

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

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Rep. Doc. No. 437

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COMMISSION OF INDUSTRIAL RELATIONS

STATE OF NEBRASKA

William G. Blake, Presiding Officer

1248 "O" Street
Suite 600
Lincoln, NE 68508

Jeffrey L. Orr

322 W. 39th St.
P. O. Box 1060
Kearney, NE 68848-1060

G. Peter Burger

116 West E St.
P. O. Box 1205
McCook, NE 69001-1205

Loren L. Lindahl

551 N. Linden
P. O. Box 277
Wahoo, NE 68006-0277

Bernard J. McGinn

4140 S. 58th Street
Lincoln, NE 68506

Annette Hord

Clerk/Administrator

Megan D. Neiles

Legal Counsel/Deputy Clerk

301 Centennial Mall South

P. O. Box 94864

Lincoln, NE 68509-4864

(402) 471-2934

(402) 471-6597 (Fax)

industrial.relations@nebraska.gov (E-mail)

www.ncir.ne.gov (Website)

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

INTERNATIONAL BROTHERHOOD)	CASE NO. 1213
OF ELECTRICAL WORKERS,	)	REP. DOC. NO. 437
LOCAL UNION NO. 1597)	
	)	FINDINGS AND ORDER
Petitioner,)	
)	
v.)	
)	
BILL SACK, HOWARD COUNTY)	
COMMISSIONER,)	
JIM SIDEL, HOWARD COUNTY)	
COMMISSIONER,)	
RANCE LIERMAN, HOWARD)	
COUNTY COMMISSIONER,)	
LAUREN SCARBOROUGH,)	
HOWARD COUNTY)	
COMMISSIONER,)	
LARRY SEIFERT, HOWARD)	
COUNTY COMMISSIONER)	
DELORES HEMINGER, HOWARD)	
COUNTY ASSESSOR,)	
MARGE PALMBERG, HOWARD)	
COUNTY CLERK,)	
CONNIE M. NICKEL, HOWARD)	
COUNTY TREASURER,)	
HAROLD SCHENCK, HOWARD)	
COUNTY SHERIFF,)	
HOWARD COUNTY, NEBRASKA)	
)	
Respondents.)	

Filed October 28, 2009

APPEARANCES:

For Petitioner: Dalton W. Tietjen
Tietjen, Simon & Boyle
1023 Lincoln Mall, Suite 202
Lincoln, NE 68508

For Respondents: Robert J. Sivick
Howard County Attorney

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Howard County Courthouse
612 Indian Street, Suite 3
St. Paul, NE 68873

Vincent Valentino
100 North 12th St., Ste. 200
P.O. Box 84640
Lincoln, NE 68501-4640

Before: Commissioners Burger, Orr, and Blake

BURGER, Comm'r

NATURE OF THE PROCEEDINGS:

The International Brotherhood of Electrical Workers, Local Union No. 1597, ("Petitioner") filed a Petition seeking to certify a bargaining unit consisting of:

all permanent full time and regular part time employees of the Respondent, including, but not limited to, those occupying the following classifications: 911 dispatcher, senior 911 dispatcher, communications office manager, deputy assessor, assessor clerk, deputy county clerk, county clerk clerk, extension office manager, sheriff secretary, deputy treasurer, treasurer clerk and excluding all statutory supervisors, law enforcement officers, county attorney secretary, and employees working under the direction of the Highway Superintendent and Weed Superintendent.

(the proposed "Bargaining Unit").

Howard County and the Howard County Board of Commissioners ("Respondents"), filed an Answer which included a denial of the appropriateness of the proposed bargaining unit. In their Answer, the Respondents claimed that the deputies in the offices of Clerk, Assessor, and Treasurer are statutory supervisors and confidential employees performing managerial duties, which would render all of these deputies ineligible for inclusion in the unit. The Respondents also asserted that the Sheriff's Secretary was a confidential employee. Furthermore, the Respondents claimed that unionization would lead to the elected office-holders being forced to rely on employees not of their own choosing and would thus lead to practical difficulties and conflicts of interest. Finally, the Respondents objected to the inclusion of the Extension Office Manager, on the

ground that the Respondents believe that she is a managerial employee and therefore ineligible for membership in the unit. The issues presented at trial centered on whether the following eight positions are supervisors and/or confidential employees, and therefore should be excluded from the bargaining unit:

1. Deputy Clerk
2. Deputy Assessor
3. Deputy Treasurer
4. Extension Officer Manager
5. Clerk Clerk
6. Assessor Clerk
7. Treasurer Clerk
8. Sheriff's Secretary

Prior to the hearing, the positions of the 911 dispatchers and senior 911 dispatchers were stipulated to by both parties for inclusion in the bargaining unit. The parties also stipulated to exclude the Communications Office Manager and the 911 Chief Dispatcher/Supervisor.

FACTS:

The Petitioner proposes to create a bargaining unit from employees working in the offices of the Howard County Clerk, County Assessor, County Treasurer, County Extension Office, and Sheriff. All of these offices are located in the Howard County courthouse. General employment policies for these employees are governed by a personnel handbook established by the Howard County Commissioners.

The offices of the Howard County Clerk, County Assessor and County Treasurer are all staffed by three people: an elected office-holder, a deputy and a clerk. The Sheriff's office is staffed by one secretary and several 911 dispatchers (as well as deputies who are not proposed for inclusion in the bargaining unit). The Howard County Extension Office currently is staffed by one "Howard County" employee (the Extension Office Manager), who works directly with employees from the University of Nebraska at Lincoln.

Other relevant facts will be discussed in the analysis of the eight positions in question.

DISCUSSION:

The issue before the Commission is whether the positions of Deputy

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Clerk, Deputy Assessor, Deputy Treasurer, Extension Office Manager, Clerk Clerk, Assessor Clerk, Sheriff's Secretary and Treasurer Clerk should be included in the bargaining unit. Specifically, the question is whether these workers are supervisors and/or classified employees as defined by Nebraska law.

NEB. REV. STAT. § 48-801(9) defines supervisors as:

“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 a merely routine or clerical nature, but requires the use of independent judgment.”

The statutory definition is disjunctive, and therefore, to be classified as a supervisor, an employee need only have one of the ten 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.” *Neligh Ass'n Group v. City of Neligh*, 13 CIR 305, 307-308 (2000) (quoting *N.L.R.B. 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.” *N.L.R.B. v. Southern Bleachery & Print Works, Inc.* 257 F.2d 235, 239 (4th Cir. 1958), cert. denied, 359 U.S. 911 (1959).

The Commission, in *State Law Enforcement Bargaining Council v. State of Nebraska*, 15 CIR 84 (2005), found that State Conservation Officer Supervisors were not supervisors under the definition of NEB. REV.

STAT. § 48-801, as their duties did not rise to the level of management responsibility, but were routine in nature and that they performed the same work as their fellow Conservation Officers. The Nebraska Court of Appeals reversed the Commission in an unpublished opinion, relying primarily upon the prior written "comprehensive position questionnaires" of the Conservation Officer Supervisors.

The evidence indicated that these questionnaires had originally been prepared for the purpose of obtaining reclassification of the supervisors to raise their pay grade. Each of the Conservation Officer Supervisors completed a questionnaire, in which they proclaimed their supervisory skills and duties. These prior inconsistent statements were heavily relied upon by the Court of Appeals in its determination that the supervisor's job was indeed "supervisory". 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). In the instant case, the evidence reflects no indication that including any of these positions in the bargaining unit has created any such conflict, or that it will in the future.

In the instant case, there are no prior inconsistent statements unlike *State Law Enforcement Bargaining Council*. We believe the testimony of the deputies directly correlates with their respective supervisors' testimony. Even the Respondents admit in their brief, that the Howard County deputies do not actually perform many of the duties that they are statutorily allowed to perform pursuant to the applicable statutes. There is no evidence in this case that Petitioner's statutory authority for any of the deputies to act in the stead of the elected official resulted in any exercise of supervisory authority, or effectively recommending such supervisory authority, nor did the evidence show that any of these deputies used independent judgment.

In the instant case we do not find the testimony to be self-serving, but instead find the testimony of both the elected officials and their deputies, consistent. The testimony clearly states that there is no potential conflict of interest. The facts in this particular case consistently show that the deputies do not actually perform the duties of the elected officials in their absence. The statutes designating the deputies to act in the absence or disability of the elected official do not reflect reality in this case. The evidence shows that the deputies do not exercise independent judgment in the absence of the elected officials, and instead carry out the mundane, ministerial tasks of the office.

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A County Commissioner suggests that the existence of a certified bargaining unit would disrupt efficiency of office operations and limit the discretion of future elected officials to hire and fire. We are unable to connect the dots on this argument. The certification of a bargaining unit provides the members certain rights under the Industrial Relations Act, but insubordination and lifetime tenure are not included within these rights. This argument is, basically, pure speculation. We do not find a conflict of interest that would preclude these positions from being included in the proposed bargaining unit.

Confidential Employees

The second issue presented by the Respondents is whether these positions are confidential. The guidelines concerning the status as a confidential employee were articulated in *Civilian Management, Professional and Technical Employees Council of the City of Omaha, Inc. v. City of Omaha*, 6 CIR 460, (August 9, 1982). In this case, the CIR stated that:

It is well settled that National Labor Relations Board decisions and promulgated policies are helpful and may be looked to for guidance but are not controlling in making determinations under the Nebraska Commission of Industrial Relations statutes. See *City of Grand Island v. AFSCME*, 186 Neb. 711, 185 N.W.2d 860 (1971). The National Labor Relations Board has a practice, recently approved by the United States Supreme court, excluding from bargaining units those “confidential employees...[']who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *N.L.R.B. v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170, 102 S. Ct. 216, 220 (1981).

In *Hendricks County Rural Electric Membership Corporation*, the Supreme Court found that the personal secretary of the Respondent was not a confidential employee. The Supreme Court analyzed the NLRB's historical application of the “labor nexus” test, and found that the secretary was not in any event such a “confidential employee” because she did not act in a confidential capacity with respect to labor-relations matters. The Supreme Court held that because there was no suggestion that the Board's finding regarding labor nexus was not supported by substantial evidence, the Court of Appeals erred in holding that the record did not support the Board's determination that the secretary was not a confidential employee with a labor nexus.

The Respondents have failed to meet the burden of proof to show why these positions should be excluded. The positions in question are not confidential. The evidence showed that confidential information was held in a secure location by their supervisor, and that such confidential information could not be accessed by those employees. None of the employees formulated, determined or effectuated management policies. Therefore, we find there is no evidence in the record to hold that any of these employees are confidential employees. See discussions of the individual positions below.

Deputy Clerk

The Petitioner argues the Deputy Clerk is not a supervisor or a confidential employee and should be included in the bargaining unit. The Respondents cite NEBRASKA REV. STAT. § 23-1301.01 providing that the Deputy Clerk, in the absence or disability of the County Clerk, shall perform the duties of the Clerk pertaining to the office. The Respondents argue that the statute is controlling as to the duties and responsibilities of the Deputy Clerk.

As part of the daily duties, the Howard County Deputy Clerk works with the local district court, Register of Deeds, payroll, and accounts payable. The Deputy Clerk works with two other employees: the County Clerk and the Office Clerk. The Deputy Clerk does not hire or effectively recommend the hiring of any employees. The Clerk runs the day-to-day operations of the office. The Deputy Clerk does not have the authority to transfer, suspend, lay-off, recall, promote, assign, reward, discipline, provide direction, adjust grievances of any of the other employees in the office, nor does she have the authority to effectively recommend any of the above listed supervisory duties. The Deputy Clerk does not have access to any confidential labor-related materials, like performance evaluations, negotiation notes, or proposals. On a day-to-day basis the Clerk's office works with other offices like the assessor's office, the extension office and the treasurer's office. There is no evidence the Deputy Clerk has ever exercised any of the supervisory duties of the County Clerk in the absence of the County Clerk. The Deputy Clerk testified that she did not possess or exercise any of the supervisory powers listed in NEB. REV. STAT. § 48-801(9).

The Commission concludes, based upon the specific evidence in this case, that the Deputy Clerk does not actually exercise independent judgment and is not a supervisor under the definition set forth in NEB. REV. STAT. §48-801(9). The Deputy Clerk is also not a confidential employee, with access to any confidential materials. As stated before, she performs

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basically ministerial tasks in the presence of, or in the absence of the Clerk. We find that the Deputy Clerk is neither a supervisor, nor a confidential employee, and should be part of the bargaining unit.

Deputy Treasurer

The Petitioner argues the Deputy Treasurer is not a supervisor or a confidential employee and should be included in the bargaining unit. The Respondent cites the statutory duties of the Deputy Treasurer and asserts it as controlling the issue.

As part of her daily duties, the Howard County Deputy Treasurer answers the phone, issues motor vehicle registrations and titles, collects real estate taxes, does monthly book work and writes checks. The Deputy Treasurer works with two other employees: the Treasurer and the Clerk Treasurer. The Deputy Treasurer works under the direction of the employment handbook of Howard County. The Deputy Treasurer does not hire or effectively recommend hiring of any employees. The Treasurer runs the day-to-day operations of the office. The Deputy Treasurer does not have the authority to transfer, suspend, lay-off, recall, promote, assign, reward, discipline, provide direction, adjust grievances of any of the other employees in the office, nor does she have the authority to effectively recommend any of the above listed supervisory duties. The Deputy Treasurer does not have access to any confidential labor-related materials, like performance evaluations, negotiation notes, or proposals. On a day-to-day basis the Treasurer's office works with other offices like the assessor's office, the extension office and the clerk's office.

There is no evidence the Deputy Treasurer has ever exercised any of the supervisory duties of the Treasurer in the absence of the Treasurer. The Deputy Treasurer testified that she did not possess or exercise any of the supervisory powers listed in NEB. REV. STAT. §48-801(9). Furthermore, the Treasurer testified that in her absence, the deputy does not perform supervisor duties but instead only handles duties that are routine in nature.

The Commission concludes, based upon the specific evidence in this case, that the Deputy Treasurer does not actually exercise independent judgment and is not a supervisor under the definition set forth in NEB. REV. STAT. § 48-801(9). The Deputy Treasurer is not a confidential employee, with access to any confidential materials. We find the Deputy Treasurer is neither a supervisor nor a confidential employee and should be part of the bargaining unit.

Deputy Assessor

The Petitioner argues the Deputy Assessor is not a supervisor or a confidential employee and should be included in the bargaining unit. The Respondent cites the statutory duties of the Deputy Assessor and asserts it as controlling the issue.

The Deputy Assessor reviews and processes home sales in Howard County. The Deputy Assessor also helps with the day-to-day operations such as dealings with personal property, homestead exemptions, or discussing property valuations with citizens. The Deputy Assessor follows the instructions of the Assessor who supervises the Deputy Assessor and the Assessor Clerk. The Deputy Assessor follows the same Howard County handbook as the other employees in the proposed bargaining unit. The Deputy Assessor cannot hire, fire, develop policies, transfer employees, lay-off employees, recall, promote, assign, discipline, direct or adjust grievances of any of the employees, nor can the Deputy Assessor effectively recommend any of the above actions. The Deputy Assessor does not have access to any confidential employment related materials, like performance evaluations, negotiation notes. The evaluations are kept in a locked box with a combination known only by the Assessor. On a day-to-day basis the assessor's office works with other offices like the treasurer's office, the extension office and the clerk's office. There is no evidence the Deputy Assessor has ever exercised any of the supervisory duties of the Assessor in the absence of the Assessor. The Deputy Assessor testified that she did not possess or exercise any of the supervisory powers listed in NEB. REV. STAT. § 48-801(9). Furthermore, the Assessor testified that in her absence, the deputy does not perform supervisor duties but instead only handles duties that are routine in nature. The Respondents suggested that the Assessor was not a reliable witness because she was sympathetic to union organization. This red herring got into the record when the objection was overruled as premature. Unfortunately, the witness did not answer yes or no, but expanded her response. We find no inconsistency in her factual testimony. We find no suggestion that her purported sympathy for her subordinates' desire to exercise statutory rights to bargain collectively for terms and conditions of employment impeaches her testimony. We find no relevance in the email exhibit offered by the Respondent.

The Commission concludes, based upon the specific evidence in this case, that the Deputy Assessor does not actually exercise independent judgment and is not a supervisor under the definition set forth in NEB. REV. STAT. § 48-801(9). The Deputy Assessor is also not a confidential employee, with access to any confidential materials. We find the Deputy

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Assessor is neither a supervisor nor a confidential employee and should be part of the bargaining unit.

Office Clerk or “Clerk, Clerk”

The Petitioner argues the Office Clerk is not a confidential employee, such that the position should be excluded from the bargaining unit. The Petitioner further argues that the reason confidential employees are excluded from the bargaining unit is that as part of their job, they can gain access to confidential employee records or information regarding labor negotiations. Such information faces a potential conflict of interest in the Office Clerk’s role as a union member versus the Office Clerk’s obligation to keep management employment information secret. The Respondents argue that a confidential relationship exists because of the close physical proximity to the Clerk and the confidential records. The Respondents conclude that it is therefore practical and reasonable that the Office Clerk be classified as a confidential employee.

The Office Clerk in the Clerk’s Office records the register of deeds, helps with elections, the issuing of marriage licenses and other general work. The Office Clerk must follow the Howard County Handbook. The Office Clerk stated that the County Clerk runs the office on a day-to-day basis and implements and instructs the two other staff members to follow the office policies and procedures developed by her. The Office Clerk has no access to confidential information as the County Clerk keeps those documents in a locked box in the vault. The County Clerk also testified to this fact. The County Clerk further testified that there would be no inconvenience or issues with keeping confidential employment matters separate and distinct from the Office Clerk’s duties.

The Office Clerk is in no respect a confidential employee with access to any confidential materials. We find the Office Clerk should be part of the bargaining unit.

Assessor Clerk

The Petitioner argues the Assessor Clerk is not a confidential employee, such that the position should be excluded from the bargaining unit. The Respondent makes the same argument concerning physical proximity of desks.

The Assessor Clerk answers the office phone, helps with homestead exemption applications, and the measuring of properties. The Assessor Clerk stated that the Assessor runs the office on a day-to-day basis and

implements and instructs the two other staff members to follow the office policies and procedures developed by her. The Assessor Clerk has no access to confidential information, which is kept in a locked box in the vault.

The Commission concludes, based upon the specific evidence in this case, the Assessor Clerk is not a confidential employee with access to any confidential materials. We find the Assessor Clerk should be part of the bargaining unit.

Treasurer Clerk

The Petitioner argues the Treasurer Clerk is not a confidential employee, such that the position should be excluded from the bargaining unit. The Respondent makes the same argument concerning physical proximity of desks.

The Treasurer Clerk as part of her daily duties waits primarily on citizens who come into the office. The Treasurer Clerk processes motor vehicles licensing and registration, driver's licenses, real estate taxes, and irrigation assessments. The Treasurer Clerk also mails out motor vehicle data cards, notices, and heavy highway use tax forms. The Treasurer Clerk stated that the Treasurer runs the office on a day-to-day basis and implements and instructs the two other staff members to follow the office policies and procedures which the Treasurer developed. The Treasurer Clerk testified that the Treasurer is the only employee required to make significant independent decisions. The Treasurer Clerk testified that she interacts with the other county offices especially with the assessor's office in dealing with the real estate taxes. The Treasurer Clerk has no access to confidential information, which the Treasurer keeps in a locked box.

The Commission concludes, based upon the specific evidence in this case, that the Treasurer Clerk is not a confidential employee with access to any confidential materials. We find the Treasurer Clerk should be part of the bargaining unit.

Sheriff's Secretary

The Petitioner argues the Sheriff's Secretary is not a confidential employee, such that the position should be excluded from the bargaining unit. The Respondents argue that a confidential relationship exists because of a close proximity to the Sheriff and confidential police reports. The Respondents conclude that because the Sheriff's Secretary is the only clerical employee working in the sheriff's office and the Sheriff's Secretary is in close physical proximity to the Sheriff and the confidential

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records, it is reasonable that the Sheriff's Secretary be classified as a confidential employee.

The Sheriff's Secretary, as part of the position's daily duties, answers the phones, enters and returns "civils", returns arrest warrants, and attends to general office traffic. The Sheriff's Secretary has no access to personnel related documents. The Sheriff's Secretary also has daily interaction with the dispatchers.

The Commission concludes, based upon the specific evidence in this case, that the Sheriff's Secretary is not a confidential employee, with access to any confidential materials. We find the Sheriff's Secretary should be part of the bargaining unit.

Extension Office Manager

The Petitioner argues the Office Manager for the Extension Office is not a manager and should be included in the bargaining unit. The Respondents argue that if Howard County were to hire an additional person, the current "Office Manager" would be a supervisor of that new employee.

The Extension Office Manager as part of the position's daily work, answers phones, types letters, mails letters, fills out monthly 4-H letters, and shares bug or tree diseases for identification with the extension educator. The Extension Office Manager works with one extension educator regularly and occasionally with two other extension educators that service other counties, including Howard County. The Extension Office Manager works part-time because the County cannot afford to pay an employee for full-time work.

The title Extension Office Manager inflates the reality of her duties. The Extension Office Manager performs clerical duties to assist the extension educators. The Extension Office Manager supervises no position. The position performs none of the duties and exercises none of the power described in the statute. The Extension Office Manager is not a supervisor of anyone and should be included in the proposed bargaining unit.

THE COMMISSION HEREBY FINDS from the evidence that an appropriate unit shall consist of:

All full time and regular part time employees of the Respondents, including, but not limited to, those occupying the following classifications: 911 dispatcher, senior 911 dispatcher, deputy assessor, assessor clerk, deputy county clerk, county

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clerk clerk, extension office manager, sheriff secretary, deputy treasurer, treasurer clerk, excluding statutory supervisors, law enforcement officers, county attorney secretary, and employees working under the direction of the highway superintendent and weed superintendent.

IT IS THEREFORE ORDERED that a secret ballot election be conducted within a reasonable time from the date of this order within the above described unit.

All panel commissioners join in the entry of this order.

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OF ELECTRICAL WORKERS)	
LOCAL 763, INTERNATIONAL)	
BROTHERHOOD OF ELECTRICAL)	FINDINGS AND ORDER
WORKERS LOCAL 1483,)	
)	
Petitioners,)	
)	
v.)	
)	
OMAHA PUBLIC POWER DISTRICT,)	
)	
Respondent.)	

Filed December 14, 2009

APPEARANCES:

For Petitioners: Robert E. O'Connor, Jr.
2433 South 130th Circle
Omaha, NE 68144

For Respondent: Robert F. Rossiter, Jr.
Cristin McGarry Berkhausen
Fraser Stryker PC LLO
500 Energy Plaza

409 South 17th Street
Omaha, NE 68102-2663

Before: Commissioners Orr, Blake, and McGinn.

ORR, Comm'r

NATURE OF THE PROCEEDINGS:

The International Brotherhood of Electrical Workers Local 763 and the International Brotherhood of Electrical Workers Local 1483, (hereinafter, "Petitioners") filed a Petition on July 7, 2009 pursuant to NEB. REV. STAT. § 48-824(1) and §48-824(2)(a),(b), and (f), claiming that the Omaha Public Power District (hereinafter "Respondent" or "OPPD") committed various prohibited practices through its implementation of the Tobacco Free Workplace Policy. Petitioners seek a cease-and-desist order, ordering Respondent to terminate the implementation of the Tobacco Free Workplace Policy; award attorneys' fees and costs; make whole any employees who have suffered any economic loss under the Tobacco Free Workplace Policy, and expunge files of any employees disciplined under this policy. Respondent filed an Answer on July 16, 2009, denying the Petitioners' allegations and stating that OPPD unilaterally implemented the Tobacco Free Worksite Policy only after reaching an impasse in negotiations with Petitioners.

The Commission of Industrial Relations (hereinafter, the "Commission") conducted a Preliminary Proceeding on July 28, 2009. Each submitted a witness list and together the parties submitted a joint statement of issues on September 17, 2009. The following issues were presented in the joint statement:

1. Whether OPPD committed a prohibited practice under NEB. REV. STAT. §48-824(a), which forbids interference with, restraint, or coercion, of employees in the exercise of rights granted under the Industrial Relations Act, when OPPD unilaterally implemented the Tobacco Free Worksite Policy after reaching an impasse in negotiations with Petitioners, International Brotherhood of Electrical Workers Locals 1483 and 763.
2. Whether OPPD committed a prohibited practice under NEB. REV. STAT. § 48-824(b), which forbids domination or interference in the administration of any employee organization, when OPPD unilaterally implemented the Tobacco Free Worksite Policy after reaching an impasse in negotiations with Petitioners, International Brother-

hood of Electrical Workers Locals 1483 and 763.

3. Whether OPPD committed a prohibited practice under NEB. REV. STAT. § 48-824(f), which forbids the denial of rights accompanying certification or recognition granted by the Industrial Relations Act, when OPPD unilaterally implemented the Tobacco Free Worksite Policy after reaching an impasse in negotiations with Petitioners International Brotherhood of Electrical Workers Locals 1483 and 763.

FACTS:

In February of 2008, the Governor signed the Nebraska Clean Indoor Air Act which codified Nebraska Revised Statutes § 71-5716 to § 71-5734. The implementation of this new law gave rise to OPPD's notification letter, which notified its three unions on May 28, 2008 that it planned to implement a new 2009 policy concerning a Tobacco Free Worksite to comply with the new law.

In May of 2008 OPPD believed that the tobacco policy was not a subject of mandatory bargaining. However, on December 12, 2008 and December 23, 2008, OPPD received a letter from each of the unions which both stated that the unions believed the Tobacco Free Worksite policy was a mandatory subject of bargaining. Agreeing with the unions, OPPD conceded that the tobacco policy was a mandatory subject of bargaining and in February of 2009 opened up negotiations on the policy.

On February 26, 2009, the parties held the first of four negotiation meetings between OPPD and the unions. OPPD started negotiations by presenting the parties with an initial draft Memorandum of Understanding. (See Exhibit 19). The parties met a second time on March 12, 2009. At this negotiation meeting between the parties the unions presented a "Joint Union Proposal" which contained several changes, including an extended implementation date, designated smoking areas, exceptions for smokeless tobacco, and a provision regarding the use of cessation medication and sick leave for the purpose of quitting smoking. One week later on March 19, 2009, the parties held a third meeting where OPPD presented its counter-proposal. The counter-proposal agreed to the unions' requests regarding the use of tobacco during "unpaid time" and smoking cessation medication and use of sick leave for the purpose of quitting smoking.

The parties held their fourth and final meeting on April 13, 2009. At this meeting, OPPD stated that this was its final proposal. As a follow-up

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to the final offer, on April 17, 2009, OPPD sent its final offer as a Memorandum of Understanding to all of the unions. The letter instructed the unions to notify OPPD by April 30, 2009 with regard to their position. International Brotherhood of Electrical Workers Local Union 1483 and International Brotherhood of Electrical Workers Local Union 763 both declined to accept the last, best and final offer made by OPPD as evidenced in their May 5, 2009 letters to OPPD. With these rejections of the final offer, on May 11, 2009 OPPD sent a letter notifying all of the three unions that OPPD would unilaterally implement the policy on June 1, 2009. The tobacco policy was implemented on June 1, 2009. All the parties stipulated at trial that they were at impasse regarding negotiations of this issue.

DISCUSSION:

The Petitioners allege a violation of NEB. REV. STAT. § 48-824(1) and (2)(a), (b), and (f) when the Respondent unilaterally implemented the Tobacco Free Worksite Policy after reaching an impasse in negotiations with the Petitioners. The Respondent argues that it did not refuse to negotiate in good faith with respect to the mandatory topic of bargaining (the Tobacco Free Worksite Policy). The Respondent argues it did not commit a prohibited practice because it met multiple times with the Petitioners and did in fact reach impasse prior to its unilateral implementation of the tobacco policy.

