of the Commission.

All panel judges join in the entry of this order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

COMMUNICATIONS WORKERS OF)	Case No. 1086
AMERICA, AFL-CIO,)	
)	
Petitioner,)	ORDER NUNC
)	PRO TUNC
v.)	
)	
COUNTY OF HALL, NEBRASKA,)	
a Political Subdivision,)	
)	
Respondent.)	

Filed April 25, 2005

APPEARANCES:

For Petitioner: Michael J. Stapp
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For Respondent: Jerry L. Pigsley
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Before: Judges Blake, Burger, and Lindahl.

BLAKE, J:

The Commission, having convened, finds that the Findings and Order entered in this case on March 24, 2005 contains an inadvertent error on

COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1086

page 26, that should be corrected.

IT IS THEREFORE ORDERED that the portion of page 26 of the Findings and Order entered on March 24, 2005, which reads:

- (c) Unlawfully withholding any benefits as a result of the County's prohibited practices, including but not limited, to the health insurance premium percentage from employees who were employed prior to January 1, 2001.

Is hereby corrected to read:

- (c) Unlawfully withholding any benefits as a result of the County's prohibited practices, including but not limited, to the health insurance premium percentage from employees who were employed prior to July 1, 2000.

All panel judges join in the entry of this order.

CASES CURRENTLY ON APPEAL

Case No. 1061

Regina Davis, Dawn Russell-Cummings, Danielle Matthews, Tina Meyers, Delores Simpson, Chantella Wallace, Jack Nelson, and Johnnie Mann v. Fraternal Order of Police Lodge No. 8 of Douglas County, Nebraska, page 1. Appealed October 20, 2004.

Case No. 1084

Rep. Doc. No. 388

State Law Enforcement Bargaining Council v. State of Nebraska, page 84. Appealed June 1, 2005.

APPELLATE DECISIONS DISMISSED SINCE 14 CIR 126

Case No. 1046

Hyannis Education Association, an Unincorporated Association v. Grant County School District No. 38-0011, a/k/a Hyannis High School, a Political Subdivision of the State of Nebraska, 14 CIR 203 (2004). Appealed January 29, 2004. Affirmed in part, and in part reversed and remanded for further proceedings by the Nebraska Supreme Court June 22, 2005.

Case No. 1077

Beatrice Education Association, an Unincorporated Association v. Gage County School District No. 34-0015, a/k/a Beatrice Public School District, a Political Subdivision of the State of Nebraska, 15 CIR 46 (2004). Appealed January 3, 2005. Dismissed by Nebraska Court of Appeals March 22, 2005.

Case No. 1081

United Food and Commercial Workers District Local 22 v. County of Hall, Nebraska, A Political Subdivision, pages 55, 73.

Case No. 1082

Local Union 571, International Union of Operating Engineers, AFL-CIO v. The County of Douglas, and Roger Morrissey, Douglas County Assessor, page 75.

Case No. 1084

Rep. Doc. No. 388

State Law Enforcement Bargaining Council v. State of Nebraska, page 84.

Case No. 1086

Communication Workers of America, AFL-CIO v. County of Hall, Nebraska, A Political Subdivision, pages 95, 115.