NEB. REV. STAT. § 48-824(1) declares that it is a prohibited labor practice for any employer ... to refuse to negotiate in good faith with respect to mandatory topics of bargaining. As affirmed by the statute's legislative history, the purpose of NEB. REV. STAT. § 48-824 is to provide public sector employees with the protection from unfair labor practices that most private sector employees enjoy under the National Labor Relations Act, by making refusals to negotiate in good faith regarding mandatory bargaining topics a prohibited practice. LB 382, 94th Leg., 1st Sess., 1995. All parties in the instant case agree that this is a mandatory subject of bargaining.

In the past, the Commission has dealt with cases regarding impasse and unilateral implementation of final offers. *See General Drivers and Helpers Union Local 554 v. Saunders County*, 6 CIR 313 (1982); *Lincoln County Sheriffs Employees Ass'n, Local 546 v. County of Lincoln*, 5 CIR 441 (1982), 216 Neb. 274, 343 N.W. 2d 735 (1984). In these cases, the Commission found that an employer may unilaterally implement its final offer if it does so after impasse and before any proceeding has been initiated in the Commission.

In *Fraternal Order of Police Lodge 41 v. County of Scotts Bluff*, 13 CIR 270 (2000), 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 also *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 *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 339 (2007), the Commission found that the decisions of the NLRB and federal decisions interpreting the NLRA are helpful, but not binding precedent when the statutory provisions are similar. See also *Nebraska Public Employee Local Union 251 v. Otoe County*, 257 Neb. 50, 595 N.W.2d 237 (1999). In *City of Omaha*, the Commission concluded that the provisions of Section 48-824(1) were sufficiently similar to Section 8(A)(5) of the National Labor Relations Act.

Under section 8(a)(5) of the NLRA, an employer commits an unfair labor practice by "refus[ing] to bargain collectively with the representatives of his employees." 29 U.S.C. §158(a)(5). The obligation to "bargain collectively" requires an employer to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." *Id.* §158(d). An employer thus violates section 8(a)(5) by unilaterally changing an existing term or condition of employment without first bargaining to impasse. *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 198, 111 S.Ct. 2215, 2221, 115 L.Ed.2d 177 (1991). Under the National Labor Relations Act as stated in *N.L.R.B. v. Cambria Clay Prod. Co.*, 215 F.2d 48 (6th Cir. 1954), once a genuine impasse has been reached on a mandatory subject of bargaining, the employer may initiate unilateral implementation of its proposals and/or abstain from further negotiations on that subject until the conditions resulting in impasse have changed. See also *Transport Co. of Texas*, 175 N.L.R.B. 763, 71 L.R.R.M. 1085 (1969).

In looking to the NLRB for guidance, the NLRB has clearly held that after bargaining to impasse the employer may make unilateral changes that are reasonably comprehended within his pre-impasse proposals. *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 64 LRRM 1386 (1967). The NLRB

emphasizes that an impasse must in fact exist or a unilateral change will be considered an unlawful refusal to bargain. See *Taft Broadcasting, supra. N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962); *N.L.R.B. v. Crompton-Highland Mills*, 337 U.S. 217, 69 S.Ct. 960 (1949); *Winn-Dixie Stores v. N.L.R.B.*, 567 F.2d 1343 (2d Cir. 1978). The Commission has held many times that National Labor Relations Board decisions are helpful, and may be looked to for guidance, but are not controlling. *City of Grand Island v. AFSCME*, 186 Neb. 711, 185 N.W.2d 860 (1971); *AFSCME v. County of Lancaster*, 196 Neb. 89, 241 N.W.2d 523 (1976), *Nebraska Association of Public Employees v. State of Nebraska*, 204 Neb. 165, 281 N.W.2d 544 (1979).

As stated in *N.L.R.B. v. Cambria Clay Prod. Co.*, 215 F.2d 48 (6th Cir. 1954), once a genuine impasse has been reached on a mandatory subject of bargaining, the employer may initiate unilateral implementation of its proposals and/or abstain from further negotiations on that subject until the conditions resulting in impasse have changed. See also *Transport Co. of Texas*, 175 N.L.R.B. 763, 71 L.R.R.M. 1085 (1969). 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 N.L.R.B. 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.

In *Communication Workers of America, AFL-CIO v. County of Hall*, 15 CIR 95 (2005), the Commission carefully noted that 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.

In the instant case, the parties have both stipulated that impasse does indeed exist. The parties thoroughly negotiated for four bargaining sessions and in those bargaining sessions the Respondent made several concessions before arriving at its final offer. Under these facts and the stipulation of the parties, the law stated in Nebraska is simple: an employer may unilaterally implement its final offer if it does so after impasse. The Respondent has clearly bargained to impasse. Therefore, ●PPD may make unilateral changes that are reasonably comprehended within its pre-impasse proposals.

THE COMMISSION HEREBY FINDS, under the evidence presented, that Petitioners have failed to prove Respondent's act of unilaterally implementing the Tobacco Free Worksite Policy constitutes a violation of § 48-824, constitutes a restraint, or coercion of employees in the exercise of rights, constitutes domination or interference in the administration of any employee organization or otherwise violates Nebraska's public sector labor laws. Therefore, the Commission holds that the Respondent did not commit a prohibited practice in unilaterally implementing the Tobacco Free Worksite Policy.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petitioners' causes of action are ordered dismissed.

All commissioners assigned to the panel in this case join in the entry of this ●order.

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JEFFERY L NEWTON
16 CIR 401 (2010)

Case No. 1217

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THE NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

FRATERNAL ORDER OF)	Case No. 1217
POLICE, LODGE NO. 8,)	
	)	FINDINGS AND ORDER
Petitioner,)	
)	
v.)	
)	
DOUGLAS COUNTY, NEBRASKA)	
And JEFFERY L. NEWTON, in his)	
Official capacity as Director of the)	
Douglas County Department of)	
Corrections,)	
)	
Respondents.)	

Filed January 20, 2010

APPEARANCES:

For Petitioner: John E. Corrigan
 Dowd, Howard, & Corrigan, LLC
 1411 Harney Street, Suite 100
 Omaha, NE 68102

For Respondents: Diane M. Carlson
 Deputy County Attorney
 909 Civic Center
 Omaha, NE 68183

Before: Commissioners Blake, Orr, and Burger.

BLAKE, Comm’r

NATURE OF THE PROCEEDINGS:

The Fraternal Order of Police, Lodge No. 8, (hereinafter, “Petitioner“ or “Union”) filed a Petition on July 14, 2009 pursuant to NEB. REV. STAT. § 48-824(1), claiming that Douglas County and Jeffery L. Newton, (hereinafter, “Respondents“ or “County”) committed a prohibited practice through their unilateral implementation of employing part-time corrections officers to perform bargaining unit work, without bargaining about that proposed implementation. The Respondents filed an Answer on July 23, 2009,

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denying the Petitioner's allegations and stating that Douglas County has, under management prerogative, the ability to hire part-time employees and to schedule work.

The Commission of Industrial Relations (hereinafter, the "Commission") conducted a Preliminary Proceeding on July 30, 2009. The parties both submitted a statement of issues. The following issues were presented by the Petitioner:

1. Whether the Respondents' conduct as alleged and admitted to in the pleadings with respect to its attempt to hire and employ part-time employees to engage in correction officer work performed traditionally and by CBA ("Collective Bargaining Agreement") by members of the bargaining unit represented by Petitioners constitutes a breach of the Respondent's duty to bargain pursuant to Neb. Rev. Stat. Section 48-824(1).

2. Whether the Respondents' conduct as alleged and admitted to constituted an intentional breach of the duty to bargain under the Industrial Relations Act or represented a willful pattern or practice of undermining the status of Petitioner entitling the Petitioner to an award of reasonable attorney fees pursuant to Rule 42 of the Rules of the Commission of Industrial Relations.

3. Whether the Petitioner is entitled to a cease and desist order making permanent the Status Quo order until such time as the parties negotiate different terms and conditions of employment.

The following issues were presented by the Respondents:

1. Whether or not the hiring of part-time correctional officers is an action which requires negotiation under the Nebraska Industrial Act?

2. Whether or not the Respondents have contractually bound themselves to only assign correctional officer work to full-time correctional officers?

FACTS:

In March of 2009, the Director of the Douglas County Corrections approached the Union President; informing the Union that Douglas County was going to bring in part-time employees to cover overtime hours, rather than having full-time employees cover overtime hours in order to reduce budgetary exposure for overtime. Douglas County informed the Union that they believed the overtime issue was a management prerogative and not subject to negotiations. The Union then filed a grievance with the County

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on March 15, 2009. Then on April 7, 2009, relying on conversations with various County Commissioners, the Union withdrew the grievance because the County had not yet planned on employing any part-time workers. In June of 2009, the County recommitted to its pursuit in employing part-time employees to cover overtime hours.

Currently, significant overtime is incurred in the Corrections Department of Douglas County in order to meet minimum staffing requirements. Overtime occurs when an employee misses work and a fill-in employee is needed. The collective bargaining agreement spells out an elaborate system for how to distribute overtime hours among bargaining unit members. The agreement provides for a regular work week. While the agreement does not state that it is mandatory to provide overtime, the Respondents have, through a long-standing practice, created a level of expectation beyond a regular work week. This expectation is evidenced both by the carefully detailed distribution of overtime system and the fact that full-time employees have been filling overtime shifts for at least the last nineteen years, and for some of the employees, at a significant percentage of the overall yearly salary.

The agreement also defines seasonal and part-time employees. Part-time and seasonal employees are not bargaining unit members. The agreement states that temporary or seasonal employees cannot be used as a substitute for full-time permanent (bargaining unit) employees. The agreement is silent about the use of part-time employees as a substitute for full-time permanent employees.

Absent direct language regarding the hiring of part-time employees to cover bargaining unit work in the agreement, the County decided it would be more cost effective to hire a number of part-time employees to reduce the cost of overtime. As a rebuttal, the Petitioner provided some evidence of the safety risks of allowing part-time employees who do not perform this type of work on a regular basis to respond to emergencies, and fights between inmates, or inmates attacking staff members.

The Petitioner appeared at the Douglas County Board meeting on July 14, 2009, stating its opposition to the hiring of part-time workers in part because of their safety concern and also because the Petitioner felt the part-time employees were performing bargaining unit work. The Douglas County Commissioners decided at their board meeting to hire part-time employees to cover overtime hours previously covered by full-time union employees. The Petitioner then filed a case with the Commission. The Union represents approximately 380 correctional officers in this case.

DISCUSSION:

The Petitioner argues that the Respondents failed and refused to negotiate a change in the terms and conditions of employment on a mandatory subject of collective bargaining, the transfer of bargaining unit work to non-bargaining unit, part-time employees. The Petitioner alleges this is a violation of NEB. REV. STAT. § 48-824(1). The Respondents argue that they did not commit an unfair labor practice under the Nebraska Industrial Relations Act by hiring part-time correctional officers because overtime is a management prerogative.

Generally, the goal of labor law is to equalize the bargaining power between employer and employees. In order to equalize bargaining power, the Commission follows three categories of collective bargaining subjects: mandatory, permissive, and prohibited. *Nebraska Public Employees, Local Union 251 v. Otoe County*, 257 Neb. 50; 595 N.W.2d 237 (1999). *International Union of Operating Engineers, Local 571 v. City of Plattsmouth*, 14 CIR 89 (2002), *Aff'd* 265 Neb. 817, 660 N.W. 2d 480 (2003). The distinction between the different categories of bargaining subjects is important.

Mandatory collective bargaining subjects are those which relate to “wages, hours, and other terms and conditions of employment, or any question arising thereunder.” NEB. REV. STAT. § 48-816(1). Additional mandatory subjects of bargaining are those which “vitaly affect” the terms and conditions of employment. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). *Fraternal Order of Police Lodge 41 v. County of Scotts Bluff Nebraska, et. al.*, 13 CIR 270 (2000).

The Industrial Relations Act only requires parties to bargain over mandatory bargaining subjects. NEB. REV. STAT. § 48-816(1). Permissive bargaining subjects are legal subjects of bargaining, which do not fit within the definition of mandatory subjects. *See N.L.R.B. v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958). Either party may raise a permissive subject during bargaining, but the non-raising party is not required to bargain over permissive subjects. *Id.* Finally, prohibited bargaining subjects are topics that the law forbids the parties from agreeing to bargain.

Additionally, some subjects are considered management prerogatives and may generally be altered at the will of the employer. *See, Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area*, 203 Neb. 832, 281 N.W.2d 201 (1979) (holding in a school case that the following subjects are management prerogatives: the right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be sup-

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ported or sponsored; and to determine the curriculum, class size, and types of specialties to be employed). See also *Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972).

In an effort to establish working guidelines as to what constitutes mandatory subjects of bargaining the Nebraska Supreme Court in *Metro Technical Community College Educ. Ass'n*, set forth the following test:

A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered though there may be some minor influence of educational policy or management prerogative. However those matters which involve foundational value judgments, which strike at the very heart of educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.

Id at 842. 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. Conditions of employment have an economic impact on the *employee's* job assignment. *Omaha Police Union, Local 101 v. City of Omaha*, 7 CIR 179 (1984). This does not include management prerogatives. Several negotiation terms and conditions that would seem to be management prerogatives have been included under the umbrella of mandatory subjects of bargaining, such as parking stall assignments. *Id*. We must recognize that overtime certainly relates to wages and hours, and that it has a dramatic effect on the financial wellbeing of some of the members of the bargaining unit. However, we must also recognize several of the Commission's prior cases have treated overtime as management prerogatives.

· The issue of whether overtime and the scheduling of hours worked is a management prerogative has been decided by the Commission a number of times, although not in the context of the claim of a prohibited practice. See *Lincoln Firefighters Ass'n Local Union No. 644 v. City of Lincoln* 12 CIR 248 (1997), *Aff'd*. 253 Neb. 837, 572 N.W.2d 369 (1998) (Hours of

work per cycle and overtime are management prerogatives); *Fraternal Order of Police Lodge No. 81 v. City of Grand Island*, 14 CIR 81 (2002) (Overtime practices are management prerogatives and CIR should not limit management authority); *General Drivers and Helpers Union, Local 554 v. County of Gage*, 14 CIR 170 (2003) (Number of hours worked per day and per week determined to be management prerogatives, including overtime); and *International Ass'n of Firefighters, Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007) (Commission declined to address overtime policies, as overtime falls under hours worked in a day and week, or a scheduling procedure, so therefore a management prerogative).

Furthermore, the Commission may look to the National Labor Relations Board for guidance, as to issues not definitively settled in Nebraska. *Norfolk Educ. Ass'n v. School Dist. of the County of Madison, a/k/a Norfolk Public Schools*, 1 CIR 40 (1971) & (1973). Nevertheless, the National Labor Relations Board is guidance, not controlling, and does not override areas decided by the Commission, the Nebraska Supreme Court, or statutorily mandated by the Nebraska Legislature. Under NLRB rulings, overtime would be treated as a mandatory subject of bargaining, but we have a long-standing line of decisions wherein we have determined it to be management prerogative. In reviewing this issue we cannot interpret contracts or write them, and we do not issue declaratory judgments. See *Transport Workers of America v. Transport Authority of the City of Omaha*, 205 Neb. 26, 286 NW2d 102 (1979) and *City of Grand Island v. International Union of Firefighters, Local Union No. 647*, 15 CIR 378 (2007).

We will not interpret an ambiguous contract as it is not within our jurisdiction. However, the contract is clear in that it provides a carefully crafted and detailed system for scheduling/assigning overtime, and there could be no reasonable explanation for the contract clause in question unless based on the understanding of both sides that there would be substantial overtime. This overtime practice was followed until the unilateral decision by the employer. We do not need to decide whether overtime is a management prerogative or mandatory subject of bargaining in this case. Overtime is a longstanding method extensively used by the employer to cover shifts, so elaborate that no one would go to such a great effort to allocate it, if it could be so easily extinguished. Ultimately, for the Commission to hold otherwise in this case would promote cleverness over fairness. Therefore, we find the Respondents committed a prohibited practice by unilaterally deciding to hire part-time employees in violation of NEB. REV. STAT. § 48-824(1).

Remedial Authority

The Petitioner seeks an order requiring the Respondents to keep its cur-

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rent practice of using only full-time employees to cover potential overtime shifts. The Petitioner also requests attorney fees.

NEB. REV. STAT. § 48-825 states: "If the commission finds that the party accused has committed a prohibited practice, the commission, within thirty days after its decision, shall order an appropriate remedy." The Commission has the authority to order an appropriate remedy, which will promote public policy, adequately provide relief to the injured party, and lead to the resolution of the industrial dispute.

It is clear that the Commission has the authority to issue bargaining orders following findings of prohibited practices and has done so in the past. See *United Food and Commercial Workers, Local Union No. 22 v. County of Hall*, 15 CIR 55 (2005). Having found that the Respondents have engaged in a prohibited labor practice, we find that the Respondents are required to negotiate with the Petitioner in good faith.

In ordering an appropriate remedy, pursuant to NEB. REV. STAT. § 48-825(2), we note that the rules of the Commission were recently amended to authorize an award of attorney fees when the Commission finds that a prohibited practice has occurred. NEB. COM. IND. REL. R. 42. Such an award would not be appropriate in all cases, but should be reserved for cases where the employer's misconduct was flagrant, aggravated, persistent, and pervasive. *J.P. Stevens & Co.*, 244 N.L.R.B 407, 102 LRRM 1039 (1979), enforced and remanded, 668 F.2d 767, 109 LRRM 2345, 2352 (4th Cir. 1982); *J.P. Stevens & Co. v. N.L.R.B.*, 458 US 1118, 110 LRRM 2896 (1982). As to the request for attorney fees, we find that the evidence does not establish a willful pattern or practice of violation of behalf of the Respondents.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that 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 commissioners assigned to the panel in this case join in the entry of this Order.

G. Peter Burger, Concurring:

I concur in the Findings and Order. It is my opinion though, that even accepting for the sake of argument, the Respondents' contention that the decision to transfer work out of the bargaining unit to part-time employees is a management prerogative, the Respondents still had a duty to bargain in good faith over the impact of the action on the bargaining unit members,

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See International Union of Operating Engineers Local 571 vs. City of Plattsmouth, 14 CIR 89 (2002), and *Stevens International, Inc. and International Union United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local Union No. 1688*, 337 N.L.R.B. 143 (2001).

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

PROFESSIONAL FIREFIGHTERS	)	Case No. 1227
ASSOCIATION of OMAHA,)	
LOCAL 385, AFL-CIO CLC,	)	FINDINGS AND ORDER
)	
Petitioner,)	
)	
v.)	
)	
CITY OF OMAHA, NEBRASKA,)	
A Municipal Corporation,)	
)	
Respondent.)	

Filed January 4, 2011

APPEARANCES:

For Petitioner:	John E. Corrigan Dowd Howard & Corrigan, L.L.C. 1411 Harney Street, Suite 100 Omaha, NE 68102
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For Respondent:	A. Stevenson Bogue Abigail M. Moland McGrath North Mullin & Kratz PC LLO Suite 3700 First National Tower 1601 Dodge Street Omaha, NE 68102
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Before: Commissioners McGinn, Orr, Blake, Burger, and Lindahl (EN BANC). Burger Dissenting.

PROF'L FIREFIGHTERS ASS'N OF OMAHA, LOCAL 385
V. CITY OF OMAHA
16 CIR 408 (2011)

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McGINN, Comm'r

NATURE OF THE PROCEEDINGS:

This action was brought by the Professional Firefighters of Omaha, Local 385 ("Petitioner" or "Union") pursuant to NEB. REV. STAT. § 48-818 a labor organization as defined by NEB. REV. STAT. § 48-801(6) (Reissue 2004). The Petitioner is the duly recognized collective bargaining representative of a bargaining unit consisting of employee classifications of firefighter, fire apparatus engineer, fire captain, drill master, EMS shift supervisors, assistant fire marshal, and battalion chief of the City of Omaha ("Respondent" or "City"). The Petitioner seeks the resolution of an industrial dispute over wages and other terms and conditions of employment for the December 30, 2008 to December 28, 2009 contract year.

Under NEB. REV. STAT. § 48-818 the Commission is charged with determining rates of pay and conditions of employment which are comparable to prevalent wage rates paid and conditions of employment maintained under the same or similar working conditions. In accomplishing this, the Commission hears evidence from each of the parties concerning the similarity and appropriateness of including the members of the array proposed by each of them. The Commission then chooses the array cities which are sufficiently the same or similar. This is a determination of fact and made from the evidence on a case-by-case basis. Furthermore, the Commission is not required to consider every possible array, but seeks one which is sufficiently representative so as to determine whether the wages paid or benefits given are comparable. *See Lincoln Co. Sheriff's Emp. Ass'n v. County of Lincoln*, 216 Neb. 274, 343 N.W. 2d 735 (1984). Once the array is chosen, the Commission then establishes prevalent wage rates paid and conditions of employment, determining the overall compensation.

ARRAY:

The parties have five array cities, which they agree are similar, and should be included in the array. These cities are: Lincoln, NE; Milwaukee, WI; Madison, WI; Des Moines, IA; and St. Paul, MN. The Petitioner proposes including the additional cities of Cincinnati, OH and Columbus, OH. The Respondent proposes instead to include the city of St. Louis, MO in the array.

NEB. REV. STAT. §48-818 gives the Commission discretion in its determination of what is comparable to the prevailing wage rate. *See Lincoln Fire Fighters Ass'n v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977). While the Industrial Relations Act does not define comparable, nor

specifically directs the Commission in the manner and process of its determination, the Commission has received some guidance from the Nebraska Supreme Court. In *Omaha Ass'n of Firefighters v. City of Omaha*, 194 Neb. 436, 440-41, 231 N.W.2d 710, 713-14 (1975), the Supreme Court found that

“a prevalent [sic] wage rate to be determined by the Court of Industrial Relations must almost invariably be determined after consideration of a combination of factors. . . . Under Section 48-818, R.R.S. 1943, in selecting cities in reasonably similar labor markets for the purpose of comparison in arriving at comparable and prevalent wage rates the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate.”

As a general rule, the factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills and job conditions. *Douglas Cty. Health Dept. Emp. Ass'n v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* in 209 Neb. 397, 309 N.W.2d 65 (1981). Balance is another factor that has been considered regarding selection of array cities. “Balancing an array” is defined as using some cities that are larger and some that are smaller in population than the subject city. However, as previously held, the Commission will also not assume that balance automatically impacts array members and absent credible evidence, the Commission will not use it as criteria in its selection process. *See Fraternal Order of Police, Lodge 24, City of Grand Island*, 14 CIR 59 (2002).

The cities agreed upon by both parties will be included in the array. In numerous past cases, the Commission has expressed its preference for arrays containing more than four (4) or five (5) members whenever possible. *Grand Island Educ. Ass'n v. Hall County School Dist. No. 0002*, 11 CIR 237 (1992); *International Ass'n of Firefighters, Local No. 1575 v. City of Columbus*, 11 CIR 267 (1992); *Douglas County Health Dept. Employees Ass'n v. County of Douglas*, 9 CIR 219 (1987). The Commission has held that arrays consisting of six (6) to eight (8) members are appropriate. *O'Neill Educ. Ass'n v. Holt County School Dist. No. 7*, 11 CIR 11 (1990); *Red Cloud Educ. Ass'n v. School Dist. of Red Cloud*, 10 CIR 120 (1989); *Logan County Educ. Ass'n v. School Dist. of Stapleton*, 10 CIR 1 (1988); *Trenton Educ. Ass'n v. School Dist. of Trenton*, 9 CIR 201 (1987). However, there have been cases where four or five member arrays have been found to be adequate. *Hastings Educ. Ass'n v. the School Dist. of Hastings*, 6 CIR

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317 (1982) and *Local No. 831, Int'l Ass'n of Firefighters v. City of North Platte*, 6 CIR 1 (1982). *Aff'd in part, and in part rev'd*. 215 Neb. 89, 337 N.W.2d 716 (1983). A thorough analysis of each of the array cities proposed by the parties in this case is necessary to obtain a sufficient array.

Array decisions are made on a case-by-case basis from the evidence received. *See General Drivers & Helpers Union Local No. 554 v. County of Gage*, 14 CIR 170 (2003). An array decision does not control the proper array in future cases. *See Lincoln Firefighters Ass'n Local 644 v. City of Lincoln*, 12 CIR 211 (1996).

For example, in *Lincoln Firefighters Ass'n*, the Commission had rendered two prior wage and fringe benefit decisions between the parties to that proceeding. *See Lincoln Firefighters Association, Local 644 v. City of Lincoln*, 3 CIR 130 (1976), *aff'd in part and rev'd in part*, 198 Neb. 174, 252 N.W.2d 607 (1977) and *Lincoln Firefighters Association, Local 644 v. City of Lincoln*, 8 CIR 31 (1985). The Commission found that the array of compared-to employers in each of those two cases was similar, but not identical. In *Lincoln Firefighters Ass'n*, the Commission determined that it was not required to use either of the previously used arrays in the present proceeding. The Commission stated:

The Court of Industrial Relations should not be compelled to compare the same school districts in every case that comes before it involving the same school districts. The ultimate question is whether, as a matter of fact, the school districts selected for comparison are sufficiently similar to the subject district to fulfill the requirements of section 48-818, R.R.S. 1943. If they are, then there is no room for complaint. We are not prepared to say that merely because one set of school districts was deemed adequate in one case, a different set of school districts would necessarily be inadequate in a different case, particularly where different evidence is adduced.

AFSCME, Local 2088 v. County of Douglas, 208 Neb. 511, 518, 304 N.W.2d 368, 373 (1981) (citing *Crete Educ. Ass'n v. School Dist. of Crete*, 193 Neb. 245, 226 N.W.2d 752 (1975)).

Cincinnati, Ohio; Columbus, Ohio; and St. Louis, Missouri

The parties have stipulated that in the five agreed-upon cities of Des Moines, IA; Milwaukee, WI; St. Paul, MN; Madison, WI; and Lincoln, NE, the work, skills, and working conditions of bargaining unit employees are sufficiently similar to those employees at the proposed comparable array

points to satisfy the standards set forth in NEB. REV. STAT. § 48-818. In addition to the five agreed-upon comparable cities, the Petitioner requests that Cincinnati, OH and Columbus, OH be included in the array selected by this Commission. The Petitioner seeks to include both Ohio cities in order to both achieve balance in the array between larger and smaller populated cities as compared to Omaha, and to establish an array of statistically significant proportions. The Respondent argues that the Ohio cities are not geographically proximate, the statistics represent dissimilar working conditions and the cities represent one labor market. The Respondent objects to the inclusion of Cincinnati, OH and Columbus, OH, and instead requests that St. Louis, MO be included in the array selected by the Commission. The Petitioner objects to the inclusion of St. Louis, MO in the array selected by the Commission.

The Commission previously included the City of Cincinnati in its array the last time these same parties were before this Commission. See *Professional Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 16 CIR 35 (2008). The Petitioner argues that there is no evidence in the record supporting the exclusion of Cincinnati, OH. However, we note that the burden of proof rests on the moving party to prove the inclusion of an array city. See *Local No. 831, International Ass'n of Firefighters v. City of North Platte*, 4 CIR 12 (1979).

As the Nebraska Supreme Court stated in *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977), “the burden is on the moving party in a NEB. REV. STAT. § 48-818 case to demonstrate that existing wages are not comparable to the prevalent wage rate...” Basically, it is necessary for the party requesting the inclusion of a particular array city to first establish by the evidence what were 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. NEB. REV. STAT. § 48-818. In making this statutory comparison, the Court found it necessary to take into consideration not only the wage for time actually worked but also wages for time not worked, including vacations, holidays, and other excused time; all other benefits received including insurance and pensions; and the continuity and stability of employment. The Nebraska Supreme Court held that: “This was not done in this case as no evidence was presented on fringe benefits received by the firemen in those cities used for comparison.” *Lincoln Fire Fighters Assn. v. City of Lincoln, supra*. See also, *Crete Education Assn. v. School Dist. of Crete*, 193 Neb. 245, 226 N.W.2d 752 (1975). These principals are applicable also in determining whether a party has sustained its burden of proof regarding proposed array cities. See *International Association of Firefighters, Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007).

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The Respondent argues that the Petitioner's additional proposed array cities of Cincinnati, OH and Columbus, OH should be excluded because "it is unnecessary for the Commission to use a comparable that far separated from Omaha to get a sufficient array of comparable employers..." (Respondent's Post-Hearing Brief, p.2.)

The Petitioner testified that, in choosing its array, it employed the concepts of geographic proximity, weather conditions, and whether the array city was cross-trained in ALS. Relying on a Supreme Court decision in *Lincoln Fire Fighters Ass'n v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977), which affirmed the Commission's previous selection of an array consisting of cities in the West North Central region to compare to the city of Lincoln, the Petitioner also used the concept of comparing Omaha to cities only within the West North Central region. Inclusion within the West North Central region alone does not make a city within the region comparable to Omaha. In sum, the Commission chooses the array cities which are sufficiently the same or similar. This is a determination of fact, and made from the evidence on a case-by-case basis. The Commission is not required to consider every possible array, but, seeks one which is sufficiently representative so as to determine whether the wages paid or benefits given are comparable. See *Lincoln Co. Sheriff's Emp. Ass'n v. County of Lincoln*, 216 Neb. 274, 343 N.W. 2d 735 (1984).

In the 2008 *Omaha Firefighters* case quoted above, involving the same parties, the Commission disagreed with the Petitioner's request to include Columbus, OH and the Respondent's request that St. Louis, MO be included in the Commission's selected array. This Commission remains convinced that the Petitioner's requested Columbus, OH and the Respondent's requested St. Louis, MO are properly excluded array cities.

With regard to Columbus, OH, the Respondent points out that Columbus staffing is more than double the size of Omaha's Fire Department (1,481 uniformed employees as compared to 679 uniformed employees at Omaha). (Exhibit 2). Additionally, the Columbus Fire Department handles almost four times as many service calls compared to Omaha (146,144 total calls for service as compared to 38,849 calls for service in Omaha). (Exhibit 3). Columbus is the farthest proposed array city from Omaha. (Exhibit 2). The evidence proves once again that there are substantial differences in the conditions of employment between Columbus and Omaha. We will not include Columbus, OH.

Likewise in this case, the Petitioner presented testimony again that the ALS services were administered very differently in St. Louis as compared to Omaha. St. Louis is still not requiring its employees to be dual-rolled,

cross-trained and a fully integrated fire department. See also *International Association of Firefighters, Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007). In the instant case, the two cities work in very different working conditions. In Omaha, roughly 73% of the total calls require the emergency medical function, performed by the dual-trained firefighters, whereas in St. Louis the separate division which performs the EMS function handles these calls. As in the previous *Omaha Firefighters wage case* in 2008, St. Louis still has a separate EMS service, the service is still in a separate bargaining unit, under separate direction and supervision, and those employees still are not required to be cross-trained as firefighters in St. Louis. The evidence in the instant case also demonstrates that while all firefighters in Omaha could do either the job of firefighter or paramedic in St. Louis, the vast majority of the firefighters in St. Louis are not qualified to perform the role of firefighter in Omaha. The evidence proves once again that there are substantial differences in the conditions of employment between St. Louis and Omaha. We will not include St. Louis.

The greater issue is whether Cincinnati should be included in the Commission's selected array in the instant case. The Petitioner argues that the factors the Commission relied upon in the 2008 case have not changed in a general reference in Petitioner's brief, although the Petitioner did not provide the Commission with testimony or exhibits to prove Cincinnati's working conditions have remained unchanged. In fact, it appears from the record that both the Petitioner and the Respondent have relied upon the Commission's 2008 array decision to include Cincinnati, as demonstrated by the detailed evidence introduced by the parties regarding working condition similarities and/or dissimilarities for St. Louis and Columbus but not for the array city of Cincinnati.

In support of its argument to include Cincinnati, the Petitioner relies on the opinion testimony of Omaha Fire Captain Loren Muschall, secretary of the Omaha firefighters' union, regarding the similarity of work, skill, and working conditions. He testified that he went to Cincinnati and met with the president of the Cincinnati firefighters' union and some of his officers. He testified that he observed the Cincinnati fire operations "through discussions with him" (the president of the Cincinnati firefighters' union). Based upon his "observations" he gave his opinion that the fire work they were doing in Cincinnati was the same or similar work under the same or similar conditions to the work that he was doing in Omaha as a fire captain. There is no testimony regarding what he observed. Opinion evidence is evaluated largely on the facts on which the opinion is based. The opinion here does not merit much weight. This evidence lacks important factors regarding the witness's opportunity for seeing or knowing things about which the witness testified.

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In the 2008 *Omaha Firefighters* case, we recognize that the Commission included Cincinnati in its array. Just over a year later it may seem incredulous that the Commission would be considering whether or not to include Cincinnati in the array. However, the law is well settled that in each case the party requesting the inclusion of a particular array member must prove the inclusion of that array city through the weight of the evidence presented in that case. Under *stare decisis* (the doctrine of precedent), the Commission must require the parties to consistently establish their array in each case. The Commission also determines what weight, if any, to give to opinion testimony, considering the source(s) of the expert's information and any reasons given for any opinion expressed by the witness.

The Petitioner did not prove comparability in the instant case. The record lacks evidence regarding whether any working conditions have changed since 2008 have, or have not, changed. Exhibit 80, the Petitioner's survey of Cincinnati does not present the Commission with convincing evidence for the inclusion of Cincinnati. In the taking of evidence, the rules of evidence, prevailing in the trial of civil cases in Nebraska are observed by the Commission. See NEB. REV. STAT. § 48-809. The Petitioner's testimony lacks the weight necessary to meet Petitioner's burden of proof in light of *NJI2d Civ. 1.41*. While the Respondent raised an objection on foundation to the inclusion of Exhibit 80, the objection was overruled because the Respondent also did not provide sufficient argument or evidence to exclude the exhibit. Nevertheless, it is the Petitioner's burden to prove the inclusion of Cincinnati in the array. The Petitioner did not prove comparability in the instant case, failing to sustain its burden. Cincinnati will not be included in the Commission's array.

Although small, with the agreed-to array of the five cities of Lincoln, NE; St. Paul, MN; Milwaukee, WI; Madison, WI; and Des Moines, IA, this Commission has a valid and sufficient expression of the relevant market. There is no need to go an even greater distance from Omaha than the five agreed-to cities to find valid comparators. The evidence shows that Cincinnati, OH is 626 miles from Omaha and Columbus, OH is 690 miles from Omaha. The Petitioner has failed to convince the Commission that the city of Cincinnati, Ohio should be included in the array. The Commission's array shall consist of only the five common array cities of Lincoln, NE; St. Paul, MN; Milwaukee, WI; Madison, WI; and Des Moines, IA agreed to by the parties.

WAGES and STEPS:**Probationary Firefighter**

The Petitioner contends that a probationary wage is not prevalent in the market and argues the wage should be eliminated. The Respondent argues it is appropriate to calculate a separate market wage rate for probationary firefighters because they have separate conditions of employment.

Exhibit 324 confirms that the City of Madison has a probationary firefighter position and Exhibit 323 states that the probationary period lasts for 9 months. Exhibit 301 confirms that the City of Milwaukee has probationary firefighters. According to Exhibit 267, the City of Lincoln has a probationary firefighter position and the position lasts for the first 6 months of employment. St. Paul has a probationary firefighter that makes \$12.81 according to Exhibit 286 and lasts 13 weeks. Finally, Des Moines has a probationary pay rate lasting 12 months as seen in Exhibit 311. The Commission has not received evidence to determine the length of a probationary period for Milwaukee. Additionally, the Respondent's expert witness also testified that all of the array cities have some type of probation, whether the array city paid the probationary firefighter at a starting wage rate (lower than the first step of the firefighter) or just placed the probationary firefighter on the first step of the firefighter pay structure. The evidence demonstrates that having a probationary firefighter is a clear prevalent amongst the array. A probationary firefighter has a different job description than any of the other surveyed jobs. We agree with the Respondent's argument that it is appropriate to have a separate pay classification for probationary firefighters because the position is a separate job classification. The midpoint for probationary firefighter pay is \$14.79. See Table 1.

Step Placement

The Petitioner requests that because placement on the pay line results in an overlap in ranks, some bargaining unit members who earn a promotion in the year in question earn less on the lowest step of the higher rank. The Petitioner seeks to eliminate the overlap between ranks by guaranteeing a minimum percentage increase (5%) when receiving a promotion. The Respondent asserts the practice of guaranteeing a 5% increase is not prevalent and the Petitioner did not provide competent evidence in the record to support its conclusion.

Based upon the array chosen, it is prevalent to place employees on the pay-line based upon a combination of time and performance under all four of the job classifications. See Tables 9 through 12. Drawing upon the per-

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formance evaluations of each firefighter, which are in the custody of the Respondent, the Respondent should place each officer on the pay-line using both time and performance since a combination of the two is the prevalent practice. The Supreme Court in *Douglas Cty. Health Dept. Emp Assn. v. Douglas Cty*, 229 Neb. 301, 427 N.W.2d 28 (1988) specifically held that the "manner in which an individual moves from the minimum to the maximum salary rate of a job classification is a timing difference in the salary schedule, which must be adjusted to reach a comparability determination" and is a condition of employment, which the Commission has statutory authority to establish. *See also Plattsmouth Pol. Dept. Collective Bargaining v. Plattsmouth*, 205 Neb. 567, 288 N.W.2d 729 (1980). Furthermore, in *AF-SCME v. City of Grand Island*, 13 CIR 1 (1997), the Commission placed employees on the pay-line both by time of service and successful completion of performance evaluations.

We find that each employee should be placed on the appropriate new pay plan (Tables 9–12) at a step for which each such employee has qualified by time in service as of the contract date, December 30, 2008, and the number of performance evaluations each employee has successfully completed to the date of the contract, whichever is the lesser number of steps. This placement on the new step pay plans gives credit to the employees for their time in service, and gives credit to each such employee for previously demonstrated job performance.

Now turning to the issue of promotional overlap, the Petitioner provided Omaha Municipal Code § 23-151, which requires the most approximate placement to a 5% pay increase upon promotion from one class to another. The Petitioner also suggests that Exhibits 55 indicates that it is prevalent to have a guaranteed percentage increase upon promotion because at each rank, promoted employees are receiving promotion to the next highest step in the new pay grade. The Petitioner further argues that this Exhibit provides sufficient foundational information for the Commission to order promotional placement within the market. The Respondent argues that the Petitioner's evidence fails to properly identify the prevalent practice in the market.

In the previous *Omaha Firefighters* case in 2008, the Commission was unable to determine the prevalent pay practice among the array members. The evidence provided in Exhibit 55 is confusing at best and does not clearly sort out the practice at each of the array cities. Without sufficient information, the Commission cannot determine the promotional issue. The current promotional practice in Omaha remains in effect.

FRINGE BENEFITS:**Pension Plan – Structural Changes**

The Respondent proposes changes to the definitions such as modifying the current pension definition of base pay to exclude overtime, compensatory time and holiday time. The Respondent argues that these changes would reflect what is prevalent in the market. Alternatively, the Petitioner argues the Commission lacks the jurisdiction to amend the pension plan.

The Respondent concedes that the Supreme Court has indicated that the Commission has no authority to order certain structural changes to the pension plans for current employees; however the Respondent argues this case law does not prevent the Commission from ordering non-structural or definitional changes such as those requested above by the City. The Respondent argues that these are definitional changes as to the method of calculating the pension amount. According to both *Plattsmouth Police Dep't Collective Bargaining Comm. v City of Plattsmouth*, 205 Neb. 267, 288 N.W.2d 729 (1980) and *General Drivers and Helpers Union, Local 554 v. County of Douglas*, 13 CIR 202 (1999), we cannot amend the pension plan which includes how the parties arrive at the pension definition. We conclude such a change is actually structural, and which therefore is a change we cannot make, because we lack the necessary jurisdiction.

Pension Plan – Offset

The Respondent also requests that the Commission should order an offset based on its assertion that it overpaid retirement benefits to employees in the bargaining unit. The Petitioner argues that the Commission lacks sufficient evidence to determine an offset.

The pension plan is in the nature of a long-term contract which extends beyond the one-year period over which the Commission has jurisdiction in this case. The Commission has no general jurisdiction over contractual disputes. See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N. W. 2d 102 and *Professional Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 16 CIR 35 (2008).

In *Plattsmouth Police Dept. Collective Bargaining Committee v. City of Plattsmouth*, 205 Neb. 567; 288 N.W.2d 729 (1980), the Nebraska Supreme Court, reversed the Commission in its decision ordering changes in the pension plan. The Commission in its decision ordered the City to amend its pension plan to provide a 12 percent or 6 and 6 pension plan. The Supreme Court concluded that the part of the order which directed the defendant to amend its pension plan was beyond the jurisdiction of the Commission.

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Although the Commission does not have jurisdiction over the pension plan of the employees to order a change in the pension plan, the Commission does have jurisdiction to offset favorable and unfavorable comparisons of current to prevalent when reaching its decision establishing wage rates. *Douglas Cty. Health Dept. Emp. Ass'n v. Douglas Cty.*, 229 Neb. 301, 422 N.W.2d 28 (1998). The Commission, however, cannot offset pension contributions if such an adjustment rests on speculation, surmise, or conjecture. In *Lincoln Firefighters Ass'n Local 644 v. City of Lincoln*, 12 CIR 248 (1997), *aff'd* 253 Neb. 837 (1998), the Commission offset wages only after an actuary arrived at a theoretical cost of the benefits, equalizing the percentage of contributions.

In this case, an actuary called by Petitioner stated that from an actuarial standpoint, the pension contributions amounts could not be valued as benefits in order to make retirement plan comparisons. The actuary testified that the contribution rate of the employer contemplates paying for both the normal cost for benefits as they are accruing and the past service liability which is amortized over time. The Petitioner argues that the array cities' contribution rates were arrived at differently at each of the array cities and consequently the Commission is without proper and sufficient foundation to award an offset for contributions to the pension plan by the employer. The Petitioner argues the Respondent did not provide adequate foundation for the figures that go into calculating the necessary contribution rates. Accordingly, the Petitioner maintains the Respondent provided insufficient evidence for the Commission to determine "overall compensation" to order an offset because those contribution rates are designed to pay past service liability as well as the plan's cost of currently accruing benefits.

With regard to the Respondents request for an offset, we note that the Commission has in the past ordered an offset of pension benefits, which are above the prevalent, against wage increases. In this case, both experts acknowledge that we cannot rely simply upon the employer contribution rates in evidence. Although it appears that the Respondent is contributing at a higher rate than the array, we do not have the evidence upon which we could quantify that benefit without engaging in the speculation that we can simply rely on the contribution rates; which the testimony says we cannot. Since we are unable to accurately quantify the employer pension plan contributions disparities within the various array cities, we are unable to calculate an offset.

Retiree Benefits

The Respondent requests the Commission to adjust the employer/employee contribution rates for all those hired after the date of the Commis-

sion's decision and make the same definitional changes to Omaha's pension plan structure to reflect the current market conditions. The Petitioner argues such a determination is moot.

In *Lincoln Firefighters Ass'n, Local 644 v. City of Lincoln*, 12 CIR 248, 266 (1997), the Commission refused to address insurance benefits for all non-bargaining unit members, namely retirees. The Respondent in this case suggests that we alter health insurance coverage offered to retirees from the year in dispute and forward. For those employees retiring or retired in the current year in dispute, the Commission found in *Lincoln Firefighters* that those retirees were not in the bargaining unit and therefore the Commission could not address their benefits.

Furthermore, any forward application of this year in dispute and for future years would be speculative and the Commission does not have jurisdiction to order elimination of health insurance benefits for retirees for future years. Therefore, the Commission will not determine this issue.

Staffing

The Respondent requests the Commission to order that mandatory minimum daily staffing, staffing by rank and overall staffing requirements are management prerogatives. The Petitioner maintains that the staffing issue is moot by operation of the expiration of the contract year. The Petitioner also asserts that the Respondent's arguments are not supported by the record. The Petitioner further asserts that staffing is primarily a firefighter safety issue and therefore is a mandatory subject of bargaining.

Whether an issue is one for bargaining under the Industrial Relations Act depends upon whether it is primarily related to wages, hours, conditions of employment of the employees, or whether it is primarily related to formulation or management of public policy. While "terms and conditions of employment" have been given a broad and inclusive interpretation, a condition of employment should normally have an effect and an economic impact on the employee's job assignment. Conditions of employment do not include certain subjects normally considered prerogatives of management. These include but are not limited to: business schedules, company policy, plant locations, or supervisors, because management decisions lie at the core of management control. See *Fibreboard Paper Products Corp. v. N.L.R. B.*, 379 U.S. 203 (1964). A condition of employment should normally have an effect and an economic impact on the employee's job assignment. See *Omaha Police Union Local 101, IUPA, AFL-CIO v. City of Omaha and Chief of Police, Thomas Warren and Mayor Michael Fahey*, 15 CIR 292 (2007). Further, the distinction between conditions of employment

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and management prerogatives in the school setting was set forth in *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972) (school districts have management prerogatives with regard to: "The right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed.")

Any staffing is primarily an issue of safety and is a mandatory subject of bargaining. See *Norfolk Education Ass'n v. School Dist. of Norfolk*, 1 CIR 40 (1971) & (1973) (where the Commission quoted *N.L.R.B. v. Gulf Power Co.*, 384 F.2d 822, 56 LC 12, 258 (5th Cir. 1967) by stating "company rules relating to safety and work practices are mandatory subjects for collective bargaining.") However, staffing relating to scheduling work such as daily staffing and staffing by rank and overall staffing requirements are management prerogatives much like those in *School Dist. of Seward Educ. Ass'n v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972). The Commission does not have jurisdiction over management prerogatives. *Nebraska Dept. of Roads Emp. Ass'n v. Dept. of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973); *IBEW v. City of Fairbury*, 6 CIR 205 (1982). Therefore, because these particular staffing requirements are more closely related to the assignment of work, the Commission does not have the jurisdiction to order any change to daily staffing, staffing by rank, and overall staffing requirements.

Longevity Pay

The Petitioner argues that longevity pay continues to be a benefit and zeros should not be counted in calculating longevity pay. The issue of whether to count zeros refers to whether those array cities that are found to not provide a particular benefit should be counted in the computation determining the average and then the midpoint of the benefit. The Petitioner requests the Commission to order increases or decreases to the midpoint where necessary. The Respondent argues that longevity is pay and not a benefit and for purposes of calculating accurate wage rates for the array cities, the Commission should use zeros in its calculation. The Respondent further suggests that the Commission must conclude that St. Paul pays higher wages because they do not pay any longevity pay.

. The Commission has not included zeros in its calculation of longevity pay in the past. See *Professional Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 16 CIR 35 (2008) and *International Union of Operating Engineers, Local Union 571 v. Cty. of Douglas*, 15 CIR 203, 208 (2006).

As we state in the previous 2008 *Omaha Firefighters*, whether longevity is “pay” or a “benefit” is really an argument of semantics. The effect of longevity pay simply provides additional compensation for years of service without regard to performance. Longevity pay is “pay” that is bargained for as a “benefit” that may or may not be provided at a particular array city. Additionally, the Commission cited *Lincoln Firefighters Ass’n Local 664 v. City of Lincoln*, 12 CIR 248 (1997), *aff’d*, 253 Neb. 837, 572 N.W.2d 369 (1998), stating that in this case the Commission found that comparability should be determined by eliminating the array employers which are not among the prevalent. The Commission opined that if a particular fringe benefit is not offered by a majority of the array of compared-to employers, then that benefit is eliminated. In doing so, the Commission reasoned that no value should be given for the fact that a minority of the array employers provide this benefit; or conversely, when a majority of the array employers provide a benefit, no value should be given for the minority of array employers which do not provide the benefit.

The Commission has frequently calculated fringe benefits in this manner. *See also Omaha Police Union Local 101 v. City of Omaha*, 11 CIR 114 (1991); *Nebraska Pub. Employees Local Union 251 v. Cty. of Douglas*, 11 CIR 189 (1992); *Neligh-Oakdale Educ. Ass’n v. Antelope County School Dist. 0009*, 12 CIR 21 (1993); *General Drivers & Helpers Local Union No. 554 v. Robertson*, 12 CIR 120 (1995). We will first determine whether longevity pay or any other fringe benefit is prevalent among the array of compared-to employers, and then determine comparability among those providing the prevalent benefit.

With regard to the instant case, the Respondent argues that St. Paul does not provide longevity pay because it provides higher wages to its employees. We note in reviewing the evidence that the Respondent did not prove that the St. Paul has purposely chosen to not have longevity pay and instead placed those dollars into the daily pay rates in the various job classifications. Without convincing evidence, the Commission will not change its traditional proven method of calculating longevity pay. Therefore, the Commission will not include zeros in the table calculations.

Moot Fringe Benefits

While the Commission is not deprived of jurisdiction to set wage rates after the end of the bargaining year in question, a dollar-for-dollar costing out of each benefit is not required where, as here, the contract year in dispute is already past, and the impossibility or impracticability of retroactively changing fringe benefits for an expired contract year is well recognized. *See Lincoln Firefighters v. City of Lincoln*, 12 CIR 248 (1997), *aff’d*, 253

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Neb. 837, 572 N.W.2d 369 (1998). The Commission determines that the following fringe benefits are moot because the year in dispute is over; see *General Drivers & Helpers Union Local 554 v. County of Gage, et. al.*, 14 CIR 170 (2003):

- 1) Funeral Leave
- 2) Holidays (Hours Per Year)
- 3) Holidays (Comp. Leave Bank)
- 4) Personal Days
- 5) Disability Plans
- 6) Full Time Union Representative
- 7) Union Business (Time Off, Leave Hours, and Forms of Union Leave)
- 8) Vacation Bid System
- 9) Paid Vacation Policies – Unused Vacation Can Be Converted To Cash Upon Resignation, Dismissal, Retirement and Death.
- 10) Fire Bunker Gear
- 11) Annual Maintenance and Cleaning Allowance
- 12) Replace Personal Items
- 13) Turn Out Gear
- 14) Uniform Provided
- 15) Quartermaster System
- 16) Overtime –Vacation Hours, Sick Leave Hours, and Compensatory Time Hours not included in computation.
- 17) Life Insurance Amount of Coverage.
- 18) Health Insurance Major Medical – Provided.
- 19) Health Insurance Maximum Benefit – Unlimited.
- 20) Health Insurance Employee – Deductible Allowed.
- 21) Health Insurance Single Deductible Amount – \$150.
- 22) Health Insurance Family Deductible Amount – \$300.
- 23) Health Insurance Stop-Loss – Provided.
- 24) Health Insurance Percent Co-Pay – 90/10.
- 25) Health Insurance Prescription Drug Plan – Provided and Generic/Brand.
- 26) Health Insurance Plan Type.
- 27) Health Insurance – Co-Insurance Amount.
- 28) Vision Insurance.
- 29) Dental Insurance – Employer Paid.
- 30) Dental Insurance – Part of the Overall Health Insurance Premium.
- 31) Holiday – Hours Per Year.
- 32) Holiday Payout for Employees – Yes.
- 33) Holiday Accumulation Holiday and Comp. leave Bank – No.
- 34) Personal Days – No.
- 35) Sick Leave – Hours Allowed Annually.

- 36) Sick Leave Define Family.
- 37) Sick Leave Converted to Cash Upon, Resignation, Dismissal, Retirement or Death.
- 38) Union Dues Check-off

Benefits Not Considered

The Commission shall continue to determine comparability of health insurance and life insurance by comparing the percent of the premium to be paid by the employer and employee. *See also Lincoln Firefighters Ass'n Local 644 v. City of Lincoln*, 12 CIR 248, 265 (1997); *General Drivers & Helpers Union Local 554 v. County of Gage, et. al.*, 14 CIR 170 (2003).

The following benefits will not be considered according to the above rule:

- 1) Health Insurance Dollar Amounts.
- 2) Life Insurance Dollar Amounts.
- 3) Dental Insurance Dollar Amounts.

Comparable Fringe Benefits

The following fringe benefits received by the ●maha firefighters shall remain unchanged because they are comparable to those received by firefighters in the array:

- 1) Pay Administration Firefighter/Senior Firefighter Steps – Provided. See Table 9.
- 2) Pay Administration Firefighter/Senior Firefighter Years to Max and Movement – 7 and Performance and Time. See Table 9.
- 3) Pay Administration Fire Apparatus Engineer Steps – Provided. See Table 10.
- 4) Pay Administration Fire Apparatus Engineer Years to Max and Movement –Performance and Time. See Table 10.
- 5) Pay Administration Fire Captain Steps – Provided. See Table 11.
- 6) Pay Administration Fire Captain Years to Max and Movement – Performance and Time. See Table 11.
- 7) Pay Administration Battalion Chief Steps – Provided. See Table 12.

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- 8) Pay Administration Battalion Chief Years to Max and Movement – 7. See Table 12.
- 9) Pay Administration Battalion Chief Movement – Performance and Time. See Table 12.
- 10) Holidays – Regular Rate of Pay. See Table 13.
- 11) Vacation Annual Accrual 24 Hour Employees – remained the same where appropriate. See Table 14.
- 12) Vacation Annual Accrual Day Employees – remained the same where appropriate. See Table 15.
- 13) Educational Assistance – Provided. See Table 16.
- 14) Educational Assistance –100% Tuition. See Table 16.
- 15) Call In Pay Hours Paid – 4. See Table 17.
- 16) Call In Pay Rate of Pay – 1.5 times the regular rate. See Table 17.
- 17) Uniform Allowance – Provided. See Table 18.
- 18) Bank Compensatory Time –Yes. See Table 19.
- 19) Life Insurance – Provided. See Table 21.
- 20) Life Insurance Percentage Paid by Employer – 100%. See Table 21.
- 21) Health Insurance Single – 100%. See Table 22.
- 22) Sick Leave 8 – 10 Hour Employees – Maintain Hours Earned Per Year at 104. See Table 23.
- 23) Sick Leave Maximum Accumulation of Hours for both 24 Hour Employees and 8 –10 Hour Employees- Unlimited. See Table 23.
- 24) Sick Leave – Converted Annually to Cash – No. See Table 24.
- 25) Sick Leave – Converted Annually to Vacation – No. See Table 24.
- 26) Specialty Pay Not Provided – Arson Investigation, Bomb Disposal,

Medical Unit Driver, High Angle Rescue, Swift Water Rescue, Dive Team Rescue, EMT I, EMT B and EMT A. See Table 25.

- 27) Specialty Pay Provided at Same Rate – 4% for Hazardous Materials Assigned, 2% for Hazardous Materials Not Assigned, and 10% EMT P Assigned. See Table 25.
- 28) Injured on Duty Leave Provided. See Table 26.
- 29) Injured on Duty Leave Maximum – 365 Days. See Table 26.
- 30) Injured on Duty Leave How Compensated – 100% Salary for one year. See Table 26.
- 31) Court Duty Minimum Hours – 3 hours. See Table 27.
- 32) Court Duty Amount – 1.5 Times. See Table 27.
- 33) Work-Out-Of Class Pay – Provided. See Table 28.
- 34) Work-Out-Of Class Pay Hours – For all Hours Worked. See Table 28.
- 35) Work-Out-Of Class Pay Rate – Rate of Higher Classification. See Table 28.
- 36) Longevity Pay Plan – Provided. See Table 29.
- 37) Longevity Pay Plan Years for Eligibility – 6. See Table 29.
- 38) Overtime – Vacation Hours, Sick Leave Hours, and Compensatory Time Hours not included in computation. See Table 20.

Non-Comparable Benefits

The Commission finds the following fringe benefits to be non-comparable to the array cities, and orders the following adjustments:

- 1) Pay Administration Firefighter/Senior Firefighter Number of Steps – Increased from 7 to 8. See Table 9.
- 2) Pay Administration Fire Apparatus Engineer Number of Steps – Increased from 6 to 7. See Table 10.

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- 3) Pay Administration Fire Apparatus Engineer Years to Maximum – Decreased from 7 to 4. See Table 10.
- 4) Pay Administration Fire Captain Number of Steps – Increased from 6 to 7. See Table 11.
- 5) Pay Administration Fire Captain Years to Maximum – Decreased from 7 to 4. See Table 11.
- 6) Pay Administration Battalion Chief Number of Steps – Increased from 6 to 9. See Table 12.
- 7) Vacation Leave – Accumulation Not Allowed. See Table 30
- 8) Vacation Annual Accrual 24 Hour Employees – increased and decreased where appropriate. See Table 14.
- 9) Vacation Annual Accrual Day Employees – increased and decreased where appropriate. See Table 15.
- 10) On-Call Pay – Now Provided at a Guaranteed Rate. See Table 31
- 11) Uniform Allowance Annual Amount – Decreased from \$461 to \$417 per year. See Table 18
- 12) Compensatory Time Hours – Decreased from 120 to 109 Hours. See Table 19.
- 13) Health Insurance Family – Increased to 97%. See Table 22.
- 14) Health Insurance 2/4 Party – Increased to 97%. See Table 22.
- 15) Dental Insurance Premium Individual – Increased from 86% to 93%. See Table 32.
- 16) Dental Insurance Premium Family – Increased from 80% to 90%. See Table 32.
- 17) Sick Leave 24 Hour Employees – Increase Hours Earned Per Year from 148 to 152. See Table 23.
- 18) Specialty Pay Provided at Different Rate – Decreased from 7% to 6% for EMT-P not assigned. See Table 25.

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- 19) Longevity Pay Firefighter/Senior Firefighter – Starting after Year 5, increased and decreased where necessary. See Table 33.
- 20) Longevity Pay Fire Apparatus Engineer – Starting after Year 5, increased and decreased where necessary. See Table 34.
- 21) Longevity Pay Fire Captain – Starting after Year 5, increased and decreased where necessary. See Table 35.
- 22) Longevity Pay Battalion Fire Chief – Starting after Year 10, decreased where necessary. See Table 36.

IT IS THEREFORE ORDERED that for the December 30, 2008 through December 28, 2009 contract year, the following shall be effective as of December 30, 2008:

1) Petitioner’s wages for the December 30, 2008 through December 28, 2009 contract year shall be as follows:

JOB CLASSIFICATION	MIN	MAX
Probationary Firefighter	\$ 14.79	
Firefighter/Senior Firefighter	\$ 15.99	\$ 21.12
Fire Apparatus Engineer	\$ 18.58	\$ 22.34
Captain	\$ 21.31	\$ 25.76
Drill Master	\$ 23.70	\$ 28.65
EMS Shift Supervisor	\$ 23.70	\$ 28.65
Assistant Fire Marshall	\$ 25.62	\$ 31.46
Bataillon Fire Chief	\$ 27.49	\$ 33.76

2) The fringe benefit and wage offset, as found herein, shall be calculated on an individual employee basis. The Respondent shall determine the net lump sum overpayment or underpayment for the contract year for each employee. Any net lump sum underpayment for any employee shall be paid by the Respondent to each such employee; however, any employee reimbursement shall not exceed the amount of compensation owed to the employee from the Respondent.

3) The Respondent shall maintain a step pay plan for Firefighter/Senior Firefighter but shall increase the number of steps from 7 to 8. The Respondent shall maintain 7 years to maximum and shall maintain movement on the pay plan with both performance and time.

4) The Respondent shall maintain a step pay plan for Fire Apparatus Engineer but shall increase the number of steps from 6 to 7 and decrease the

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years to maximum from 7 to 4. The Respondent shall maintain movement on the pay plan with both performance and time.

5) The Respondent shall maintain a step pay plan for Fire Captain but shall increase the number of steps from 6 to 7 and decrease the years to maximum from 7 to 4. The Respondent shall maintain movement on the pay plan with both performance and time.

6) The Respondent shall maintain a step pay plan for Battalion Chief but shall increase the number of steps from 6 to 9. Due to the fact the parties did not provide sufficient comparables, the Respondent shall maintain the years to max at 7 for the Battalion Fire Chief. The Respondent shall maintain movement on the pay plan with both performance and time.

7) The Respondent shall maintain holiday pay at the regular pay rate.

8) The Respondent shall decrease annual vacation accrual for 24 Hour Employees as follows in year: 6 from 168 hours to 151 hours; 19 from 274 to 265 hours; shall maintain 143 hours in year 4; and shall increase annual vacation accrual for 24 hour employees in the following years: 1 from 135 hours to 143 hours; 2 from 135 hours to 143 hours; 3 from 135 hours to 143 hours; 5 from 148 hours to 151 hours; 7 from 187 hours to 197 hours; 8 from 191 hours to 202 hours; 9 from 192 hours to 202 hours; 10 from 192 hours to 202 hours; 11 from 196 hours to 209 hours; 12 from 217 hours to 240 hours; 13 from 229 hours to 240 hours; 14 from 231 hours to 240 hours; 15 from 231 hours to 247 hours; 16 from 251 hours to 265 hours; 17 from 251 hours to 265 hours; 18 from 251 hours to 265 hours; 20 from 280 hours to 302 hours; 21 from 296 hours to 306 hours; 22 from 296 hours to 306 hours; 23 from 296 hours to 306 hours; 24 from 296 hours to 306 hours; 25 from 297 hours to 307 hours; 30 from 298 hours to 308 hours; and for maximum from 298 hours to 308 hours .

9) The Respondent shall decrease annual vacation accrual for Day Employees as follows in year: 4 from 91 hours to 85 hours; 5 from 94 hours to 89 hours; 6 from 104 hours to 103 hours; 14 from 146 hours to 145 hours; 19 from 175 hours to 167 hours; shall maintain the 83 hours in years 1, 2 and 3; and shall increase annual vacation accrual for day employees in the following years: 7 from 119 to 121 hours; 8 from 121 hours to 123 hours; 9 from 122 hours to 123 hours; 10 from 122 hours to 123 hours; 11 from 127 hours to 130 hours; 12 from 142 hours to 145 hours; 13 from 142 hours to 145 hours; 15 from 159 hours to 160 hours; 16 from 162 hours to 163 hours; 17 from 162 hours to 163 hours; 18 from 162 hours to 163 hours; 20 from 193 hours to 195 hours; 21 from 195 hours to 198 hours; 22 from 195 hours to 198 hours; 23 from 195 hours to 198 hours; 24 from 195 hours

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to 198 hours; 25 from 198 hours to 199 hours; 30 from 198 hours to 198 hours and maximum from 198 hours to 199 hours.

10) The Respondent shall continue to provide educational assistance with 100% reimbursed for tuition.

11) The Respondent shall continue to pay 4 hours paid for call in pay at the rate of 1.5 times the regular pay rate.

12) The Respondent shall continue to provide a uniform allowance but decrease the annual amount from \$461 to \$417.

13) The Respondent shall continue to allow employees to bank compensatory time but should decrease the number of hours from 120 hours to 109 hours.

14) The Respondent shall continue to compute overtime by not counting vacation, sick leave, holidays, or compensatory time.

15) The Respondent shall continue to provide life insurance paid 100% by the Respondent.

16) The Respondent shall continue to pay 100% of individual health insurance. The Respondent shall increase the amount it pays for family coverage from 96% to 97% and 2-Party coverage from 96% to 97%.

17) The Respondent shall increase the sick leave hours earned per year for 24 hour employees from 148 hours to 152 hours and for 8-10 hours employees the Respondent shall maintain the rate of 104 hours earned per year. The maximum accumulation of hours shall remain unlimited.

18) The Respondent shall continue to not allow sick leave to annually be converted to cash or vacation.

19) The Respondent shall continue to not provide specialty pay for the positions of bomb disposal, arson investigator, medical unit driver, high angle rescue, swift water rescue, dive team rescue or EMT I, EMT B, or EMT A. The Respondent shall maintain paying 4% of Hazardous materials specialty pay that is assigned, paying 2% of hazardous materials not assigned and 10% of EMT P assigned. The Respondent should decrease its percentage of specialty pay from 7% to 6% for EMT P not assigned.

20) The Respondent shall continue to provide injury leave for a maximum number of 365 days at the rate of 100% salary for one year.

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21) The Respondent shall continue to provide 3 minimum hours of court duty pay at the rate of 1.5 times the regular rate of pay.

22) The Respondent shall continue to provide working out of class pay for all hours worked at the rate of the higher classification.

23) The Respondent shall continue to have a longevity plan.

24) The Respondent shall discontinue the practice of allowing accumulation conversion of vacation.

25) The Respondent shall provide on-call pay at a guaranteed rate at an amount negotiated to by the parties because the result had no clear prevalence. See Table 31.

26) The Respondent shall continue to provide dental insurance but shall increase the rate paid of dental insurance from 86% for individuals to 93% for individuals and from 80% for family coverage to 90% for family coverage.

27) The Respondent shall start providing longevity pay after year 5 for the Firefighter/Senior Firefighter at the rate of \$688. The Respondent shall increase the rate of longevity pay for the Firefighter/Senior Firefighter after years: 6 from \$633 to \$688; 7 from \$663 to \$688; decreasing in year 8 from \$693 to \$688; and then again increasing in year 9 from \$693 to \$917; and then again decreasing in year 10 from \$1,011 to \$970 ; and then again increasing in year 11 from \$1,011 to \$1,162; 12 from \$1,011 to \$1,162; 13 from \$1,011 to \$1,290; 14 from \$1,164 to \$1,500; 15 from \$1,506 to \$1,787; 16 from \$1,556; 17 from \$1,556 to \$1,851; 18 from \$1,659 to \$2,062; 19 from \$1,659 to \$2,125; 20 from \$2,091 to \$2,361; 21 from \$2,091 to \$2,361; 22 from \$2,144 to \$2,571; 23 from \$2,194 to \$2,571; 24 from \$2,194 to \$2,644; 25 from \$2,194 to \$2,644; and maximum from \$2,314 to \$2,855.

28) The Respondent shall start providing longevity pay after year 5 for the Fire Apparatus Engineer at the rate of \$722. The Respondent shall increase the rate of longevity pay for the Fire Apparatus Engineer after years: 6 from \$696 to \$722; 7 from \$696 to \$722; 8 from \$714 to \$722; 9 from \$714 to \$991; 10 from \$1,032 to \$1,205; 11 from \$1,032 to \$1,205; 12 from \$1,032 to \$1,205; 13 from \$1,032 to \$1,339; 14 from \$1,192 to \$1,561; 15 from \$1,535 to \$1,852; 16 from \$1,587 to \$1,852; 17 from \$1,587 to \$1,919; 18 from \$1,695 to \$2,141; 19 from \$1,695 to \$2,209; 20 from \$2,130 to \$2,444; 21 from \$2,130 to \$2,444; 22 from \$2,186 to \$2,666; 23 from \$2,186 to \$2,666 ; 24 from \$2,186 to \$2,666; 25 from \$

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2,186 to \$2,739; and maximum from \$2,359 to \$2,962.

29) The Respondent shall start providing longevity pay after year 5 for the Fire Captain at the rate of \$808. The Respondent shall increase the rate of longevity pay for the Fire Captain after years: 6 from \$745 to \$808; 7 from \$745 to \$808; 8 from \$746 to \$808; 9 from \$746 to \$1,102; 10 from \$1,069 to \$1,310; 11 from \$1,069 to \$1,310; 12 from \$1,069 to \$1,310; 13 from \$1,069 to \$1,457; 14 from \$1,243 to \$1,713; 15 from \$1,585 to 2,010; 16 from \$1,643 to \$2,010; 17 from \$1,643 to \$2,084; 18 from \$1,760 \$2,340; 19 from \$1,760 to \$2,413; 20 from \$2,199 to \$2,649; 21 from \$2,199 to \$2,649; 22 from \$2,259 to \$2,905; 23 from \$2,259 to \$2,905; 24 from \$2,259 to \$2,905; 25 from \$2,436 to \$2,978; and maximum from \$2,436 to \$3,234.

30) The Respondent shall continue to provide longevity pay after year 10 for the Battalion Fire Chief at the rate of \$2,130 (from \$1,542), eliminating the practice of paying longevity pay in the amount of \$1,589 after year 7. The Respondent shall increase the rate of longevity pay after year 11 from \$1,542 to \$2,130; 12 from \$1,542 to \$2,130; 13 from \$1,542 to \$2,397; 14 from \$2,065 to \$2,990; 15 from \$2,133 to \$3,173; 16 from \$2,234 to \$3,173; 17 from \$2,234 to \$3,307; 18 from \$2,656 to \$3,900; 19 from \$2,656 to \$4,3034; 20 from \$2,950 to \$4,084; 21 from \$2,950 to \$4,084; 22 from \$3,273 to \$4,677; 23 from \$3,273 to \$4,677; 24 from \$3,273 to \$4,811; 25 from \$3,597 to \$4,861; and maximum from \$3,597 to \$5,504

31) Any adjustments in compensation resulting from the final order rendered in this matter will be made by lump sum payment within 90 days of the Final Order.

All other terms and conditions of employment are not affected by this Order.

Commissioners Orr, Blake and Lindahl join in the entry of this order. Commissioner Burger dissents.

G. Peter Burger, Dissenting:

I was satisfied that the evidence supported the inclusion of Cincinnati in the array. For this reason, I dissent.

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TABLE 1*
CITY OF OMAHA-FIREFIGHTERS
PROBATIONARY FIREFIGHTER

<u>City</u>	<u>Starting Rate</u>
Des Moines	\$17.10
Lincoln	\$13.82
Madison	\$17.01
Milwaukee	\$14.53
St. Paul	\$12.81
Mean	\$15.05
Median	\$14.53
Midpoint	\$14.79
Omaha	\$15.18

*See Exhibit 56 and 171.

TABLE 2*
CITY OF OMAHA-FIREFIGHTERS
FIREFIGHTER/SENIOR FIREFIGHTER

<u>City</u>	<u>Hourly Wage</u>	
	<u>Minimum</u>	<u>Maximum</u>
Des Moines	\$17.10	\$20.37
Lincoln	\$13.82	\$19.62
Madison	\$17.01	\$20.49
Milwaukee	\$14.53	\$24.42
St. Paul	\$16.23	\$23.82 ¹
Mean	\$15.74	\$21.74
Median	\$16.23	\$20.49
Midpoint	\$15.99	\$21.12
Omaha	\$15.19	\$21.43

*See Exhibit 57 and 172.

¹TR 368: 11-22

TABLE 3*
CITY OF OMAHA-FIREFIGHTERS
FIRE APPARATUS ENGINEER

City	Hourly Wage	
	Minimum	Maximum
Des Moines	\$18.00	\$21.50
Lincoln	\$18.88	\$21.22
Madison	\$21.52	\$21.52
Milwaukee	\$18.28	\$25.85
St. Paul	\$17.69	\$25.72 ¹
Mean	\$18.87	\$23.16
Median	\$18.28	\$21.52
Midpoint	\$18.58	\$22.34
Omaha	\$18.68	\$22.84

*See Exhibit 58 and 173.

¹TR 368: 11 – 22.

TABLE 4*
CITY OF OMAHA-FIREFIGHTERS
CAPTAIN
(56 Hour Week)

City	Job Title	Hourly Wage	
		Minimum	Maximum
Des Moines	Lt/Captain	\$19.34	\$24.80 ¹
Lincoln	Captain	\$21.30	\$24.89
Madison	Lt	\$23.56	\$23.56
Milwaukee	Lt/Captain	\$23.34	\$31.78
St. Paul	Captain	\$19.02 ³	\$28.09 ^{2,3}
Mean		\$21.31	\$26.62
Median		\$21.30	\$24.89
Midpoint		\$21.31	\$25.76
Omaha		\$21.63	\$26.03

*See Exhibit 59 and 174.

¹See Exhibit 98 and 312.

²See Exhibit 286 Page 5.

³TR 368: 11-22

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TABLE 5*
CITY OF OMAHA-FIREFIGHTERS
DRILL MASTER
(56 Hour Week)

City	Hourly Wage	
	Minimum	Maximum
Des Moines		
Lincoln		
Madison		
Milwaukee		
St. Paul		
Mean		
Median		
Aligned with Captain Midpoint	\$23.70	\$28.65
Omaha	\$24.07	\$28.95

*See Exhibit 60 and 175.

TABLE 6*
CITY OF OMAHA-FIREFIGHTERS
EMS SHIFT SUPERVISOR
(56 Hour Week)

City	Hourly Wage	
	Minimum	Maximum
Des Moines		
Lincoln		
Madison		
Milwaukee		
St. Paul		
Mean		
Median		
Aligned with Captain Midpoint	\$23.70	\$28.65
Omaha	\$24.07	\$28.95

*See Exhibit 61 and 176.

TABLE 7*
CITY OF OMAHA-FIREFIGHTERS
ASSISTANT FIRE MARSHAL
(56 HOUR WEEK)

City	Hourly Wage	
	Minimum	Maximum
Des Moines		
Lincoln		
Madison		
Milwaukee		
St. Paul		
Mean		
Median		
Midpoint	\$25.62	\$31.46
Omaha	\$25.75	\$30.31

*aligned with Battalion Chief.

TABLE 8*
CITY OF OMAHA-FIREFIGHTERS
BATTALION FIRE CHIEF
(56 Hour Week)

City	Hourly Wage	
	Minimum	Maximum
Des Moines	\$26.85	\$32.28
Lincoln	\$26.46	\$31.43
Madison	\$34.04	\$34.04
Milwaukee	\$28.42	\$34.51
St. Paul	\$24.86 ¹	\$35.07 ¹
Mean	\$28.13	\$33.47
Median	\$26.85	\$34.04
Midpoint	\$27.49	\$33.76
Omaha	\$27.64	\$32.54

*See Exhibit 63 and 178.

¹TR 368:11 - 22.

TABLE 9*
CITY OF OMAHA-FIREFIGHTERS
FIREFIGHTER/SENIOR FIREFIGHTER PAY
ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	Yes	8	8.5	Performance/Time
Madison	Yes	5	3.5	Performance/Time
Milwaukee	Yes	7	5.5	Seniority/Time
St. Paul	Yes	8	20	Performance/Time
Mean		7	8	
Median		8	6	
Midpoint		8	7	
Mode	Yes			Performance/Time
Omaha	Yes	7	7	Performance/Time

*See Exhibits 14 and 179.

TABLE 10*
CITY OF OMAHA-FIREFIGHTERS
FIRE APPARATUS ENGINEER PAY ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	Yes	6	5	Performance/Time
Madison	No	Flat	N/A	N/A
Milwaukee	Yes	5	4	Seniority/Time
St. Paul	Yes	8	**	Performance/Time
Mean		7	4	
Median		7	4	
Midpoint		7	4	
Mode	Yes			Performance/Time
Omaha	Yes	6	7	Performance/Time

*See Exhibits 15 and 180.

**See TR: 96, 97 and Exhibits 348, page 39

TABLE 11*
CITY OF OMAHA-FIREFIIGHTERS
FIRE CAPTAIN PAY ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	Yes	5	5	Performance/Time
Madison	No	Flat	N/A	N/A
Milwaukee	Yes	6	4	Seniority/Time
St. Paul	Yes	8	**	Performance/Time
Mean		7	4	
Median		7	4	
Midpoint		7	4	
Mode	Yes			Performance/Time
Omaha	Yes	6	7	Performance/Time

*See Exhibits 16 and 181.

**See TR: 96, 97 and Exhibit 348, Page 39.

TABLE 12*
CITY OF OMAHA-FIREFIIGHTERS
BATTALION FIRE CHIEF PAY ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	No	Range	N/A	Performance/Time
Madison	No	Flat	N/A	N/A
Milwaukee	Yes	5	4	Seniority/Time
St. Paul	Yes	9	**	Performance/Time
Mean		8	***	
Median		9	***	
Midpoint		9	***	
Mode	Yes			Performance/Time
Omaha	Yes	6	7	Performance/Time

*See Exhibits 17 and 182.

**See TR: 96, 97 and Exhibits 348, Page 39.

***Insufficient Comparables.

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TABLE 13*
CITY OF OMAHA-FIREFIGHTERS
HOLIDAY PAY
(24 HOUR EMPLOYEES)

City	Rate of Pay for Holidays
Des Moines	17 hours taken as vacation
Lincoln	Regular Pay Rate
Madison	2 times hours worked
Milwaukee	Regular Pay Rate
St. Paul ¹	Regular Pay Rate
Mean	
Median	
Midpoint	
Mode	Regular Pay Rate
Omaha	Regular Pay Rate

*See Exhibit 30 and 198.

¹Some Shifts receive 3 hours to 6 hours for working holiday.

TABLE 14*
CITY OF OMAHA-FIREFIGHTERS
VACATION ANNUAL ACCRUAL
24 Hour Employees

Years	1	2	3	4	5	6	7	8	9	10	11	12	13	14
City	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours
Des Moines	112	112	112	112	112	112	168	168	168	168	168	224	224	224
Lincoln	120	120	120	120	120	180	180	180	180	180	192	192	192	192
Madison	240	240	240	264	264	264	264	312	312	312	312	336	336	336
Milwaukee	96	96	96	96	96	96	144	144	144	144	144	216	216	216
St. Paul	258	258	258	258	314	314	314	314	314	314	314	314	314	314
Mean	165	165	165	165	181	181	214	224	224	224	226	256	256	256
Median	120	120	120	120	120	120	180	180	180	180	192	224	224	224
Midpoint	143	143	143	143	151	151	197	202	202	202	209	240	240	240
Omaha	135	135	135	143	148	168	187	191	192	192	196	217	229	231

Years	15	16	17	18	19	20	21	22	23	24	25	30	Max.
City	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours
Des Moines	224	224	224	224	280	280	280	280	280	280	280	280	280
Lincoln	192	240	240	240	240	240	276	276	276	276	276	276	276
Madison	336	384	384	384	384	456	456	456	456	456	456	468	468
Milwaukee	216	216	216	216	216	264	264	264	264	264	264	264	264
St. Paul	381	381	381	381	381	381	381	381	381	381	392	392	392
Mean	270	289	289	289	289	324	331	331	331	331	334	336	336
Median	224	240	240	240	240	280	280	280	280	280	280	280	280
Midpoint	247	265	265	265	265	302	306	306	306	306	307	308	308
Omaha	231	251	251	251	274	280	296	296	296	296	297	298	298

*See Exhibits 28 and 191.

TABLE 15*
CITY OF OMAHA-FIREFIGHTERS
VACATION ANNUAL ACCRUAL
Day Employees

Years	1	2	3	4	5	6	7	8	9	10	11	12	13	14
City	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours
Des Moines	80	80	80	80	80	80	120	120	120	120	120	160	160	160
Lincoln	80	80	80	80	80	120	120	120	120	120	128	128	128	128
Madison	80	80	80	100	100	100	100	120	120	120	140	140	140	140
Milwaukee	80	80	80	80	80	80	120	120	120	120	120	160	160	160
St. Paul	104	104	104	104	144	144	144	144	144	144	144	144	144	144
Mean	85	85	85	89	97	105	121	125	125	125	131	146	146	146
Median	80	80	80	80	80	100	120	120	120	120	128	144	144	144
Midpoint	83	83	83	85	89	103	121	123	123	123	130	145	145	145
Omaha	83	83	83	91	94	104	119	121	122	122	127	142	142	146

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Years	15	16	17	18	19	20	21	22	23	24	25	30	Max.
City	Hours												
Des Moines	160	160	160	160	200	200	200	200	200	200	200	200	200
Lincoln	128	160	160	160	160	160	184	184	184	184	184	184	184
Madison	160	160	160	160	160	200	200	200	200	200	200	200	200
Milwaukee	160	160	160	160	160	200	200	200	200	200	200	200	200
St. Paul	192	192	192	192	192	192	192	192	192	192	200	200	200
Mean	160	166	166	166	174	190	195	195	195	195	197	197	197
Median	160	160	160	160	160	200	200	200	200	200	200	200	200
Midpoint	160	163	163	163	167	195	198	198	198	198	199	199	199
Omaha	159	162	162	162	175	193	195	195	195	195	198	198	198

*See Exhibit 192.

TABLE 16*
CITY OF OMAHA-FIREFIGHTERS
EDUCATIONAL ASSISTANCE

City	% Reimbursed Provided	For Tuition
Des Moines	Yes	100%
Lincoln	Yes	100%
Madison	Yes	100%
Milwaukee	Yes	100%
St. Paul	Yes	
Mode	Yes	100%
Omaha	Yes	100%

*See Exhibits 42 and 238.

TABLE 17*
CITY OF OMAHA-FIREFIGHTERS
CALL IN PAY POLICIES

City	Hours Paid	Rate of Pay
Des Moines	Actual	1.5
Lincoln	2.5	1.5
Madison	3	1.5
Milwaukee	3	1.5
St. Paul	4	1.5
Mean		
Median		
Midpoint		
Mode	No Clear Mode	1.5
Omaha	4	1.5

*See Exhibits 39 and 237.

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TABLE 18*
CITY OF OMAHA-FIREFIGHTERS
FIRE BUNKER GEAR and UNIFORM ALLOWANCE

Uniform City	Annual Allowance	Amount
Des Moines	No	N/A
Lincoln	Yes	\$409
Madison	Yes	\$404
Milwaukee	Yes	\$325
St. Paul	Yes	\$565
Mean		\$426
Median		\$407
Midpoint		\$417
Mode	Yes	
Omaha	Yes	\$461

*See Exhibits 18 and 242.

TABLE 19 *
CITY OF OMAHA-FIREFIGHTERS
OVERTIME/COMPENSATORY TIME PAY PRACTICES

City	May Fire Employees Bank Compensatory Time	Number of Hours
Des Moines	Yes	48
Lincoln	No	N/A
Madison	Yes	144
Milwaukee	Yes	225
St. Paul	Yes	56
Mean		118
Median		100
Midpoint		109
Mode	Yes	
Omaha	Yes	120

*See Exhibits 24 and 239.

TABLE 20*
CITY OF OMAHA-FIREFIGHTERS
OVERTIME PAY PRACTICES

**When Computing Overtime, do the following
count as Time Worked**

City	Vacation	Sick Leave	Holidays	Comp Time
Des Moines	Yes	Yes	Yes	Yes
Lincoln	Yes	Yes	Yes	N/A
Madison	No	No	No	No
Milwaukee	No	No	No	No
St. Paul	No	No	No	No
Mode	No	No	No	No
Omaha	No	No	No	No

*See Exhibit 240.

TABLE 21*
CITY OF OMAHA-FIREFIGHTERS
LIFE INSURANCE

City	Coverage Provided	% Paid by Employer
Des Moines	Yes	100%
Lincoln	Yes	100%
Madison	Yes	100%
Milwaukee	Yes	100%
St. Paul	Yes	100%
Mode	Yes	100%
Omaha	Yes	100%

*See Exhibit 35 and 219.

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TABLE 22*
CITY OF OMAHA-FIREFIGHTERS
HEALTH INSURANCE

City	% Paid by Employer		
	Individual	Family	2 Party
Des Moines	100%	97%	97%
Lincoln	100%	94%	94%
Madison	100%	100%	100%
Milwaukee	100%	100%	100%
St. Paul	100%	93% ¹	93% ¹
Mean	100%	97%	97%
Median	100%	97%	97%
Midpoint	100%	97%	97%
Omaha	100%	96%	96%

*See Exhibits 32 and 203.

¹See Exhibits 347, Using Open Access Choice Plan w/deductible.

TABLE 23*
CITY OF OMAHA-FIREFIGHTERS
SICK LEAVE

City	Hours Earned Per Year		Maximum Accumulation of Hours	
	24 Hour Employees	8-10 Hour Employees	24 Hour Employees	8-10 Hour Employees
Des Moines	144	96	Unlimited	Unlimited
Lincoln	144	96	Unlimited	Unlimited
Madison	156	104	1,800	1,200
Milwaukee	168	120	Unlimited	Unlimited
St. Paul	151	104	Unlimited	Unlimited
Mean	153	104		
Median	151	104		
Midpoint	152	104		
Mode			Unlimited	Unlimited
Omaha	148	104	Unlimited	Unlimited

*See Exhibit 25, 183 and 184.

TABLE 24*
CITY OF OMAHA-FIREFIGHTERS
SICK LEAVE CONVERSION

City	Can Sick Leave be Converted Annually to:	
	Cash	Vacation
Des Moines	No	No
Lincoln	No	No
Madison	Yes	No
Milwaukee	Yes	Yes
St. Paul	No	Yes
Mode	No	No
Omaha	No	No

*See Exhibits 26 and 185.

TABLE 25*
CITY OF OMAHA-FIREFIGHTERS
SPECIALTY PAY

City	Bomb Disposal	Med Arson Invest.	Hazard Unit Driver	Hazard Mat. Assigned	Hazard Mat Not Assigned	High Angle Rescue	Swift Water Rescue	Dive Team Rescue	EMT P Assigned	EMT P Not Assigned	EMT I	EMT B	EMT A
Des Moines	No	No	No	3.6%	0%	No	No	No	5%	5%	No	No	No
Lincoln	No	No	5%	3.3%	3.3%	No	No	No	14%	12%	No	No	No
Madison	No	6%-10%	No	3%	1.5%	No	No	1%	10%	5%	No	No	No
Milwaukee	No	No	No	2%	1.5%	No	\$240	\$240	5%	5%	No	No	No
St. Paul	No	6.5%	\$2.33	8.3%	4%	No	No	No	12.4%	7%	\$1.93	No	\$3.13
Mean				4%	2%				9%	7%			
Median				3%	2%				10%	5%			
Midpoint				4%	2%				10%	6%			
Mode	No	No	No			No	No	No			No	No	No
Omaha	No	No	No	4%	2%	No	No	No	10%	7%	No	No	No

*See Exhibit 250.

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TABLE 26*

**CITY OF OMAHA-FIREFIGHTERS
INJURED ON DUTY LEAVE**

City	Injury Leave	Maximum Amount	How Compensated
Des Moines	Yes	(Part of Pen)	Regular pay, per Iowa Retirement System
Lincoln	Yes	180 days	6 mos; 12 mos. with approval
Madison ¹	Yes	Sick leave	Regular pay, 36-52 weeks
Milwaukee	Yes	One year	80% base for 12 mos.
St. Paul	Yes	One year	Regular pay, 12 mos.
Mode	Yes	No clear mode	No clear mode
Omaha	Yes	365 days	100% salary for one year

*See Exhibit 41 and 202.

¹ City pays difference between work. comp. and net regular pay.

TABLE 27*

**CITY OF OMAHA-FIREFIGHTERS
COURT DUTY**

City	Minimum Hours	Amount
Des Moines	2	Straight Time
Lincoln	Actual	1.5 times
Madison	3	1.5 times
Milwaukee	2	Straight time
St. Paul	4	1.5 times
Mean	3	
Median	3	
Midpoint	3	
Mode		1.5 times
Omaha	3 hours	1.5 times

*See Exhibit 252.

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TABLE 28*
CITY OF OMAHA-FIREFIGHTERS
WORK OUT OF CLASS PAY PROVISIONS

City	Paid Paid	How Paid	Compensated Hours	Rate
Des Moines	Yes		For all hours worked	one step in current rank or first step of higher rank
Lincoln	Yes		For all hours worked	5% above regular rate or next higher step in higher classification
Madison	Yes		For all hours worked	rate of higher classification
Milwaukee	Yes		For all hours worked	\$22.00 per shift
St. Paul	Yes		12	rate of higher classification
Mode	Yes		For all hours worked	No clear prevalent
Omaha	Yes		All hours worked	rate of higher classification

*See Exhibits 40 and 260.

TABLE 29*
CITY OF OMAHA-FIREFIGHTERS
LONGEVITY

City	Have Plan
Des Moines	Yes
Lincoln	Yes
Madison	Yes
Milwaukee	Yes
St. Paul	No
Mean	
Median	
Midpoint	
Mode	Yes
Omaha	Yes

*See Exhibit 19 and Exhibit 231

TABLE 30*

**CITY OF OMAHA-FIREFIGHTERS
PAID VACATION POLICIES - ACCUMULATION CONVERSION**

Accumulation City	Allowed
Des Moines	Yes
Lincoln	No
Madison	No
Milwaukee	No
St. Paul	Yes
Mode	No
Omaha	Yes

*See Exhibit 29 and 193.

TABLE 31*

**CITY OF OMAHA-FIREFIGHTERS
ON-CALL PAY PRACTICE**

City	ON-CALL Yes or No	Guaranteed Rate	Time Or Amount
Des Moines	Yes	Yes	\$1.00 per hr
Lincoln	Yes	Yes	2 hrs for 24
Madison	Yes	No	\$2.00 per hr
Milwaukee	Yes	Yes	Actual
St. Paul	No	No	
Mean			
Median			
Midpoint			
Mode	Yes	Yes	No Prevalent
Omaha	No		

*See Exhibit 236

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TABLE 32*
CITY OF OMAHA-FIREFIGHTERS
DENTAL INSURANCE

City	% Paid by Employer	
	Individual	Family
Des Moines	100%	99%
Lincoln	100%	94%
Madison	N/A	N/A
Milwaukee	43%	43%
St. Paul	100%	97%
Mean	86%	83%
Median	100%	96%
Midpoint	93%	90%
Mode		
Omaha	86%	80%

*See Exhibits 34 and 214.

TABLE 33*
CITY OF OMAHA-FIREFIGHTERS
ANNUAL LONGEVITY PAY
FIREFIGHTER/SENIOR FIREFIGHTER
Longevity Pay Earned After

City	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Des Moines	\$561	\$561	\$561	\$561	\$561	\$1,122	\$1,122	\$1,122	\$1,122	\$1,683	\$1,683
Lincoln	\$348	\$348	\$348	\$348	\$851	\$851	\$851	\$851	\$851	\$851	\$1,363
Madison ¹	\$1,535	\$1,535	\$1,535	\$1,535	\$1,535	\$1,535	\$3,069	\$3,069	\$4,092	\$4,092	\$4,604
Milwaukee	N/A	N/A	N/A	N/A	N/A	\$300	\$300	\$300	\$300	\$300	\$550
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$815	\$815	\$815	\$815	\$983	\$952	\$1,336	\$1,336	\$1,592	\$1,732	\$2,050
Median	\$561	\$561	\$561	\$561	\$851	\$987	\$987	\$987	\$987	\$1,267	\$1,523
Midpoint	\$688	\$688	\$688	\$688	\$917	\$970	\$1,162	\$1,162	\$1,290	\$1,500	\$1,787
Omaha	0	\$663	\$663	\$693	\$693	\$1,011	\$1,011	\$1,011	\$1,011	\$1,164	\$1,506

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City	16 Years	17 Years	18 Years	19 Years	20 Years	21 Years	22 Years	23 Years	24 Years	25 Years	Max Years
Des Moines	\$1,683	\$1,683	\$2,244	\$2,244	\$2,244	\$2,244	\$2,805	\$2,805	\$2,805	\$2,805	\$3,366
Lincoln	\$1,363	\$1,363	\$1,363	\$1,363	\$1,875	\$1,875	\$1,875	\$1,875	\$1,875	\$2,069	\$2,069
Madison ¹	\$4,604	\$5,116	\$5,116	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627
Milwaukee	\$550	\$550	\$550	\$550	\$900	\$900	\$900	\$900	\$900	\$900	\$900
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$2,050	\$2,178	\$2,319	\$2,446	\$2,662	\$2,662	\$2,802	\$2,802	\$2,802	\$2,850	\$2,991
Median	\$1,523	\$1,523	\$1,804	\$1,804	\$2,060	\$2,060	\$2,340	\$2,340	\$2,340	\$2,437	\$2,718
Midpoint	\$1,787	\$1,851	\$2,062	\$2,125	\$2,361	\$2,361	\$2,571	\$2,571	\$2,571	\$2,644	\$2,855
Omaha	\$1,556	\$1,556	\$1,659	\$1,659	\$2,091	\$2,091	\$2,144	\$2,194	\$2,194	\$2,194	\$2,314

*See Exhibits 20 and 232.

¹See Exhibit 324, Page 23 and Exhibit 102, Page 23.

TABLE 34*
CITY OF OMAHA-FIREFIIGHTERS
ANNUAL LONGEVITY PAY
FIRE APPARATUS ENGINEER
Longevity Pay Earned After

City	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Des Moines	\$593	\$593	\$593	\$593	\$593	\$1,186	\$1,186	\$1,186	\$1,186	\$1,779	\$1,779
Lincoln	\$348	\$348	\$348	\$348	\$348	\$851	\$851	\$851	\$851	\$851	\$1,363
Madison ¹	\$1,611	\$1,611	\$1,611	\$1,611	\$3,223	\$3,223	\$3,223	\$3,223	\$4,297	\$4,297	\$4,834
Milwaukee	N/A	N/A	N/A	N/A	N/A	\$300	\$300	\$300	\$300	\$300	\$550
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$851	\$851	\$851	\$851	\$1,388	\$1,390	\$1,390	\$1,390	\$1,659	\$1,807	\$2,132
Median	\$593	\$593	\$593	\$593	\$593	\$1,019	\$1,019	\$1,019	\$1,019	\$1,315	\$1,571
Midpoint	\$722	\$722	\$722	\$722	\$991	\$1,205	\$1,205	\$1,205	\$1,339	\$1,561	\$1,852
Omaha	N/A	\$696	\$696	\$714	\$714	\$1,032	\$1,032	\$1,032	\$1,032	\$1,192	\$1,535

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City	16 Years	17 Years	18 Years	19 Years	20 Years	21 Years	22 Years	23 Years	24 Years	25 Years	Max Years
Des Moines	\$1,779	\$1,779	\$2,372	\$2,372	\$2,372	\$2,372	\$2,965	\$2,965	\$2,965	\$2,965	\$3,558
Lincoln	\$1,363	\$1,363	\$1,363	\$1,363	\$1,875	\$1,875	\$1,875	\$1,875	\$1,875	\$2,069	\$2,069
Madison ¹	\$4,834	\$5,371	\$5,371	\$5,908	\$5,908	\$5,908	\$5,908	\$5,908	\$5,908	\$5,908	\$5,908
Milwaukee	\$550	\$550	\$550	\$550	\$900	\$900	\$900	\$900	\$900	\$900	\$900
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$2,132	\$2,266	\$2,414	\$2,549	\$2,764	\$2,764	\$2,912	\$2,912	\$2,912	\$2,961	\$3,109
Median	\$1,571	\$1,571	\$1,868	\$1,868	\$2,124	\$2,124	\$2,420	\$2,420	\$2,420	\$2,517	\$2,814
Midpoint	\$1,852	\$1,919	\$2,141	\$2,209	\$2,444	\$2,444	\$2,666	\$2,666	\$2,666	\$2,739	\$2,962
Omaha	\$1,587	\$1,587	\$1,695	\$1,695	\$2,130	\$2,130	\$2,186 ²	\$2,186 ²	\$2,186 ²	\$2,186 ²	\$2,359

*See Exhibits 21 and 233.

¹See Exhibit 324, page 23 and Exhibit 102, page 23.

²See Table 44 in Case 1173.

TABLE 35*
CITY OF OMAHA-FIREFIGHTERS
ANNUAL LONGEVITY PAY
CAPTAIN
Longevity Pay Earned After

City	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Des Moines	\$683	\$683	\$683	\$683	\$683	\$1,366	\$1,366	\$1,366	\$1,366	\$2,049	\$2,049
Lincoln	\$348	\$348	\$348	\$348	\$348	\$851	\$851	\$851	\$851	\$851	\$1,363
Madison ¹	\$1,764	\$1,764	\$1,764	\$1,764	\$3,528	\$3,528	\$3,528	\$3,528	\$4,704	\$4,704	\$5,292
Milwaukee	N/A	N/A	N/A	N/A	N/A	\$300	\$300	\$300	\$300	\$300	\$550
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$932	\$932	\$932	\$932	\$1,520	\$1,511	\$1,511	\$1,511	\$1,805	\$1,976	\$2,314
Median	\$683	\$683	\$683	\$683	\$683	\$1,109	\$1,109	\$1,109	\$1,109	\$1,450	\$1,706
Midpoint	\$808	\$808	\$808	\$808	\$1,102	\$1,310	\$1,310	\$1,310	\$1,457	\$1,713	\$2,010
Omaha	N/A	\$745	\$745	\$746	\$746	\$1,069	\$1,069	\$1,069	\$1,069	\$1,243	\$1,585
	16	17	18	19	20	21	22	23	24	25	Max

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City	Years										
Des Moines	\$2,049	\$2,049	\$2,732	\$2,732	\$2,732	\$2,732	\$3,415	\$3,415	\$3,415	\$3,415	\$4,098
Lincoln	\$1,363	\$1,363	\$1,363	\$1,363	\$1,875	\$1,875	\$1,875	\$1,875	\$1,875	\$2,069	\$2,069
Madison ¹	\$5,292	\$5,880	\$5,880	\$6,468	\$6,468	\$6,468	\$6,468	\$6,468	\$6,468	\$6,468	\$6,468
Milwaukee	\$550	\$550	\$550	\$550	\$900	\$900	\$900	\$900	\$900	\$900	\$900
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$2,314	\$2,461	\$2,631	\$2,778	\$2,994	\$2,994	\$3,165	\$3,165	\$3,165	\$3,213	\$3,384
Median	\$1,706	\$1,706	\$2,048	\$2,048	\$2,304	\$2,304	\$2,645	\$2,645	\$2,645	\$2,742	\$3,084
Midpoint	\$2,010	\$2,084	\$2,340	\$2,413	\$2,649	\$2,649	\$2,905	\$2,905	\$2,905	\$2,978	\$3,234
Omaha	\$1,643	\$1,643	\$1,760	\$1,760	\$2,199	\$2,199	\$2,259	\$2,259	\$2,259	\$2,436	\$2,436

*See Exhibits 22 and 234.

¹See Exhibit 324, Page 23 and Exhibit 102, Page 23

TABLE 36*
CITY OF OMAHA-FIREFIIGHTERS
ANNUAL LONGEVITY PAY
BATTALION CHIEF
Longevity Pay Earned After

City	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
Des Moines	\$890	\$890	\$890	\$890	\$890	\$1,780	\$1,780	\$1,780	\$1,780	\$2,670	\$2,670
Lincoln	N/A	N/A	N/A	N/A	N/A	\$850	\$850	\$850	\$850	\$850	\$1,150
Madison ¹	\$2,403	\$2,403	\$2,403	\$2,403	\$4,806	\$4,806	\$4,806	\$4,806	\$6,408	\$6,408	\$7,209
Milwaukee	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean						\$2,479	\$2,479	\$2,479	\$3,013	\$3,309	\$3,676
Median			Not Prevalent ²			\$1,780	\$1,780	\$1,780	\$1,780	\$2,670	\$2,670
Midpoint						\$2,130	\$2,130	\$2,130	\$2,397	\$2,990	\$3,173
Omaha	N/A	N/A	N/A	\$1,092	\$1,092	\$1,542	\$1,542	\$1,542	\$1,542	\$2,065	\$2,133

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City	16 Years	17 Years	18 Years	19 Years	20 Years	21 Years	22 Years	23 Years	24 Years	25 Years	Max Years
Des Moines	\$2,670	\$2,670	\$3,560	\$3,560	\$3,560	\$3,560	\$4,450	\$4,450	\$4,450	\$4,450	\$5,340
Lincoln	\$1,150	\$1,150	\$1,150	\$1,150	\$1,450	\$1,450	\$1,450	\$1,450	\$1,450	\$1,750	\$2,050
Madison ¹	\$7,209	\$8,010	\$8,010	\$8,811	\$8,811	\$8,811	\$8,811	\$8,811	\$9,612	\$9,612	\$9,612
Milwaukee	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$3,676	\$3,943	\$4,240	\$4,507	\$4,607	\$4,607	\$4,904	\$4,904	\$5,171	\$5,271	\$5,667
Median	\$2,670	\$2,670	\$3,560	\$3,560	\$3,560	\$3,560	\$4,450	\$4,450	\$4,450	\$4,450	\$5,340
Midpoint	\$3,173	\$3,307	\$3,900	\$4,034	\$4,084	\$4,084	\$4,677	\$4,677	\$4,811	\$4,861	\$5,504
Omaha	\$2,234	\$2,234	\$2,656	\$2,656	\$2,950	\$2,950	\$3,273	\$3,273	\$3,273	\$3,597	\$3,597

*See Exhibits 23 and 235.

¹Based on Exhibit 235, base salary for Battalion Chief of \$80,097, Exhibit 325, page 14, Exhibit 103, page 13.

²Insufficient number of comparables.

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NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

PROFESSIONAL FIREFIGHTERS)	Case No. 1227
ASSOCIATION of OMAHA,)	
LOCAL 385, AFL-CIO CLC,	)	FINAL ORDER
)	
Petitioner,)	
)	
v.)	
)	
CITY OF OMAHA, NEBRASKA,)	
A Municipal Corporation,)	
)	
Respondent.)	

Filed February 17, 2011

APPEARANCES:

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

For Respondent: A. Stevenson Bogue
 Abigail M. Moland
 McGrath, North, Mullin, & Kratz PC LLO
 Suite 3700 First National Tower
 1601 Dodge Street
 Omaha, NE 68102

Before: Commissioners McGinn, Orr, Blake, Burger, and Lindahl (EN BANC). Burger Dissenting.

McGINN, Comm’r

The Commission entered its Findings and Order on January 4, 2011. The Petitioner and the Respondent both timely filed requests for a Post-Trial Conference as provided for in NEB. REV. STAT. § 48-816 (7)(d). A Post-Trial Conference was held on January 26, 2011.

The Petitioner’s and the Respondent’s Request for a Post-Trial Conference raised several areas of concerns about the Commission’s Order of January 4, 2011. Those areas are dealt with as follows:

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1. Array—Exclusion of Cincinnati, Ohio

The issue presented at the Post-Trial Conference was whether the exclusion from the array of the City of Cincinnati, Ohio was appropriate. The Petitioner argued vigorously that Cincinnati should be included. The Petitioner also stated that it introduced evidence addressing both of the Respondent's objections to Cincinnati in the pretrial order. The Petitioner stated that those objections were "double dipping" and that Cincinnati was not very geographically proximate to Omaha.

NEB. REV. STAT. § 48-816(7)(d) 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. Generally, array choice is not a proper subject for discussion at a post-trial conference. *See District 8 Elementary Teachers Ass'n v. School Dist. No. 8*, 8 CIR 136 (1985).

However, if a party challenges array choice on the basis that the Commission mischaracterized or did not base its choice on the evidence presented, the Commission can correct any such error, if one exists. In the Commission's Findings and Order, the Commission found that the weight of evidence rested on the side of excluding Cincinnati, Ohio. The Commission did consider all the evidence presented at trial, in looking at Dr. Robert Otteman's testimony, the testimony of Ursula McDonnell, Loren Muschall, and Paul Essman and both the Petitioner's and Respondent's exhibits. The Commission still finds the record lacks the evidence necessary to include Cincinnati, Ohio in the array.

Since the Commission can find no mischaracterization of the evidence, our previous findings shall stand as issued by the Commission on January 4, 2011. After reviewing the evidence, we again conclude that the array determined to be appropriate in the original Findings and Order reflects the most appropriate array for comparison to the City of Omaha. Therefore, Cincinnati, Ohio will not be included in the array.

2. Lead Medic- Compensation

The Petitioner argued that the Commission should clarify that, based on the array selected by the Commission, lead paramedics should be compensated at a higher rate of pay. The Respondent argues that the Commission should not change the rate of pay because the Petitioner did not present any quantifiable data as to whether increased compensation should be paid and, if so, what should be the amount of that additional pay.

At the Post-Trial Conference the Petitioner presented the Commission with rates to determine the pay for lead paramedics. While the Commission does not dispute the accuracy of these figures, the Commission cannot determine whether those rates are based in the evidence presented at trial. Therefore, the Commission declines to order a rate of pay for lead medics since the Commission cannot base the rate from evidence presented at trial.

3. Pay Administration- Paramedic Shift Supervisor, Drill Master, and Assistant Fire Marshal

The Petitioner requests that the Commission clarify the pay administration for the Paramedic Shift Supervisor, Drill Master and Assistant Fire Marshal positions, because the Commission did not directly do so in its original Findings and Order issued on January 4, 2011. The Respondent does not dispute this issue. Therefore, in order to clarify the previous order we will align the Paramedic Shift Supervisor and the Drill Master positions with the Captain pay administration as seen in the Revised Table 11 below and the Assistant Fire Marshal will be aligned with the Battalion Chief position as seen in the Revised Table 12 below.

4. Vacation Accumulation

The Petitioner is requesting the Commission to clarify that to the extent vacation carryover from year to year is not a prevalent practice, any vacation earned by the employees prior to the time of the Commission's decision be credited to those employees who accumulated and carried over the vacation in previous contract years. Alternatively, the Respondent argues this issue is moot and that the Respondent is entitled to an offset for the vacation accumulation if the Commission determines the issue is not moot.

We have clearly found the benefit of vacation leave carryover not moot in past cases. *See General Drivers & Helpers Union Local 554 v. County of Gage*, 14 CIR 170 (2003) (sick leave maximum accumulation and vacation leave carryover found not moot). *See also General Drivers and Helpers Local Union No. 554 v. Darlene Robertson and the City of Scottsbluff*, 12 CIR 120 (1995) (vacation leave carryover determined not moot).

While the Commission also does not have jurisdiction over previous or future contract years, the Respondent is entitled to an offset. We find that vacation accumulation should be retroactively calculated from the beginning of the year as an offset in determining the total amount due to the employee. Therefore, the Respondent is entitled to an offset.

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5. Sick Leave Payout Upon Retirement – Percentage of Sick Leave

The Petitioner argues that a midpoint can be determined between the three cities that provide sick leave payout, allowing a percentage conversion at retirement. The Respondent argues the issue is moot because the year in question is over.

In the Commission's January 4, 2011 decision the Commission determined sick leave pay out upon retirement was moot. We have held that sick leave pay out upon retirement is moot in the past. *See Nebraska Public Employees Local Union 251 v. Otoe County*, 12 CIR 177 (1996). The Petitioner also argues that in the Commission's decision in the 2008 case between the parties we determined this benefit. However, in 2008 the Commission's decision was implemented prior to the expiration of the contract year and therefore was not moot. Sick leave payout upon retirement will remain moot as previously determined by the Commission in its Findings and Order, January 4, 2011.

6. Pay Administration for the Battalion Chief

The issue here is whether the Commission correctly rounded the median in the pay administration steps for the battalion chief's position. The Petitioner argues the median should be 7 rather than 9 as provided and that the midpoints should be 8 rather than 9 accordingly. The Respondent simply asks that the Commission follow its past practice— whatever that may be. The Commission has consistently rounded this way in the past. *See International Brotherhood of Elec. Workers Local Union 1597 v. City of Gering*, 15 CIR 140 (2005) and *International Ass'n of Firefighters Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007). The rounding will remain as previously ordered. Therefore, the median should remain a 9, as does the midpoint of the steps.

7. Holiday Pay

The Petitioner requests that the Commission order additional hours paid to employees who actually work holidays. See Table 13. The Respondent argues that the Commission correctly determined that "regular pay" is the appropriate mode.

• In arriving at the figures in Table 13, the Commission used Petitioner's Exhibit 30 and Respondent's Exhibit 198. While both exhibits 30 and 198 do state that some shifts at St. Paul receive 3 to 6 hours for working a holiday, even if the Commission were to place "3 to 6 hours" in the line for St. Paul, no clear mode exists. However, after reviewing the evidence estab-

lished at trial again, the Commission still determines that the indicated “regular pay rate” for St. Paul is the appropriate rate to be placed in the line for St. Paul. Therefore, the Commission finds no mischaracterization of the evidence and the mode should remain regular pay rate.

8. Vacation Accrual

Both parties agree that the Commission incorrectly ordered the mean, median and midpoint in year six (6) for Vacation Accrual in Table 14. After reviewing Table 14, the Commission’s original order does in fact incorrectly state the mean, median, and midpoint at year six (6). We will revise the table with the corrected mean, median and midpoint. See Revised Table 14.

9. On-Call Pay

Both the Respondent and the Petitioner request the Commission to clarify this issue. The Petitioner requests that the Commission clarify that the employer should provide additional compensation if it places employees in an on-call status and leave the matter in the hands of the parties to negotiate in the future. Whereas, the Respondent suggests the Commission’s decision is unusual and suggests that the Commission’s order should have been that no change with regard to on-call pay should take place.

In the Commission’s Findings and Order dated January 4, 2011, the Respondent was ordered to provide on-call pay at a guaranteed rate at an amount negotiated to by the parties because the result had no clear prevalent amount. See Table 31. It is clear, based upon the evidence presented at trial, that on-call pay was indeed a prevalent practice. However, at trial neither party presented the Commission with quantifiable data to determine the rate of on-call pay. Without the quantifiable data, the Commission cannot order a rate. Therefore, the Commission orders that on-call pay is prevalent but cannot order what amount the Respondent should pay on-call employees.

10. Longevity Pay

The Petitioner requests that with respect to year 10 for Madison, the Petitioner believes that instead of \$1,535, the figure for longevity pay after year 10 should be \$3,069 and that the mean, median and midpoint should be adjusted accordingly with the new figure. The Petitioner also requests that the Commission determine that maximum in Exhibit 20 means after the 26th year of service. The Respondent argues that longevity pay is pay and not a benefit and the Commission should include zeros in arriving at the amounts of longevity pay offered to employees.

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With regard to the Petitioner's first issue, after reviewing Petitioner's Exhibit 20, it is clear the Commission incorrectly placed the figure \$1,535 in Madison's line for year 10 and the figure will be adjusted to the correct figure of \$3,069. The Commission will revise the table with the correct figures and recalculate the mean, median and midpoint. See Revised Table 33.

With regard to the Petitioner's second issue, the Commission must consider the evidence presented at trial to determine the proper meaning of "max". The Commission's Table 33 lists the last year of longevity pay as "max". In reviewing exhibits of the parties, a reasonable interpretation of "max" implies after the 26th year of service. Therefore, the Commission will revise the table accordingly. See Revised Table 33.

With regard to the Respondent's issue, the Commission has consistently not included zeros in its calculation of longevity pay in the past. See *Professional Firefighters Ass'n of Omaha, Local 385 v. City of Omaha*, 16 CIR 35 (2008) and *International Union of Operating Engineers, Local Union 571 v. Cty. of Douglas*, 15 CIR 203, 208 (2006). The Commission can find no mischaracterization of evidence. The table calculating longevity pay will remain as previously determined by the Commission in its Findings and Order.

11. Payout Wait Period for Sick and Annual Leave Accrued Banks

The Petitioner is requesting that the Commission determine how long the union members must wait for the payout of their sick and annual leave accrued banks. The Respondent argues that this issue is moot because the year in question is over. The Petitioner argues that the payout is also moot if the wait period is moot.

The Commission determined the issue of payout moot in its January 4, 2011 decision. The Commission declines to determine the payout wait period because sick and annual leave accrued banks are moot.

12. Probationary Period

The Petitioner requests that the Commission clarify when the probationary wage stops for newly employed firefighters. The Respondent argues the Commission does not have sufficient evidence in the record to make such a determination. After a review of the Petitioner's wage surveys, a prevalency analysis can be done accurately to calculate the length of months a probationary firefighter should be paid his or her probationary wage. See Revised Table 1. The Respondent will decrease its current 14-month probationary period for trainees to a 6-month probationary period.

13. Hazardous Materials Unassigned Certification Pay

The Petitioner requests that the Commission clarify whether hazardous materials certification pay is applicable to all bargaining unit employees who hold hazardous materials certification rather than the “special operations” designation required by the City of Omaha before employees are allowed to receive unassigned hazardous materials certification pay.

After reviewing the testimony and exhibits, the Commission determines there is a lack of evidence regarding unrelated disciplines and how the City of Omaha or any of the other array members consider unrelated disciplines in paying hazardous materials certification pay. Without this evidence, the Commission is unable to determine the prevalent practice. Therefore, the Commission is unable to order the parties as to how unassigned hazardous materials certification pay should be paid to the bargaining unit employees and cannot order any change to how the Respondent currently considers offering unassigned hazardous materials pay.

14. Staffing

The Respondent requests that the Commission clarify its decision with regard to daily staffing, staffing by rank and overall staffing. Specifically the Respondent would like to understand which staffing issues are management prerogatives and which staffing issues relate to safety and are mandatory subjects of bargaining. The Petitioner argues the Commission ordered no change because the Commission does not have jurisdiction over the subject matter. The Petitioner further argues that *Fiberboard v. N.L.R.B.*, 379 U.S. 203 (1964), states that even when management topics touch on public safety, those issues must be bargained.

Staffing proposed bargaining topics such as “daily staffing”, “staffing by rank”, and “overall staffing” are management prerogatives as stated previously in the Commission’s Findings and Order, issued on January 4, 2011. The Commission does not have jurisdiction over management prerogatives. *Nebraska Dept. of Roads Emp. Ass’n v. Dept. of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973); *IBEW v. City of Fairbury*, 6 CIR 205 (1982). The Commission cannot order any change because the Commission lacks the authority to do so. “Daily staffing”, “staffing by rank”, and “overall staffing” determinations are management prerogatives, properly within the City of Omaha’s prerogative to make changes accordingly.

IT IS THEREFORE ORDERED that the Petitioner’s and the Respondent’s requests to amend the Order of January 4, 2011 are sustained in part, and overruled in part, as stated herein. It is the Final Order of the Commis-

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sion that:

1. The Respondent shall align the Paramedic Shift Supervisor and the Drill Master positions with the Captain pay administration as seen in the Revised Table 11 below and the Assistant Fire Marshal will be aligned with the Battalion Chief position as seen in the Revised Table 12 below.
2. The Respondent shall receive an offset for vacation accumulation.
3. The Respondent shall increase annual vacation accrual for 24-Hour Employees in Year 6 from 168 hours to 187 Hours.
4. The Respondent shall now pay \$1,162 for Firefighter longevity pay after the 10th year of service.
5. The Respondent shall now pay \$2,855 for Firefighter longevity pay after the 26th year of service.
6. The Revised Tables 1, 11, 12, 14, and 33 all reflect the corrections made in this Final Order.
7. All other terms and conditions of employment for the 2008-2009 contract year shall be as previously established by the agreement of the parties and by orders and findings of the Commission.
8. Adjustments and compensation resulting from this Order shall be paid in a single lump sum payable within ninety (90) days of this Final Order.

Commissioners Orr, Blake and Lindahl join in the entry of this order.
Commissioner Burger dissents.

G. Peter Burger, Dissenting:

I continue to believe Cincinnati should have been included, and renew my dissent.

REVISED TABLE 1*
CITY OF OMAHA-FIREFIGHTERS
PROBATIONARY FIREFIGHTER

City	Starting Rate	Length of Probation Period
Des Moines	\$17.10	6 Months ¹
Lincoln	\$13.82	9 Months ²
Madison	\$17.01	6 Months ³
Milwaukee	\$14.53	8 Months ⁴
St. Paul	\$12.81	3 Months ⁵
Mean	\$15.05	6 Months
Median	\$14.53	6 Months
Midpoint	\$14.79	6 Months
Omaha	\$15.18	14 Months

*See Exhibits 56 and 171.

¹See Exhibit 97, Page 7.

²See Exhibit 139, Page 7.

³See Exhibit 101, Page 7.

⁴See Exhibit 121, Page 7.

⁵See Exhibit 356, Page 3 (Converted from 13 weeks for conformity).

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TABLE 11*
CITY OF OMAHA-FIREFIGHTERS
FIRE CAPTAIN, PARAMEDIC SHIFT SUPERVISOR,
AND DRILL MASTER
PAY ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	Yes	5	5	Performance/Time
Madison	No	Flat	N/A	N/A
Milwaukee	Yes	6	4	Seniority/Time
St. Paul	Yes	8	**	Performance/Time
Mean		7	4	
Median		7	4	
Midpoint		7	4	
Mode	Yes			Performance/Time
Omaha	Yes	6	7	Performance/Time

*See Exhibits 16 and 181.

**See TR: 96, 97 and Exhibit 348, Page 39.

REVISED TABLE 12*
CITY OF OMAHA-FIREFIIGHTERS
BATTALION FIRE CHIEF AND ASSISTANT FIRE MARSHALL
PAY ADMINISTRATION

City	Steps Yes/No	Number of Steps	Years to Max	Movement
Des Moines	Yes	9	4	Performance/Time
Lincoln	No	Range	N/A	Performance/Time
Madison	No	Flat	N/A	N/A
Milwaukee	Yes	5	4	Seniority/Time
St. Paul	Yes	9	**	Performance/Time
Mean		8	***	
Median		9	***	
Midpoint		9	***	
Mode	Yes			Performance/Time
Omaha	Yes	6	7	Performance/Time

*See Exhibits 17 and 182.

**See TR: 96, 97 and Exhibits 348, Page 39.

***Insufficient Comparables.

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REVISED TABLE 14*
CITY OF OMAHA-FIREFIGHTERS
VACATION ANNUAL ACCRUAL
24 Hour Employees

City	Years	1	2	3	4	5	6	7	8	9	10	11	12	13	14
	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours	Hours
Des Moines	112	112	112	112	112	112	168	168	168	168	168	224	224	224	
Lincoln	120	120	120	120	120	180	180	180	180	180	180	192	192	192	192
Madison	240	240	240	264	264	264	264	312	312	312	312	336	336	336	
Milwaukee	96	96	96	96	96	96	144	144	144	144	144	144	216	216	216
St. Paul	258	258	258	258	314	314	314	314	314	314	314	314	314	314	314
Mean	165	165	165	165	181	193	214	224	224	224	224	226	256	256	256
Median	120	120	120	120	120	180	180	180	180	180	180	192	224	224	224
Midpoint	143	143	143	143	151	187	197	202	202	202	202	209	240	240	240
Omaha	135	135	135	143	148	168	187	191	192	192	192	196	217	229	231

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City	Years · 15 Hours	16 Hours	17 Hours	18 Hours	19 Hours	20 Hours	21 Hours	22 Hours	23 Hours	24 Hours	25 Hours	30 Hours	Max. Hours
Des Moines	224	224	224	224	280	280	280	280	280	280	280	280	280
Lincoln	192	240	240	240	240	240	276	276	276	276	276	276	276
Madison	336	384	384	384	384	456	456	456	456	456	456	468	468
Milwaukee	216	216	216	216	216	264	264	264	264	264	264	264	264
St. Paul	381	381	381	381	381	381	381	381	381	381	392	392	392
Mean	270	289	289	289	289	324	331	331	331	331	334	336	336
Median	224	240	240	240	240	280	280	280	280	280	280	280	280
Midpoint	247	265	265	265	265	302	306	306	306	306	307	308	308
Omaha	231	251	251	251	274	280	296	296	296	296	297	298	298

*See Exhibits 28 and 191.

REVISED TABLE 33*
CITY OF OMAHA-FIREFIIGHTERS
ANNUAL LONGEVITY PAY
FIREFIIGHTER/SENIOR FIREFIIGHTER
Longevity Pay Earned After

City	5 Years	6 Years	7 Years	8 Years	9 Years	10 Years	11 Years	12 Years	13 Years	14 Years	15 Years
'Des Moines	\$561	\$561	\$561	\$561	\$561	\$1,122	\$1,122	\$1,122	\$1,122	\$1,683	\$1,683
Lincoln	\$348	\$348	\$348	\$348	\$851	\$851	\$851	\$851	\$851	\$851	\$1,363
Madison ¹	\$1,535	\$1,535	\$1,535	\$1,535	\$1,535	\$3,069	\$3,069	\$3,069	\$4,092	\$4,092	\$4,604
Milwaukee	N/A	N/A	N/A	N/A	N/A	\$300	\$300	\$300	\$300	\$300	\$550
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$815	\$815	\$815	\$815	\$983	\$1336	\$1,336	\$1,336	\$1,592	\$1,732	\$2,050
Median	\$561	\$561	\$561	\$561	\$851	\$987	\$987	\$987	\$987	\$1,267	\$1,523
Midpoint	\$688	\$688	\$688	\$688	\$917	\$1,162	\$1,162	\$1,162	\$1,290	\$1,500	\$1,787
Omaha	0	\$663	\$663	\$693	\$693	\$1,011	\$1,011	\$1,011	\$1,011	\$1,164	\$1,506

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City	16 Years	17 Years	18 Years	19 Years	20 Years	21 Years	22 Years	23 Years	24 Years	25 Years	Max Years
Des Moines	\$1,683	\$1,683	\$2,244	\$2,244	\$2,244	\$2,244	\$2,805	\$2,805	\$2,805	\$2,805	\$3,366
Lincoln	\$1,363	\$1,363	\$1,363	\$1,363	\$1,875	\$1,875	\$1,875	\$1,875	\$1,875	\$2,069	\$2,069
Madison ¹	\$4,604	\$5,116	\$5,116	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627	\$5,627
Milwaukee	\$550	\$550	\$550	\$550	\$900	\$900	\$900	\$900	\$900	\$900	\$900
St. Paul	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Mean	\$2,050	\$2,178	\$2,319	\$2,446	\$2,662	\$2,662	\$2,802	\$2,802	\$2,802	\$2,850	\$2,991
Median	\$1,523	\$1,523	\$1,804	\$1,804	\$2,060	\$2,060	\$2,340	\$2,340	\$2,340	\$2,437	\$2,718
Midpoint	\$1,787	\$1,851	\$2,062	\$2,125	\$2,361	\$2,361	\$2,571	\$2,571	\$2,571	\$2,644	\$2,855
Omaha	\$1,556	\$1,556	\$1,659	\$1,659	\$2,091	\$2,091	\$2,144	\$2,194	\$2,194	\$2,194	\$2,314

*See Exhibits 20 and 232.

¹See Exhibit 324, Page 23 and Exhibit 102, Page 23.

COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1233

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SCOTTSBLUFF POLICE OFFICERS)	Case No. 1233
ASSOCIATION, INC./F.O.P.)	
LODGE 38,)	FINDINGS AND ORDER
)	
Petitioner,)	
)	
v.)	
)	
CITY OF SCOTTSBLUFF,)	
NEBRASKA, A City of the First Class,)	
Respondent.)	

Filed August 31, 2010

APPEARANCES:

For Petitioner: John E. Corrigan
Dowd, Howard, & Corrigan, LLC.
1411 Harney Street, Suite 100
Omaha, NE 68102

For Respondent: Jerry L. Pigsley
Harding & Shultz, P. C., L.L.O.
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028

Before: Commissioners Lindahl, Orr, and Blake.

LINDAHL, Comm’r

NATURE OF THE PROCEEDINGS:

The Scottsbluff Police Officers Association, Fraternal Order of Police, Lodge No. 38, (hereinafter, “Petitioner” or “Union”) filed a Petition on January 25, 2010, and an Amended Petition on March 29, 2010, pursuant to NEB. REV. STAT. § 48-824(1), claiming that the City of Scottsbluff (hereinafter, “Respondent” or “City”) committed a prohibited practice through its unilateral implementation of a health care exclusion and the unilateral implementation of changes to applicable group health care benefits. The Respondent filed an Answer and Counterclaim on February 8, 2010 and an

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Amended Answer and Counterclaim on April 12, 2010, denying the Petitioner's allegations and stating that the Petitioner had already approved the collective bargaining agreement for October 1, 2009 through September 30, 2010, and that the Petitioner refused to negotiate and meet with the Respondent in good faith to discuss increases in health and dental insurance premiums effective January 1, 2010.

The Commission of Industrial Relations (hereinafter, the "Commission") conducted a Pretrial on June 1, 2010. The parties both submitted a statement of issues.

The following issues were presented by the Petitioner:

1. Whether the Respondent's conduct as alleged and admitted to in the pleadings or established at the time of trial with respect to its unilateral amendment of the exclusions to the health plan covering Petitioner's bargaining unit members constitutes a breach of Respondent's duty to bargain pursuant to NEB. REV. STAT. § 48-824(1).

2. Whether the Respondent's conduct as alleged and admitted to in the pleadings or established at the time of trial in taking action to unilaterally implement changes to applicable group health care benefits without negotiations or agreement of Petitioner effective January 1, 2010 constitutes a breach of the duty to bargain pursuant to NEB. REV. STAT. § 48-824(1).

3. Whether the Respondent's conduct as alleged and admitted to in the pleadings or established at the time of trial of this matter demonstrates an intentional breach of the duty to bargain under the Industrial Relations Act or represented a willful pattern or practice undermining the status of Petitioner, entitling the Petitioner to an award of reasonable attorney fees pursuant to Rule 42 of the Rules of the Commission of Industrial Relations.

4. Whether the Petitioner is entitled to be made whole by returning the parties to their status prior to the unilateral actions challenged herein until such time as the parties negotiate in good faith to reach terms and conditions of employment consistent with good faith negotiations.

The following issues were presented by the Respondent:

1. Whether Petitioner violated NEB. REV. STAT. §§ 48-816(1) and 48-824(3)(c) in failing to execute a written contract incorporating the agreement reached by the parties in collective bargaining negotiations and approved by a 19-0 vote of the Petitioner's members in August 2009.

2. Whether Petitioner violated NEB. REV. STAT. §§ 48-816(1), 48-824(1), and 48-824(3)(c), by failing to bargain in good faith on proposed increases in health and dental insurance premiums where such premium amounts are specifically addressed in the collective bargaining agreement effective January 1, 2010.

3. Whether it is a violation of NEB. REV. STAT. § 48-824(1) during the term of the existing collective bargaining agreement for the Respondent to change an exclusion section in the Respondent's Health Benefits Plan which is not specifically addressed in the collective bargaining agreement.

4. Whether it is a violation of NEB. REV. STAT. § 48-824(1) for the Respondent to implement changes in the health insurance deductibles, out-of-pocket maximums, co-pays, and co-insurance levels after the expiration of the collective bargaining agreement when such provisions in the Respondent's Health Benefits Plan are not specifically addressed in the collective bargaining agreement.

5. Whether Petitioner's misconduct under the Industrial Relations Act was of a willful nature so as to merit the awarding of Respondent its costs, including attorney's fees.

The Commission then held a Trial on said issues on Wednesday, June 16, 2010. The parties submitted post-trial briefs on Thursday July 8, 2010 and reply briefs on Friday, July 23, 2010.

FACTS:

The Scottsbluff Police Officers Association is a bargaining unit comprised of law enforcement officers below the rank of captain, including patrol officers and sergeants. Prior to 1999, the bargaining unit and the City had yearly negotiations for each bargaining contract. In 1999, the parties negotiated a three-year contract which locked in health insurance rates for the bargaining unit employees for the entire three years. After the expiration of the 1999 contract, the parties then began again negotiating yearly contracts. However, the bargaining agreements ran on a fiscal basis and the health insurance rates were determined on a calendar-year basis. At the time of these negotiations, in order for the City to prevent a situation where bargaining unit employees were paying different amounts than non-bargaining unit employees for health insurance, the parties originally implemented Articles 23 and 31 in the 2001 fiscal contract year. Articles 23 and 31 state:

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**ARTICLE XXIII
HEALTH AND DENTAL INSURANCE**

The City will provide a choice of four health insurance plans to members. Participation in these plans shall be subject to policies and procedures as established in the City Personnel Manual and/or Administrative Regulations. Members are provided with information to assist in making their plan selection.

The members of the SPOA shall pay the following rates for the balance of calendar year of 2008:

Plan A \$330 per month for single	\$655 per month for family
Plan B \$ 68 per month for single	\$135 per month for family
Plan C \$ 50 per month for single	\$100 per month for family
Plan D \$ 0 per month for single	\$ 0 per month for family

For Plan D, the City will contribute to the employee's Health Savings Account: \$50 per month for single and \$100 per month for family; subject to a minimum contribution by the employee to the employee's Health Savings Account.

The dental insurance premium shall remain at \$21.96 per month for family coverage and \$10 for single dental coverage.

Article XXIII of the SPOA's contract with the City of Scottsbluff states that during the term of the contract, negotiations may be re-opened for individual, specifically defined issues, such as cost of living increases, salary comparisons/increases, and health and dental premiums.

**ARTICLE XXXI
CONTRACT LANGUAGE RE-OPENER**

During the term of the contract, contract language may be modified if recommended by the Union and mutually agreed to by the City. The contract may be re-opened for individual, specifically defined issues only, such as cost of living increases, salary comparisons/increases, and health and dental premiums.

This provision is not to be construed as a broad license to re-negotiate the contract in its entirety prior to the expiration of the contract.

After the 1999 three-year contract, each year when negotiating health

insurance, the City presented the calendar year figures for the health insurance to the Union and the Union usually accepted the premiums figure changes. The parties only discussed the suggested changes in premiums and those costs were the only costs ever taken to the Union membership for a vote. The Union has never previously requested negotiations on co-pays, stop-loss policies, maximum out-of-pocket amounts, and/or deductibles on the health insurance plans.

The Union attempted to use Article 31 to reopen the contract in one prior contract year. During the negotiated contract running from October 1, 2008 through September 30, 2009, the parties met on December 4, 2008 to discuss a 2.9 % cost-of-living increase to offset the increase in health insurance premiums. See Exhibit 67. The minutes do not reflect a discussion regarding the proposed cost-of-living offset. The parties then entered into an amendment of the contract for the term of January 1, 2009 through December 31, 2009. See Exhibit 20.

For the 2009-2010 contract year negotiation in question, the parties met on May 6, 2009 to negotiate the contract. The City presented numerous topics for negotiation including a change to Article 23. The City requested the removal of the health and dental premiums to be reopened each year prior to open enrollment. The next negotiation session between the parties was held on May 20, 2009 and then another session was held on June 3, 2009. The fourth session was held on June 24, 2009. At the meeting on June 24th, the parties agreed tentatively to the wage increases and then discussed potential changes to the YMCA membership language in Article 23. There was no direct discussion regarding Article 31 listed in any of the minutes relating to the negotiations with the Union. After June 24th, there were no more "formal" negotiation sessions.

The parties then exchanged a series of emails discussing the YMCA membership language. A straw ballot was sent to the Union members on the YMCA membership language. Ballots were given to Union members on or about August 8, 2009 and the Union counted those ballots on or about August 19, 2009. Via email, the Union president informed the City that the Union members had approved the agreement by a unanimous vote.

Just prior to the time the ballots were sent the membership, the Union received notice from the City about the changes to the health insurance benefit plan pertaining to hazardous hobbies or activities, which was sent out on August 4, 2009. The City self-funds a group health plan and the administration of the fund is through a third-party administration, Regional Care Inc. ("RCI"). This health plan is contained in Exhibit 69, which describes the benefits for the City of Scottsbluff. Starting on page 32, the health plan

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lists 47 “exclusions”. These exclusions include the exclusion for “Hazardous Hobby or Activity”. On July 30, 2009, the City adopted an amendment to the Health Insurance Plan which became effective on August 1, 2009. The amendment changed the language under the hazardous hobbies or activities exclusion by adding additional hazardous hobbies or activities. The plan language was amended as follows:

DELETE:

- (16) Hazardous Hobby or Activity. Care and treatment of an Injury or Sickness that results from engaging in a Hazardous Hobby or Activity. A hobby or activity is hazardous if it is an activity which is characterized by a constant threat of danger or risk of bodily harm. Examples of hazardous hobbies activities includes but is not limited to: skydiving, auto racing, hang gliding, bungee jumping, snow mobiling, equestrian events and stunt aviation.

REPLACE WITH:

- (16) Hazardous Pursuit, Hobby or Activity. Services, supplies, care and/or treatment of an injury or sickness that results from engaging in hazardous pursuit, hobby or activity. A pursuit, hobby or activity is hazardous if it involves or exposes an individual to risk of a degree or nature not customarily undertaken in the course of the covered person’s customary occupation or if it involves leisure time activities commonly considered as involving unusual or exceptional risks, characterized by a constant threat of danger or risk of bodily harm, including but not limited to: hang gliding, skydiving, bungee jumping, parasailing, use of all terrain vehicles, rock climbing, ultimate fighting, use of explosives, automobile, motorcycle, aircraft, or speed boat racing, reckless operation of a vehicle or other machinery, and travel to countries with advisory warnings.

The Union was not informed prior to the change in the plan (only given notice) and no “formal” negotiations occurred between the parties regarding the changes in the plan exclusion language. The City did not negotiate this change to the plan, stating through its administrator that: “We didn’t feel the plan document itself was a negotiable item. That was the city’s plan basically, to amend as it felt necessary.” Since the Union had concerns regard-

ing the change in health plan, the Union sought advice from a local Scotts-bluff attorney who instructed the Union president not to sign the contract. The Union promptly emailed the City to advise them that because of the health insurance issues, the Union would not sign the contract. The City's administrator responded by stating that:

"I don't need to remove the Council's consideration of the contract from their agenda because if it is [sic] an insurance language issue they have nothing to say about it. That language is the result of our TPA. The only health insurance issue is how much each party pays for the CIR qualified plan."

The City then took the Union's contract vote to a City council meeting later that same day. The City voted and approved the contract, without discussing the newly discovered insurance issue. On September 19, 2009 the City informed the Union that the City Council had approved the contract with the Mayor's signature and the contract was available for the Union President's signature.

The parties then met informally, three times, to discuss the health insurance plan design issue. At those meetings, the Union expressed its concern that if a bargaining unit member was not covered under the health insurance policy since the member was engaged in an excluded activity, that member could become bankrupt through medical bills. Throughout those discussions, the City maintained its position that in terms of the health insurance, as long as the City provided reasonable coverage, the terms of the health insurance plan are solely within the control of the City.

On November 10, the City informed the Union that it was going to "go over" the insurance rates/benefits for 2010. However, since the parties were still in negotiations regarding the hazardous hobby exclusion, the Union declined to discuss the issue without the Union attorney. Separate from the discussions over the hazardous hobby exclusion, on November 24, 2009, the City's Health Management Committee met and developed changes to the City's health insurance plan. The City's Committee changed the deductibles, the office visit and the prescription co-pays as well as the maximum out-of-pocket amounts. The City admits that it unilaterally changed the health insurance benefits because they believe it to be within management control.

DISCUSSION:

The Petitioner argues that the Respondent failed and refused to negotiate a change in the terms and conditions of employment on a mandatory subject

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of collective bargaining, health insurance. The Petitioner alleges this is a violation of NEB. REV. STAT. § 48-824(1). The Respondent argues that it did not commit an unfair labor practice under the Nebraska Industrial Relations Act by not negotiating the health insurance plan and the Respondent also argues the Petitioner committed a prohibited practice by not negotiating the agreement in good faith and by not signing the contract

The threshold issue in this case is whether the City of Scottsbluff's health plan design (including the hazardous hobby exclusion) as well as negotiating co-pays, deductibles and maximum out-of-pockets, are mandatory subjects of collective 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). *aff'd*. 265 Neb. 817 660 N.W.2d 480 (2003). The Industrial Relations Act only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1). 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 Educ. Ass'n v. Cedar County School Dist. No. 14-0541, n/k/a Coleridge Community Schools*, 13 CIR 376 (2001).

In an effort to establish working guidelines as to what constitutes mandatory subjects of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Educ. Ass'n*, set forth the following test:

A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered though there may be some minor influence of educational policy or management prerogative. However those matters which involve foundational value judgments, which strike at the very heart of educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.

Id. at 842. 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. Conditions of employment have an economic impact on the *employee's* job assignment. *Omaha Police Union, Local 101 v. City of Omaha*, 7 CIR 179 (1984). This does not include management prerogatives. Several negotiation terms and conditions that would seem to be management prerogatives have been included under the umbrella of mandatory subjects of bargaining, such as parking stall assignments. *Id.*

Mandatory subjects of bargaining are not just topics for discussion during negotiations sessions. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of collective bargaining agreements. In *Rockwell Int'l Corp.*, 260 N.L.R.B. 1346, 109 L.R.R.M. 1366 (1982), the National Labor Relations Board found that the duty to bargain continues during the existence of a bargaining agreement concerning any mandatory subject of bargaining, which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain. In *Rockwell*, the Respondent, a manufacture of nuclear weapon components, maintained a cafeteria for its employees in part because of its remote location in the Rocky Flats near Golden, Colorado. The Respondent refused to bargain over food price increases in cafeteria items. In *Rockwell*, the Board overturned the administrative law judge's finding that a zipper clause in the collective bargaining agreement constituted an effective waiver of the Union's right to request bargaining about cafeteria and vending machine prices for the duration of the contract. Citing *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488 (1979), the Board stated that the Respondent had violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain about unilateral increases in food prices made during the terms of a collective-bargaining agreement which did not specifically cover the subject of those prices. In sum, the Board found that the Respondent had a **continuous** duty to bargain over the matter of increases in the in-plant food prices. The Board concluded that the Respondent's refusal to bargain over the price increases violated 8(a)(5) and (1) of the Act.

NEB. REV. STAT. § 48-824(1) declares that it is a prohibited labor practice for any employer ... to refuse to negotiate in good faith with respect to mandatory topics of bargaining. The Commission has previously held that health insurance is a mandatory subject of bargaining. See *Communication Workers of America, AFL-CIO v. County of Hall*, 15 CIR 95 (2005). In *County of Hall*, the Commission found that health insurance is a mandatory

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subject of bargaining and the County cannot usurp the Union's authority as the sole bargaining representative for its employees. The Commission determined that the parties were not at impasse and that the County's premature declaration of impasse was a per se failure to bargain in good faith and a prohibited practice. The Commission ordered the County to reimburse health insurance premiums improperly withheld, plus interest.

In *Fraternal Order of Police Lodge 21 v. City of Ralston*, 12 CIR 59 (1994), the Commission also stated that health insurance is a mandatory topic of bargaining, and as such, an employer had a duty to bargain with the union over changes in mandatory topics of bargaining. The Commission clearly determined that the duty continues even though the parties have a labor contract since the term or condition sought to be changed is not "contained in" that contract. Quoting *Rockwell Int'l Corp.*, 260 N.L.R.B. 1346, 1347, 109 L.R.R.M. 1366, 1367 (1982), the Commission found that: "The duty to bargain continues during the existence of a bargaining agreement concerning any mandatory subject of bargaining which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain."

The Commission determined that the above duty to bargain could be waived. The Commission found that the burden to proving waiver was on the party asserting the waiver. Citing *Pertec Computer Corp.*, 284 N.L.R.B. 810, 126 L.R.R.M. 1134 (1987). The Commission commented on its previous adopted standard, stating that the standard of proving waiver of a statutorily protected right must be clear and unmistakable. See *Bullis v. School Dist. of Columbus*, 4 CIR 27 (1979). The Commission found that facts based upon the testimony in the case, indicated the union did not request to bargain over health insurance and that in order to bargain over a mandatory subject of bargaining, the union must make a timely request to bargain. Ultimately the Commission held that the union waived its right to bargain over the health insurance changes by failing to make any attempt to bring the City to the bargaining table over this issue.

Health Insurance—Group Health Care Benefits

The Petitioner argues that the Respondent unilaterally implemented health care benefits, including premiums, co-pays, deductibles, and maximum out-of-pocket expenses without bargaining. The Respondent argues that it did not breach its duty to bargain in good faith in making changes to the health plan document based on past practice. The Respondent counterclaims that the Union refused to bargain in good faith on the proposed increase in health and dental insurance premiums.

The City's administrative regulations embodied in Exhibit 105 state that "it is the Committee's responsibility to review and determine plan benefits, employee and employer contribution amounts, examine proposals for reinsurance carriers, monitor the services of third party administrator and determine when to rebid the service." The Committee's members consist of several management officials, which do not include any members of either of the City's unions. Both sides also testified that other than premiums, the parties never "bargained" specifically over other health care benefits.

The Respondent argues that Exhibit 15 indicates the Union refused to bargain collectively with the employer. However, we find the evidence presented at trial instead establishes that the Health Insurance Committee (or the City) created the design of plan, the plan benefits, and the contribution amounts independently from the negotiation process. As seen in Exhibits 24 and 25, the changes in health insurance were substantial. For example, the maximum out-of-pocket expenses increase by \$1,000 for single health insurance coverage. While in the past the parties have generally negotiated over health insurance premiums, the City is also required under the Industrial Relations Act to negotiate over deductibles, maximum out-of-pocket, co-pays and other health insurance benefits. *See County of Hall*, 15 CIR 95 (2005); *City of Ralston*, 12 CIR 59 (1994). Furthermore, the duty to bargain about health insurance continues during the existence of a bargaining agreement because health insurance changes do not happen concurrently with contract year bargaining. Furthermore, the Respondent presented no evidence that the Union had clearly and unmistakably waived its right to bargain. Accordingly because health insurance benefits are a mandatory subject of bargaining and the Union did not waive its right to bargain over the issues, we find the Respondent committed a prohibited practice in violation of NEB. REV. STAT. § 48-824(1).

Health Insurance–Plan Design

The Petitioner argues that plan design is a mandatory subject of bargaining and that the Respondent committed a prohibited practice by unilaterally changing the plan design during the term of the existing agreement. The Respondent alternatively counterclaims that the Petitioner failed to execute a written contract in good faith during the term of an existing agreement and in doing so the Petitioner waived any of its rights to further bargaining on the issues of health insurance.

While health insurance is clearly a mandatory subject of bargaining, health plan design has not specifically been discussed in previous Commission decisions. Decisions of the NLRB, and Federal decisions interpreting the FLRA are helpful, but not binding precedent when the statutory provi-

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sions are similar. *Nebraska Public Employee Local Union 251 v. Otoe County*, 257 Neb. 50, 595 N.W.2d 237 (1999). See also *International Union of Operating Engineers, Local 571 v. City of Plattsmouth*, 265 Neb. 817, 660 N.W.2d 480 (2003). In past cases we have concluded that NEB. REV. STAT. § 48-824(1) is sufficiently similar to Section 8(A)(5) of the National Labor Relations Act and for that reason we can use federal decisions for guidance in interpreting the scope and application of our statutes.

In *FDIC v. Federal Labor Relations Authority*, 977 F.2d 1493 (C.A.D.C.1992), the Federal Deposit Insurance Corporation petitioned for review of the order of the Federal Labor Relations Authority (FLRA) holding that it violated its duty to bargain under the Federal Service Labor Management Relations Statute (FSLMRS). The Court of Appeals held that the agency violated its duty to bargain when it unilaterally changed conditions of employment by requiring employees with family-plan health coverage to pay more for their insurance and by changing timing of "open season" for election of health insurance.

This Federal labor law case began when the insurance company which underwrites the agency's [FDIC's] own health insurance plan notified the agency that there would be rate increases for both the single and family options for the plan's next renewal period, due to expected increases in the costs of providing medical care. The agency determined that it would be advantageous to allow the renewal period for its own plan to coincide with the open season for the other Federal employee health benefit plans, and extended the 1987-88 enrollment period accordingly. The agency decided to absorb the premium increase for those subscribing to the single option in the plan, as part of the agency's share of the total premium. However, with regard to the employees who chose the family option coverage, the Agency passed on to the employee a portion of the premium increase. The amount passed on was equivalent to the same percentage that had been being paid by the employees for the family option previously. The Agency decided to make these changes and notified employees of these changes by issuance of an employee bulletin. The union requested to bargain but the agency refused to honor those requests and implemented the changes as announced in its bulletin. The parties stipulated that no bargaining has occurred between them regarding these changes to the agency's health insurance plan.

. In the holding, the FLRA rejected the FDIC's claim that it had no obligation to bargain because the agency's health insurance plan is not a condition of employment. The FLRA held that "the Agency was required to negotiate over the substance, impact and implementation of its decision to change its health plan."

In light of the foregoing facts, the FLRA found that the FDIC had violated its duty to bargain when it unilaterally changed conditions of employment by requiring employees with family-plan coverage to pay more for their insurance and by changing the timing of the open season. The FLRA imposed a status quo ante remedy on the FDIC, requiring it to reinstate its 1987 practices, make whole any affected employees, and begin negotiations. Agreeing with the FLRA, the Court of Appeals affirmed its ruling in the entirety.

Whether plan design is a mandatory topic of bargaining is at issue in the instant case. In this case, on September 4, 2010, the Union notified the City, prior to the City voting on the contract that the Union was requesting further negotiations on the insurance issues (specifically the hazardous hobby exclusion). See Exhibit 10. The City very clearly responded via email stating that the insurance issues were not subject to negotiation and the City was going to proceed with voting on the contract.

The Respondent argues the Petitioner committed a prohibited practice in failing to execute a written contract incorporating the agreement reached by the parties. We find the evidence presented establishes that the Union did not engage in any delay tactics or avoid bargaining with the City. Instead, the City consistently expressed to the Union through various emails, administrative documents, and conversations between the parties that the Union did not have bargaining rights with regard to health plan exclusions. Exhibit 10 clearly states that the Union desired to resolve the insurance issues through the use of a newly-hired attorney, even suggesting dates and times for negotiations. The City's response was consistent with its belief that it was under no obligation to bargain about health insurance plan design or health insurance beyond premiums.

The City argues that based on the parties' past practice of negotiating insurance premiums, the Union's current refusal to negotiate such insurance premiums equals a lack of good faith bargaining on the part of the Union. We can find no evidence that supports the City's argument; instead, we find the Union's desire to come to a resolution regarding health insurance plan design. The Union in the instant case, unlike the FOP Union in *Ralston*, did not attend the health insurance meeting, a meeting generally for all employees of the City of Scottsbluff.

• The case law above proves that health insurance plan design is a mandatory subject of bargaining. Health insurance, including plan design as well as premiums and co-pays, are all subjects that must be bargained over. Changes to those subjects must be bargained at all times, not just during negotiations of the contract year in dispute.

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Unlike past case law, we do note the evidence in this case suggests that both parties previously lacked a clear understanding of mandatory subjects of bargaining (specifically health insurance). Here, the City was under the mistaken belief that it only had to bargain over health insurance premiums, and only bargain during the negotiation of a contract. The City also was under the mistaken belief that the health insurance plan is “owned” by the City and they merely need to provide “reasonable coverage”. Whereas, the Union only negotiated the general yearly premium increases, and did not previously negotiate other parts of health insurance.

Once the Commission determines that a matter is one for mandatory bargaining, it is for the party which did not bargain to establish a claim of waiver by evidence. The series of emails between the parties do not establish a clear and unmistakable waiver on the part of the Union nor do these emails establish that the Union refused to negotiate, as the Union’s email suggested several dates for the parties to discuss the insurance issue. Exhibit 15 or any of the following exhibits relating to the Health Insurance Committee’s meetings does not meet the burden of proof to establish knowledge on the part of the Union, and thus does not meet the burden of proof regarding waiver. *See above Fraternal Order of Police v. The City of Ralston*, 12 CIR 59 (1994) (the burden of proof is on respondent regarding the union’s waiver of the right to bargain over mandatory subjects. The burden must be established clearly and unmistakably that the union waived its right, including notice of a proposed change in the mandatory bargaining subject.) The Union’s past practice, however does not establish a waiver or a failure to bargain in the 2009 contract year. We find that the Respondent violated NEB. REV. STAT. § 48-824(1), by not bargaining over health plan design and/or health care benefits during the term of the existing collective bargaining agreement .

Remedial Authority

The Petitioner seeks an order returning the Petitioner to the status quo until the parties negotiate in good faith to reach terms and conditions of employment consistent with good faith negotiations. The Petitioner, in its brief, also requests attorney fees.

NEB. REV. STAT. § 48-825 states: “If the commission finds that the party accused has committed a prohibited practice, the commission, within thirty days after its decision, shall order an appropriate remedy.” The Commission has the authority to order an appropriate remedy, which will promote public policy, adequately provide relief to the injured party, and lead to the resolution of the industrial dispute.

It is clear that the Commission has the authority to issue bargaining orders following findings of prohibited practices and has done so in the past. See *United Food and Commercial Workers, Local Union No. 22 v. County of Hall*, 15 CIR 55 (2005). Having found that the Respondent has engaged in a prohibited labor practice, we find that the Respondent is required to negotiate with the Petitioner in good faith.

In *County of Hall*, the employees were reimbursed such health insurance premiums improperly withheld, since July 1, 2004 plus interest at the rate of 4.63%, which was the Nebraska judgment rate in effect. Furthermore, a review of *F.D.I.C. v. Federal Labor Relations Authority*, indicates that the appropriate remedy in a plan design change case returns the parties to the status quo ante. In that case, the FLRA found that the remedy was perfectly appropriate: 'because when an agency makes unilateral changes and refuses to bargain over them, the typical remedy is for the FLRA to order a "make whole" or status quo ante remedy.' 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 return the parties to the status quo ante and the parties shall recommence good faith negotiations over these issues within thirty (30) days.

Attorney Fees

Not every prohibited practice will result in an award of attorney fees. To support an award of fees, under CIR Rule 42(b)(2a), it must be found that the party in violation has undertaken a pattern of repetitive, egregious, or willful prohibitive practice. We did not find any evidence that the Respondent has been willfully refusing to bargain over health insurance. Instead, the Respondent was under the mistaken belief that it was not required to bargain over health insurance. Therefore, since no evidence of repetitive, egregious, or willful behavior exists, we do not award attorney fees in the instant case.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED :

1. Respondent shall cease and desist from implementing changes in the members' health insurance plan design and other health insurance benefits.
2. The Respondent shall reimburse the bargaining unit members for any health insurance benefits improperly withheld, plus interest as set by § 45-

103, which is the Nebraska judgment rate of 2.218% now in effect. Adjustments resulting from this order shall be paid in a single lump sum payable within thirty (30) days.

3. The parties shall recommence good faith 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 commissioners assigned to the panel in this case join in the entry of this Order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

PUBLIC ASSOCIATION OF	)	CASE NO. 1238
GOVERNMENT EMPLOYEES,)	
	)	FINDINGS AND ORDER
Petitioner,)	
)	
v.)	
)	
CITY OF LINCOLN, NEBRASKA,)	
A Municipal Corporation,)	
)	
Respondent.)	

Filed March 24, 2011

APPEARANCES:

For Petitioner: Gary L. Young
 Anne E. Winner
 Keating, O’Gara, Nedved & Peter, P.C. L.L.O.
 530 South 13th Street
 Suite 100
 Lincoln, NE 68508

For Respondent: A. Stevenson Bogue
 Abigail M. Moland
 McGrath, North, Mullin, & Kratz P.C., L.L.O.
 First National Tower
 1601 Dodge Street

Suite 3700
Omaha, NE 68102

Don W. Taute
Lincoln Assistant City Attorney
555 South 10th Street
Suite 300
Lincoln, NE 68508

Before: Commissioners Orr, Blake, and Lindahl

ORR, Comm'r

NATURE OF THE PROCEEDINGS:

The Public Association of Government Employees (hereinafter, "Petitioner") filed a wage petition on August 9, 2010, seeking resolution of an industrial dispute for the September 1, 2010 through August 31, 2011 contract period. The Association is a labor organization formed by certain employees employed by the City of Lincoln (hereinafter, "Respondent" or "City") for the purpose of representation in matters of collective bargaining.

ARRAY:

The parties submitted to the Commission a joint stipulation with regard to the array of cities to compare to the City of Lincoln. See Exhibit 1. The parties used the seven-city array of Des Moines, IA; Omaha, NE; Madison, WI; Overland Park, KS; Sioux Falls, SD; St. Paul, MN; and Wichita, KS. The Commission does not set aside stipulations of the parties and certainly does not "seek" array members to supplement an agreed-to array by the parties. The parties have approved the above seven-city array; the wages that result from that array are agreed to by the parties. The Commission does not make any findings with regard to those increases or decreases in wages resulting from the parties' agreement.

FRINGE BENEFITS:

The parties cannot come to agreement on three issues, and those issues will be resolved by decision of the Commission. Those three issues are: dental insurance, pension plans, and overtime payment methods.

Dental Insurance

The Petitioner argues that the provision of dental insurance for employees is prevalent in the array of comparators and therefore the Commission should require the City to provide a comparable benefit to the bargaining unit employees. The Respondent argues that employee-paid dental insurance is not prevalent in the array market and should be eliminated or in the alternative offered at the employee's cost.

The issue in this case revolves around the array cities of Madison, WI and St. Paul, MN. The Petitioner argues that Madison provides employer-paid dental care to its employees because one of the four health plans offered to the employees, offers a 100% employer-paid dental plan. The Respondent argues that Madison does not have an "overall" employer-paid dental plan because it is not offered in all of the health plans. The Respondent's expert witness testified that the plan (that has dental insurance) covers only 26% of Madison's total employees. Madison does not have a free-standing employer-paid dental care plan comparable to the plan offered in Lincoln. Since the majority of employees do not utilize this plan and the plan is not similar to Lincoln's freestanding plan, the Commission determines that the weight of the evidence indicates that Madison does not have a similar dental plan and that Madison should be counted as a "no" with regard to employer-paid dental.

With regard to the array city of St. Paul, MN, the evidence presented at trial indicates that the majority of the employees are offered a "preventative care" type dental plan. The plan is however, not completely similar to the plan that provides preventative care as well as other dental care at Lincoln. While the plan at St. Paul provides a larger portion of the Lincoln "model" employer-paid dental by offering preventative care, it is not as easily categorized as the other array cities. Since the plan is a "hybrid" plan offering some employer paid dental insurance but not all employer-paid dental insurance, the Commission declines to label the city of St. Paul as a "yes" or a "no" in Table 1.

Leaving St. Paul out of the array modal calculation, the Commission arrives at a bi-modal result with three (3) "yes" array cities and three (3) "no" array cities. Therefore, following past Commission case law, a bi-modal result in a prevalency analysis results in Lincoln maintaining their current practice of providing dental insurance at the current percentages of employer/employee-paid dental insurance. The Respondent will continue to provide employer-paid dental insurance at its current rate of 50% for family coverage and 50% for single coverage.

Pension Plans

The Petitioner argues that it is prevalent in the market for the Respondent to provide a defined benefit pension plan with mid-point benefits as set forth in Exhibit 5, rather than the Respondent's current method of providing a defined contribution plan. Even though the Commission has declined to look at retirement plans in the past, the Petitioner reasons that since NEB. REV. STAT. § 48-818 contemplates the Commission's obligations to consider overall compensation, the Commission must order comparable benefits, including ordering the City to provide a defined benefit pension plan. The Respondent argues after a review of past Commission decisions, the Commission clearly lacks jurisdiction to make the proposed change suggested by the Petitioner to the Respondent's pension plan. Without jurisdiction to make the requested changes to the pension plan, the Respondent argues that no changes should be made to the current pension offerings.

The pension plan is in the nature of a long-term contract which extends beyond the 1-year period over which the Commission had jurisdiction in this case. The Commission has no general jurisdiction over contractual disputes. See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N. W. 2d 102. While the Commission may have jurisdiction to offset favorable and unfavorable comparisons of prevalent pension practices when reaching its decision to establish wage rates, the Commission lacks jurisdiction to order structural changes to pension plans. *Douglas Cty. Health Dept. Emp. Ass'n v. Douglas Cty.*, 229 Neb. 301, 422 N.W.2d 28 (1998). Changes to pension plans, such as in the pay subjects used to calculate the rate of contribution, **whether a plan is set up as a defined benefit or a defined contribution**, age of retirement, and measurement period all clearly have a structural impact on the pension plan and, according to previous case law decided by the Nebraska Supreme Court, are not under the statutory framework of the Commission. See *City of Omaha v. Omaha Police Union, Local 101*, 16 CIR 120 (1998).

The Petitioner proposes changes to the Respondent's pension plan, by adding another pension plan (a defined benefit plan). This is a structural change, extending years beyond the contract in question. The Commission lacks jurisdiction to order such a change. Therefore, the Commission will not order any change to the Respondent's pension plan.

Overtime Payment Method

The Petitioner requests that the Commission determine the Respondent's overtime calculation method (when overtime begins in an employees work cycle), because such a practice is fundamentally related to wages, hours

and conditions of employment. The Petitioner argues that when overtime begins in a work cycle is a matter of employee wages, and does not involve employer policy or value choices. The Petitioner maintains that when overtime begins is not a management prerogative but is instead a mandatory subject of bargaining. The Respondent submits that overtime is a management prerogative, outside the jurisdiction of the Commission.

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). *aff'd*. 265 Neb. 817 (2003). The Industrial Relations Act only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1). 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).

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 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. N.L.R.B.*, 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..." Additionally, some subjects are considered management prerogatives and may generally be altered at the will of the employer. *See, Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area*, 203 Neb. 832, 281 N.W.2d 201 (1979) (holding in a school case that the following subjects are management prerogatives: the right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialties to be employed).

The distinction between the different categories of bargaining subjects is important, because rules stated below allowing parties to bargain in good faith to impasse and then to unilaterally implement changes, apply only to mandatory bargaining subjects and management prerogatives.

The issue of whether overtime and the scheduling of hours worked is a management prerogative has been decided by the Commission a number of times. See *Lincoln Firefighters Ass'n Local Union No. 644 v. City of Lincoln*, 12 CIR 248 (1997), *Aff'd*, 253 Neb. 837, 572 N.W.2d 369 (1998) (Hours of work per cycle and overtime are management prerogatives); *Fraternal Order of Police Lodge No. 81 v. City of Grand Island*, 14 CIR 81 (2002) (Overtime practices are management prerogatives and the CIR should not limit management authority); *General Drivers and Helpers Union, Local 554 v. County of Gage*, 14 CIR 170 (2003) (Number of hours worked per day and per week determined to be management prerogatives, including overtime); and *International Ass'n of Firefighters, Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007) (Commission declined to address overtime policies, as overtime falls under hours worked in a day and week, or a scheduling procedure, so therefore a management prerogative). The Commission has also held work cycle is a management prerogative under *County of Hall v. United Food and Commercial Workers, Local 222*, 15 CIR 167 (2006).

Furthermore, the Commission may look to the National Labor Relations Board for guidance, as to issues not definitively settled in Nebraska. *Norfolk Educ. Ass'n v. School Dist. of the County of Madison, a/k/a Norfolk Public Schools*, 1 CIR 40 (1971) & (1973). Nevertheless, the National Labor Relations Board is guidance, not controlling, and does not override areas decided by the Commission, the Nebraska Supreme Court, or statutorily mandated by the Nebraska Legislature. Under NLRB rulings, overtime would be treated as a mandatory subject of bargaining, but we have a long-standing line of decisions wherein we have determined it to be management prerogative. Therefore, overtime in the instant case is management prerogative and the Commission lacks jurisdiction to change the Respondent's method of calculating when overtime begins during a work cycle.

IT IS THEREFORE ORDERED THAT:

1. The Respondent shall continue to provide employer-paid dental insurance at its current rate of 50% for family coverage and 50% for single coverage.
2. 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 commissioners join in the entry of this order.

COMMISSION OF INDUSTRIAL RELATIONS

500

Case No. 1238

Suite 100
Lincoln, NE 68508

For Respondent: A. Stevenson Bogue
Abigail M. Moland
McGrath, North, Mullin, & Kratz P.C., L.L.O.
First National Tower
1601 Dodge Street
Suite 3700
Omaha, NE 68102

Don W. Taute
Lincoln Assistant City Attorney
555 South 10th Street
Suite 300
Lincoln, NE 68508

Before: Commissioners Orr, Blake, and Lindahl

ORR, Comm’r

NATURE OF THE PROCEEDINGS:

The Public Association of Government Employees (hereinafter, “Petitioner”) filed a wage petition on August 9, 2010, seeking resolution of an industrial dispute for the September 1, 2010 through August 31, 2011 contract period. The Association is a labor organization formed by certain employees employed by the City of Lincoln (hereinafter, “Respondent” or “City”) for the purpose of representation in matters of collective bargaining.

ARRAY:

The parties submitted to the Commission a joint stipulation with regard to the array of cities to compare to the City of Lincoln. See Exhibit 1. The parties used the seven-city array of Des Moines, IA; Omaha, NE; Madison, WI; Overland Park, KS; Sioux Falls, SD; St. Paul, MN; and Wichita, KS. The Commission does not set aside stipulations of the parties and certainly does not “seek” array members to supplement an agreed-to array by the parties. The parties have approved the above seven-city array; the wages that result from that array are agreed to by the parties. The Commission does not make any findings with regard to those increases or decreases in wages resulting from the parties’ agreement.

FRINGE BENEFITS:

The parties cannot come to agreement on three issues, and those issues will be resolved by decision of the Commission. Those three issues are: dental insurance, pension plans, and overtime payment methods.

Dental Insurance

The Petitioner argues that the provision of dental insurance for employees is prevalent in the array of comparators and therefore the Commission should require the City to provide a comparable benefit to the bargaining unit employees. The Respondent argues that employee-paid dental insurance is not prevalent in the array market and should be eliminated or in the alternative offered at the employee's cost.

The issue in this case revolves around the array cities of Madison, WI and St. Paul, MN. The Petitioner argues that Madison provides employer-paid dental care to its employees because one of the four health plans offered to the employees, offers a 100% employer-paid dental plan. The Respondent argues that Madison does not have an "overall" employer-paid dental plan because it is not offered in all of the health plans. The Respondent's expert witness testified that the plan (that has dental insurance) covers only 26% of Madison's total employees. Madison does not have a free-standing employer-paid dental care plan comparable to the plan offered in Lincoln. Since the majority of employees do not utilize this plan and the plan is not similar to Lincoln's freestanding plan, the Commission determines that the weight of the evidence indicates that Madison does not have a similar dental plan and that Madison should be counted as a "no" with regard to employer-paid dental.

With regard to the array city of St. Paul, MN, the evidence presented at trial indicates that the majority of the employees are offered a "preventative care" type dental plan. The plan is however, not completely similar to the plan that provides preventative care as well as other dental care at Lincoln. While the plan at St. Paul provides a larger portion of the Lincoln "model" employer-paid dental by offering preventative care, it is not as easily categorized as the other array cities. Since the plan is a "hybrid" plan offering some employer paid dental insurance but not all employer-paid dental insurance, the Commission declines to label the city of St. Paul as a "yes" or a "no" in Table 1.

Leaving St. Paul out of the array modal calculation, the Commission arrives at a bi-modal result with three (3) "yes" array cities and three (3) "no" array cities. Therefore, following past Commission case law, a bi-modal re-

sult in a prevalancy analysis results in Lincoln maintaining their current practice of providing dental insurance at the current percentages of employer/employee-paid dental insurance. The Respondent will continue to provide employer-paid dental insurance at its current rate of 50% for family coverage and 50% for single coverage.

Pension Plans

The Petitioner argues that it is prevalent in the market for the Respondent to provide a defined benefit pension plan with mid-point benefits as set forth in Exhibit 5, rather than the Respondent's current method of providing a defined contribution plan. Even though the Commission has declined to look at retirement plans in the past, the Petitioner reasons that since NEB. REV. STAT. § 48-818 contemplates the Commission's obligations to consider overall compensation, the Commission must order comparable benefits, including ordering the City to provide a defined benefit pension plan. The Respondent argues after a review of past Commission decisions, the Commission clearly lacks jurisdiction to make the proposed change suggested by the Petitioner to the Respondent's pension plan. Without jurisdiction to make the requested changes to the pension plan, the Respondent argues that no changes should be made to the current pension offerings.

The pension plan is in the nature of a long-term contract which extends beyond the 1-year period over which the Commission had jurisdiction in this case. The Commission has no general jurisdiction over contractual disputes. *See Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N. W. 2d 102. While the Commission may have jurisdiction to offset favorable and unfavorable comparisons of prevalent pension practices when reaching its decision to establish wage rates, the Commission lacks jurisdiction to order structural changes to pension plans. *Douglas Cty. Health Dept. Emp. Ass'n v. Douglas Cty.*, 229 Neb. 301, 422 N.W.2d 28 (1998). Changes to pension plans, such as in the pay subjects used to calculate the rate of contribution, **whether a plan is set up as a defined benefit or a defined contribution**, age of retirement, and measurement period all clearly have a structural impact on the pension plan and, according to previous case law decided by the Nebraska Supreme Court, are not under the statutory framework of the Commission. *See City of Omaha v. Omaha Police Union, Local 101*, 16 CIR 120 (1998).

The Petitioner proposes changes to the Respondent's pension plan, by adding another pension plan (a defined benefit plan). This is a structural change, extending years beyond the contract in question. The Commission lacks jurisdiction to order such a change. Therefore, the Commission will not order any change to the Respondent's pension plan.

Overtime Payment Method

The Petitioner requests that the Commission determine the Respondent's overtime calculation method (when overtime begins in an employees work cycle), because such a practice is fundamentally related to wages, hours and conditions of employment. The Petitioner argues that when overtime begins in a work cycle is a matter of employee wages, and does not involve employer policy or value choices. The Petitioner maintains that when overtime begins is not a management prerogative but is instead a mandatory subject of bargaining. The Respondent submits that overtime is a management prerogative, outside the jurisdiction of the Commission.

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). *aff'd*. 265 Neb. 817 (2003). The Industrial Relations Act only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1). 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).

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 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. N.L.R.B.*, 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..." Additionally, some subjects are considered management prerogatives and may generally be altered at the will of the employer. *See, Metropolitan Tech. Community College Educ. Ass'n v. Metropolitan Tech. Community College Area*, 203 Neb. 832, 281 N.W.2d 201 (1979) (holding in a school case that the following subjects are management prerogatives: the right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialties to be employed).

The distinction between the different categories of bargaining subjects is important, because rules stated below allowing parties to bargain in good faith to impasse and then to unilaterally implement changes, apply only to mandatory bargaining subjects and management prerogatives.

The issue of whether overtime and the scheduling of hours worked is a management prerogative has been decided by the Commission a number of times. See *Lincoln Firefighters Ass'n Local Union No. 644 v. City of Lincoln*, 12 CIR 248 (1997), *Aff'd*, 253 Neb. 837, 572 N.W.2d 369 (1998) (Hours of work per cycle and overtime are management prerogatives); *Fraternal Order of Police Lodge No. 81 v. City of Grand Island*, 14 CIR 81 (2002) (Overtime practices are management prerogatives and the CIR should not limit management authority); *General Drivers and Helpers Union, Local 554 v. County of Gage*, 14 CIR 170 (2003) (Number of hours worked per day and per week determined to be management prerogatives, including overtime); and *International Ass'n of Firefighters, Local Union No. 647 v. City of Grand Island*, 15 CIR 324 (2007) (Commission declined to address overtime policies, as overtime falls under hours worked in a day and week, or a scheduling procedure, so therefore a management prerogative). The Commission has also held work cycle is a management prerogative under *County of Hall v. United Food and Commercial Workers, Local 222*, 15 CIR 167 (2006).

Furthermore, the Commission may look to the National Labor Relations Board for guidance, as to issues not definitively settled in Nebraska. *Norfolk Educ. Ass'n v. School Dist. of the County of Madison, a/k/a Norfolk Public Schools*, 1 CIR 40 (1971) & (1973). Nevertheless, the National Labor Relations Board is guidance, not controlling, and does not override areas decided by the Commission, the Nebraska Supreme Court, or statutorily mandated by the Nebraska Legislature. Under NLRB rulings, overtime would be treated as a mandatory subject of bargaining, but we have a long-standing line of decisions wherein we have determined it to be management prerogative. Therefore, overtime in the instant case is management prerogative and the Commission lacks jurisdiction to change the Respondent's method of calculating when overtime begins during a work cycle.

IT IS THEREFORE ORDERED THAT:

1. The Respondent shall continue to provide employer-paid dental insurance at its current rate of 50% for family coverage and 50% for single coverage.
2. The Commission received Exhibit 1, the Parties' Joint Stipulation, including the details itemized by the parties in Exhibits A and B, and

approves the same.

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.
4. All other terms and conditions of employment are not affected by this Order.

All commissioners join in the entry of this order.

TABLE 1
DENTAL INSURANCE

Array City	Dental Provided	Employer Paid Dental
Des Moines	Yes	Yes
Madison	Yes	No
Omaha	Yes	No
Overland Park	Yes	Yes
Sioux Falls	Yes	Yes
St. Paul	Yes	*
Wichita	Yes	No
Mode	Yes	Bi-Modal
Lincoln	Yes	Yes

*St. Paul – Has dental insurance as part of regular health insurance. The plan includes preventative care such as cleaning, but the health plan does not have a separate employer paid dental plan.

COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1242

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

SOUTH SIOUX EDUCATION)	Case No. 1242
ASSOCIATION, an Unincorporated)	
Association,	)	OPINION AND 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 December 6, 2010

APPEARANCES:

For Petitioner: Mark D. McGuire
 McGuire and Norby
 605 South 14th Street
 Suite 100
 Lincoln, NE 68508

For Respondent: Rex R. Shultze
 Perry, Guthery, Haase, & Gesford
 233 South 13th Street
 Suite 1400
 Lincoln, NE 68508

Before: Commissioners Lindahl, Burger and McGinn.

LINDAHL, Comm’r

NATURE OF THE PROCEEDINGS:

South Sioux City Education Association, (“Petitioner”) filed a Petition pursuant to NEB. REV. STAT. §§48-811, 48-816(1), and 48-819.01 (Reissue 2004), claiming that the Dakota County School District No. 22-0011, a/k/a South Sioux City Community Schools (“Respondent”), is refusing to vertically advance continuing teachers on the salary schedule based upon a

SOUTH SIOUX CITY EDUC. ASS'N V DAKOTA CO. SCH.
DIST. NO. 22-0011

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contract continuation clause in the parties' current collective bargaining agreement.

The Commission held a preliminary proceeding on October 21, 2010 and then held an evidentiary hearing on the issues on November 5, 2010. The parties jointly served the Commission simultaneous post-trial briefs on November 18, 2010, detailing the issues presented at the hearing.

At the hearing, the Petitioner requested an immediate temporary order directing the Respondent to vertically advance teachers on the salary schedule, with back pay and any other relief deemed appropriate. The Respondent denied that such relief is appropriate under the collective bargaining agreement, suggesting the Commission lacks jurisdiction to determine the issues, and requests the parties return to bargaining.

DISCUSSION:

Jurisdiction

The Respondent argues that the Commission lacks jurisdiction because the Commission does not have the authority to interpret the contract continuation clause of the parties' collective bargaining agreement. The Respondent's argument essentially states the Commission is not authorized to settle breach of contract disputes. In support of its argument, the Respondent cites *Transport Workers of America v. Transport Authority of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The Petitioner argues that the Nebraska Supreme Court decision in *Central City Educ. Ass'n v. Merrick County Sch. Dist. No. 61-0004*, 280 Neb. 27, 783 N.W.2d 600 (2010), endorses the use of contract continuation language, thus requiring the Commission to order the Respondent to follow the contract continuation language in this case. The Petitioner argues that if contract continuation clauses are not subject to interpretation then the Supreme Court's decision in *Central City* is meaningless.

In providing a forum for the public employer and public employees to resolve disputes regarding terms and conditions of employment, the Act was not intended to create a special judicial system for resolving breach of contract cases by public employees. See *Transport Workers of America v. Transit Authority of the City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979) where our Supreme Court said:

If the CIR has authority to hear cases involving an alleged breach of contract, declared rights, duties, and obligations of parties and grant equitable relief such as an accounting, that

authority must be found in the Constitution and statutes creating and authorizing the CIR. We are unable to find such authority.

205 Neb. at 31. *Transport Workers* sets forth the Supreme Court's holding that the Commission lacks jurisdiction to interpret and apply terms and conditions of a collective bargaining agreement - an action for a breach of contract must be brought in a court of general jurisdiction. The Commission of Industrial Relations was created by the Legislature under the general grant of legislative power under Article III, Section 1. *Orleans Education Assn. v. School District of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). The jurisdiction of the Commission flows from Article XV, Section 9, of the Constitution of the State of Nebraska and from the provisions of Sections 48-801 to 48-838 R.R.S. 1943. See *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277, N.W.2d 529 (1979). The authority of the Commission is carefully circumscribed. *University Police Officers Union v. University of Nebraska*, *Supra*, *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26 286 N.W.2d 102 (1979).

In the instant case, the Commission is persuaded by the position of the Respondent. The crux of the Petitioner's claim is breach of contract. The *Transport Workers* decision held:

It appears to us that the Act has not in any manner attempted to grant the CIR powers [in the sense of subject matter jurisdiction] to resolve breach of contract cases even if the breach concerns itself with terms, tenure, or conditions of employment. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter.

205 Neb. at 33-34. In providing a forum for the public employer and public employees to resolve disputes regarding terms and conditions of employment, the Act was not intended to create a special judicial system for resolving breach of contract cases by public employees. We can find no language in *Central City Educ. Ass'n v. Merrick County Sch. Dist. No. 61-0004*, 280 Neb. 27, 783 N.W.2d 600 (2010), which overrules *Transport Workers*. Also, unlike other cases previously before the Commission (where we have been asked if the Respondent's acts constituted a prohibited practice), the instant case was not filed under NEB. REV. STAT. § 48-824. Clearly, in this case we have been asked to interpret the contract and have been presented with unique contractual issues, namely the issue of parole evidence.

BILL OBERG V. STATE OF NEB.

16 CIR 509 (2011)

Case No. 1244

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This issue is a breach of contract issue and the Commission lacks the appropriate jurisdiction to hear this case. Therefore this case is not properly before the Commission.

THE COMMISSION HEREBY FINDS that the Petition does not seek proper relief and the issues are not within the Commission’s jurisdiction.

IT IS THEREFORE ORDERED that the Petition is dismissed without prejudice.

All panel commissioners join in the entry of this order.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

BILL OBERG,	)	Case No. 1244
)	
Petitioner,	)	ORDER ON MOTION
	)	TO DISMISS
v.)	
)	
STATE OF NEBRASKA,)	
)	
Respondent.)	

ORDER ON MOTION TO DISMISS

Filed January 14, 2011

APPEARANCES:

For Petitioner: Bill Oberg, Appearing Pro Se.
3716 X Street
Lincoln, NE 68503

For Respondent: A. Stevenson Bogue
Abigail M. Moland
McGrath North Mullin & Kratz PC, L.L.O.
Suite 3700 First National Tower
1601 Dodge Street
Omaha, NE 68102

Before: Commissioners McGinn, Orr, and Burger.

McGINN, Comm'r

NATURE OF THE PROCEEDINGS:

This matter comes before the Commission upon the Respondent's Motion to Dismiss. A hearing on the Respondent's Motion to Dismiss was held before the Honorable Bernard J. McGinn at 9:00 a.m. on Tuesday, January 4, 2011. The Petitioner Bill Oberg represented himself, electing to proceed pro se. The Respondent was represented by its attorney, A. Stevenson Bogue. The Respondent argued in support of its Motion to Dismiss and the Petitioner elected to submit a written response to said argument and to the Respondent's brief in support of its Motion to Dismiss. The Petitioner submitted his written response to the Respondent's Motion to Dismiss and a written response to the Respondent's Brief in support of its Motion to Dismiss on January 6, 2011. The Respondent elected to not respond to the Petitioner's written response and the matter was submitted to the Commission on January 6, 2011.

STANDARD FOR DECISION:

The Commission has in the past granted a motion to dismiss. See *Fraternal Order of Police Lodge 43 v. The City of Sidney*, 13 CIR 329 (2000). In considering a motion to dismiss under NEB. REV. STAT. § 48-812, the Commission shall conform to the Code of Civil Procedure applicable to the district courts of the state. The district courts consider motions to dismiss under Neb. Ct. R. Pldg. §§ 6-112(b)(6) and 6-1109(b). In entertaining Motions to Dismiss, the Commission determines whether the Petition states a factual basis for invoking the Commission's jurisdiction. Without an appropriate invocation of the Commission's jurisdiction, the Commission is left with no relief requested in the petition. Therefore, the Commission must determine if its jurisdiction has been properly invoked in the instant case.

LEGAL ANALYSIS:

The Respondent argues that the Petitioner is requesting the Commission to make a determination on a purely individual claim regarding a single term of employment (not overall compensation) which is unrelated to any collective or concerted employee activity or agreement. The Petitioner argues that this case is not an "individual dispute" because it is a condition of employment applicable to all state employees.

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Case No. 1244

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After a careful review of the Industrial Relations Act, we find the Petitioner presents an individual dispute not related to collective or concerted activity under the Industrial Relations Act. The Commission of Industrial Relations does not have subject matter jurisdiction with respect to “uniquely personal” matters. See *Nebraska Dept. of Roads Employees Ass’n v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973). See also, *Schmieding v. City of Lincoln and Lincoln General Hospital*, 2 CIR 60 (1972). Schmieding very clearly held that uniquely personal matters are not within the legislative policy behind the Industrial Relations Act. The Petitioner must allege an industrial dispute and has failed to do so under the Act. Therefore, we find that we do not have subject matter jurisdiction over this dispute.

The Respondent also argues that the Petitioner lacks standing to bring this action on behalf of any others because he is not, nor does he expressly allege to be, an agent or representative of the other state employees. The Petitioner suggests that NEB. REV. STAT. § 48-838 allows him in a legal action to have a choice of a representative including himself.

A review of NEB. REV. STAT. § 48-816, reveals that the Petitioner lacks standing to assert an industrial dispute. Without having the status as a bargaining agent or representative of other state employees the Petitioner cannot properly allege an industrial dispute as defined by NEB. REV. STAT. § 48-801(7). See *International Brotherhood of Electrical Workers, Local Union No. 2185 v. The Central Nebraska Public Power and Irrigation Dist.*, 1 CIR 30 (1971). The pleadings in this case confirm that the Petitioner is not an agent or a certified representative with standing to bring this dispute before the Commission. The Commission finds the Petitioner lacks standing to bring this action in front of the Commission.

The Respondent also argues the Petitioner is precluded from proceeding by the provisions of the State Employees Collective Bargaining Act. The Petitioner argues that the State Employees Collective Bargaining Act is “cumulative” to the Industrial Relations Act and that the Petitioner may be precluded from membership in a collective bargaining unit, but he is not precluded from invoking his NEB. REV. STAT. § 48-811 rights.

The State Employees Collective Bargaining Act, NEB. REV. STAT. § 81-1369 et seq. and the provisions of NEB. REV. STAT. § 81-1373(1) states that the Petitioner is precluded from membership in a collective bargaining unit or taking part in collective bargaining because he is an employee of the Department of Personnel. The State Employees Collective Bargaining Act was created to set forth a process to determine wages, hours, and working conditions for state employees, replacing NEB. REV. STAT. § 48-818 that covers

all other government employees. The Petitioner is an employee of the State of Nebraska subject to the provisions of the Collective Bargaining Act, and thus the Commission finds is precluded from bringing this action.

Furthermore, the Respondent argues that the Petitioner does not plead and describe the nature of the overall compensation presently received by those employees whose employment is allegedly covered by the Petition. The Petitioner argues that NEB. REV. STAT. § 48-818 envisions a case on only one condition of employment.

NEB. REV. STAT. § 48-818 clearly states the Commission shall take into consideration the "overall compensations". The Petition does not plead and describe the nature of the overall compensation presently received by those employees whose employment is allegedly covered by the Petition. The Petitioner affirmatively alleges that "this is not a wage case" but he seeks to invoke the Commission's jurisdiction under NEB. REV. STAT. § 48-818 without pleading overall compensation as required by said statute. Nothing in NEB. REV. STAT. § 48-818 allows the Commission to "make piecemeal benefit determinations, one component of overall compensation at a time." See Respondent's Brief in support of its Motion to Dismiss, p.13.

The Petitioner's reliance on NEB. REV. STAT. § 48-811's language which Petitioner contends allows him to bring this law suit because it includes "employee" among those who can bring a case, is misplaced. NEB. REV. STAT. § 48-811 states:

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, may file a petition with the Commission of Industrial Relations invoking its jurisdiction. No adverse action by threat or harassment shall be taken against any employee because of any petition filing by such employee, and the employment status of such employee shall not be altered in any way pending disposition of the petition by the commission.

It is the Petitioner's failure to comply with the other requirements of jurisdiction referred to in the proceeding paragraphs that is fatal to his position. It is presumed that a statute will be interpreted so as to be internally consistent. A particular section of the statute shall not be divorced from the rest of the act. Components of a series or collection of statutes pertaining to a certain subject matter are in *pari materia* and should be conjunctively con-

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sidered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. See *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002). See, also, *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947). Therefore, it is the order of the Nebraska Commission of Industrial Relations the Petition as amended is dismissed in its entirety.

REMEDIAL AUTHORITY:

The Respondent also request costs and fees be awarded to the Respondent based upon the frivolous nature of the Petition. The Petitioner suggests such a threat is contrary to the Industrial Relations Act.

The Commission finds that the parties are to pay their own costs and fees. The Respondent's request for an award of costs and fees is denied because although the Petitioner's position is untenable when examined in the light of the Respondent's Motion to Dismiss, it is not entirely frivolous and it does appear to have been brought in good faith.

THE COMMISSION HEREBY FINDS that the Petition does not seek proper relief and does not invoke the Commission's jurisdiction. The Motion to Dismiss should be granted and the Petition is hereby dismissed.

IT IS THEREFORE ORDERED that the Motion to Dismiss is sustained. This order of dismissal is a final appealable order and the defects contained within the Petition cannot be cured by further amendment.

All panel Commissioners join in the entry of this Order.

COMMISSION OF INDUSTRIAL RELATIONS

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Case No. 1246

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS

INTERNATIONAL BROTHERHOOD)	Case No. 1246
OF ELECTRICAL WORKERS)	
LOCAL 1483,)	FINDINGS AND ORDER
)	
Petitioner,)	
)	
v.)	
)	
OMAHA PUBLIC POWER DISTRICT,)	
)	
Respondent.)	

Filed March 29, 2011

APPEARANCES:

For Petitioner: Robert E. O'Connor, Jr.
2433 South 130th Circle
Omaha, NE 68144

For Respondent: Robert F. Rossiter, Jr.
Cristin McGarry Berkhausen
Fraser Stryker PC LLO
500 Energy Plaza
409 South 17th Street
Omaha, NE 68102-2663

Before: Commissioners Burger, Lindahl, and McGinn.

BURGER, Comm'r

NATURE OF THE PROCEEDINGS:

The International Brotherhood of Electrical Workers Local 1483, ("Union" or "IBEW") filed a Petition on November 22, 2010 pursuant to NEB. REV. STAT. § 48-824(2)(a) or (g), and § 48-837, claiming that the Omaha Public Power District ("Respondent" or "OPPD") committed a prohibited practice when it refused to permit the Petitioner to strike a second Federal Mediation and Conciliation Service ("FMCS") panel of arbitrators after the Petitioner had already rejected the first FMCS panel. The Petitioner seeks an order requiring the Respondent to comply with the collective bargaining agreement and agree to a new panel of arbitrators. The Respondent

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filed an Answer and Counterclaim, denying the Petitioner's allegations and stating that the Commission lacks jurisdiction over this matter and that the Petitioner committed a prohibited practice.

In lieu of a formal pretrial, each party submitted a witness list and both parties jointly submitted a statement of issues on February 8, 2011. The following issues were presented on the joint statement:

1. Whether, as alleged by IBEW in its Prohibited Practices Complaint, OPPD committed a prohibited practice under NEB. REV. STAT. § 48-824(2)(a), NEB. REV. STAT. § 48-824(2)(g), or NEB. REV. STAT. § 48-837 when OPPD refused to permit IBEW to strike a second FMCS panel of arbitrators after IBEW had already rejected the first FMCS panel?

2. Whether, as alleged by OPPD in its Answer, the Commission of Industrial Relations lacks jurisdiction to hear and determine the instant case, as the same amounts to a breach of contract claim?

3. Whether, as alleged by OPPD in its Answer, the Commission of Industrial Relations lacks jurisdiction to grant Plaintiff's second prayer for relief; namely, ordering OPPD to agree to an arbitration selection process which modifies the "Arbitration" provision of Article III, Section 2 of the Collective Bargaining Agreement?

4. In the alternative, whether as alleged by OPPD in its Answer, IBEW violated the Collective Bargaining Agreement and/or committed a prohibited practice when it rejected the first FMCS panel and refused to make strikes and select an arbitrator from the second FMCS panel after OPPD chose not to reject the second FMCS panel?

FACTS:

A grievance arose between Petitioner and the Respondent. As part of settling the grievance, the parties attempted to follow a process set forth in their collective bargaining agreement.

The collective bargaining agreement states:

If arbitration is requested by either party, an impartial Arbitrator shall be selected in the following manner. The Federal Mediation and Conciliation Service shall be requested to furnish a listing of seven (7) available Arbitrators. From this listing, the Company and the Union shall alternatively strike names [three (3) names each]. The remaining Arbitrator on the listing shall be designated to act as Arbitrator in the dispute.

Collective Bargaining Agreement, Article III, Section 2 (A)- Exhibit 1.

In using the process set forth above, the parties typically have selected an arbitrator from a single panel. However, increasingly over the past ten years, both parties have been displeased with the panels provided by the Federal Mediation and Conciliation Service. Previously, the Petitioner has rejected the first panel three times since September 7, 2010, with the Respondent rejecting a second panel in one instance. The parties' past practice has been to allow the rejection of a panel.

In the instant case, a grievance occurred and the parties went to the Federal Mediation and Conciliation Service for a panel of arbitrators. The first panel was provided by the FMCS and rejected by the Union on September 7, 2010. A second panel was also provided by the FMCS and the Petitioner again sought to strike the second panel on September 20, 2010. The Respondent disagreed and stated that the Petitioner was only allowed to strike one panel according to past practice. The Petitioner alleges that it is allowed to strike the second FMCS panel. The Petitioner further alleges that the Respondent violated NEB. REV. STAT. § 48-824(2)(a) or (g), and § 48-837 when it refused to allow the Petitioner to reject the second FMCS panel during the course of selecting an arbitrator per the collective bargaining agreement.

DISCUSSION:

The Petitioner alleges a violation of NEB. REV. STAT. § 48-824 (2)(a), (g), or NEB. REV. STAT. § 48-837 when the Respondent refused to permit the Petitioner to strike a second FMCS panel of arbitrators. The Respondent argues the Commission lacks the jurisdiction to hear and determine the instant case, as it is a breach of contract claim and in the alternative, if the Commission finds that this is not a breach of contract claim, that the Petitioner committed a prohibited practice when it rejected the first FMCS panel and refused to make strikes and select an arbitrator from the second FMCS panel.

NEB. REV. STAT. §48-824(2)(a) declares that it is a prohibited labor practice for any employer to interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act. NEB. REV. STAT. § 48-824(2)(g), states that it is a prohibited practice for any employer to refuse to participate in good faith in any impasse procedures for employees as set forth in the Industrial Relations Act.

The Nebraska Supreme Court stated in *Transport Workers of America v. Transport Authority of the City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979), that:

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The CIR performs an important and vital function in resolving impasses in the public sector. It is not, however, a substitute for the District Court with regard to existing and agreed terms, tenure, and conditions of employment. It has not been made a court by the Legislature. The proper forum to resolve this dispute is the courts.

The *Transport Workers* decision stands for a simple proposition – the Commission lacks jurisdiction to interpret and apply terms and conditions of a collective bargaining agreement. An action for a breach of contract must be brought in a court of general jurisdiction. The Petitioner seeks an interpretation of whether the contract allows the parties to strike multiple panels from the FMCS. The Commission cannot interpret the collective bargaining agreement between the parties and declare a remedy if the contract was in fact breached.

The essential cause of action here is identical to that raised in *Transport Workers of America v. Transport Authority of the City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The precedent established in the *Transport Workers of America* case, *supra* is controlling. The Commission does not have subject matter jurisdiction of the instant case. It should be noted that the subsequent adoption of NEB. REV. STAT. § 48-824 (after the *Transport Workers* case) has done nothing to expand the subject matter jurisdiction of the Commission in a way which would allow it to assume jurisdiction over this case. In *Transport Workers of America*, *supra*, it was the nature of the cause of action and not the remedy sought or its effect on employee rights which was determinative.

We are persuaded by the position of the Respondent that we lack jurisdiction to hear the Petitioner's case.

The *Transport Workers* decision held:

It appears to us that the Act has not in any manner attempted to grant the CIR powers [in the sense of subject matter jurisdiction] to resolve breach of contract cases even if the breach concerns itself with terms, tenure, or conditions of employment. Once an agreement is reached and a subsequent breach is alleged to have occurred, the parties are required to litigate their dispute in a competent court having jurisdiction of the matter.

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This is not a situation in which the claim presents both an alleged breach of a collective bargaining agreement and the existence of an industrial dispute separately within the subject matter jurisdiction of the Commission. Similarly, this is not a situation in which it is necessary for the Commission to interpret the terms of a collective bargaining agreement in order to settle an industrial dispute otherwise within the subject matter jurisdiction of the Commission. We lack subject matter jurisdiction to determine this dispute between the parties.

THE COMMISSION HEREBY FINDS, that the Commission lacks jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Petitioner's causes of action are ordered dismissed.

All commissioners assigned to the panel in this case join in the entry of this Order.

CASES CURRENTLY ON APPEAL

Case No. 1233

Scottsbluff Police Officers Association, Inc./F.O.P. Lodge 38 v. City of Scottsbluff, Nebraska, a City of the First Class, 16 CIR 478 (2010). Appealed September 30, 2010.

APPELLATE DECISIONS DISMISSED SINCE 16 CIR 221

Case No. 1200

Central City Education Association, An Unincorporated Association v. Merrick County School District No. 61-0004, a/k/a Central City Public Schools, a Political Subdivision of the State of Nebraska, 16 CIR 256, 272 (2009). Affirmed in part, and in part reversed and remanded with directions. 280 Neb. 27 (2010).

Case No. 1209

The State of Nebraska v. State Code Agencies Teachers Association, NSEA-NEA, a/k/a State Code Agencies Education Association, 16 CIR 324 (2009). Affirmed. 280 Neb. 459 (2010).

Case No. 1210

The Board of Trustees of the Nebraska State Colleges v. State College Education Association, 16 CIR 351, 356 (2009). Affirmed. 280 Neb. 477 (2010).

Case No. 1207

The Board of Regents of the University of Nebraska at Omaha v. University of Nebraska at Omaha Chapter of the American Association of University Professors, 16 CIR 283 (2009). Dismissed, January 28, 2010.

Case No. 1213

Rep. Doc. No. 437

International Brotherhood of Electrical Workers, Local Union No. 1597 v. Bill Sack, Howard County Commissioner, Jim Sidel, Howard County Commissioner, Rance Lierman, Howard County Commissioner, Lauren Scarborough, Howard County Commissioner, Delores Heminger, Howard County Assessor, Marge Palmberg, Howard County Clerk, Connie M. Nickel, Howard County Treasurer, Harold Schenck, Howard County Sheriff, Howard County, Nebraska, 16 CIR 382 (2010). Affirmed in part, and in part reversed. 280 Neb. 858 (2010).

Case No. 1216

International Brotherhood of Electrical Workers Local 763, International Brotherhood of Electrical Workers Local 1483 v. Omaha Public Power District, 16 CIR 394 (2010). Affirmed. 280 Neb. 889 (2010).

Case No. 1229

Employees United Labor Association v. Douglas County Nebraska and Michael Boyle, Pam Tusa, Chris Rogers, Kyle Hutchings, Chip Maxwell, Mary Ann Borgeson, and Claire Duda, the County Board of Douglas County, Nebraska in their official capacity. Dismissed, November 9, 2010.

Case No. 1238

Public Association of Government Employees v. City of Lincoln, Nebraska,
a Municipal Corporation, pages 493, 499.

Case No. 1242

South Sioux City Education Association, an Unincorporated Association v.
Dakota County School District No. 22-0011 a/k/a South Sioux City Com-
munity Schools, a Political Subdivision of the State of Nebraska, page 506.

Case No. 1244

Bill Oberg v. State of Nebraska, page 589.

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International Brotherhood of Electrical Workers Local 1483 v. Omaha Public
Power District, page 514.