Historical Explanation of the Nebraska Public School District Bargaining Impasse Resolution Mechanism

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[The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Commission of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. In establishing wage rates the commission shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees.]

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I. INTRODUCTION

A series of historical circumstances largely unrelated to public school districts and teachers has shaped the statutes for establishing teacher compensation and conditions of employment when negotiations fail to produce an agreement. The system is not a product of particularized legislative study or design.

Public school finance in Nebraska and elsewhere is a major issue of current public policy. So too, are concerns for attracting and compensating quality teachers, not only with respect to academics, but also as the primary component of public school district budgets.

Now is an appropriate time to review the historical development of the rules under which the Nebraska Commission of Industrial Relations (the “Commission,” named the Court of Industrial Relations from 1947 to 1979, both of which are sometimes referred to as the “CIR”) can set public school teachers’ wages and conditions of employment. As new policies relating to public school finance and teacher compensation emerge, Nebraska’s bargaining impasse resolution mechanism should be reexamined.

II. DEVELOPMENT OF THE BARGAINING IMPASSE RESOLUTION MECHANISM

A. The Nebraska Constitutional Convention (1920): Provision for an Industrial Commission

The Constitutional Convention of 1920 proposed what became Article XV, Section 9, authorizing the Legislature to create an Industrial Commission “for the investigation, submission, and determination of controversies between employers and employees in any business or vocation affected with a public interest.” The provision was patterned on a recently established Kansas Industrial Court designed to deal with employment conditions existing in the wake of World War I. The provision has been amended only once, in 1990 as part of the creation of the Nebraska Court of Appeals to change the language that “appeals shall lie to the Supreme Court” to “appeals shall be as provided by law.”

2. Neb. Const. art. XV, § 9. The section also authorizes the Legislature to enact laws “for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare.” I.d. It has been amended only once, in 1990 as part of the creation of the Nebraska Court of Appeals to change the language that “appeals shall lie to the Supreme Court” to “appeals shall be as provided by law.” LR 8CA, 1 Neb. Legis. J. 816, 818 (1989-90).

The Kansas Act was held unconstitutional in 1923, as applied to the authority of the Kansas Industrial Court to determine wages in a packing house, on federal due process grounds that the packing plant was not, as declared in the Kansas statute, "affected with a public interest." The holding might not have invalidated the Nebraska provision since Article XV, Section 9, by its own terms, applies only to "any business or vocation affected with a public interest" and not to a "broader field." The 1923 decision, however, was effectively overruled by the Supreme Court of the United States in a 1934 decision, stating that "there is no closed class or category of businesses affected with a public interest . . . in the application of the Fifth and Fourteenth Amendments." Nevertheless, the provisions in Article XV, Section 9 remained unimplemented until 1947 when a number of states enacted legislation relating to public utilities.

Two major issues have surfaced with respect to the parameters of Article XV, Section 9. There was sharp disagreement among the judges of the Nebraska Supreme Court in a series of cases decided between 1972 and 1981 as to whether the state and political subdivisions and their employees fall within the language "any business or vocation affected with a public interest." A related issue was whether Article XV, Section 9, is an exception to the Nebraska constitutional rules on separation of powers and delegation of authority. These two issues appear to be linked by the constitutional language that "[a]n Industrial Commission may be created for the purpose of administering such laws." "Such laws" is a reference to the language in the preceding sentence that "[l]aws may be enacted providing for the investigation, submission, and determination of controversies between employers and employees in any business or vocation affected with a public interest." That linkage has been unclear throughout the litigation involving these issues.

The first wage determination case to reach the Nebraska Supreme Court on appeal from the Court of Industrial Relations involved the Seward School District and Education Association in 1972. The issue of whether Article XV, Section 9 covered public school districts and employees was not raised by the parties.

8. See id. at 796, 797, 199 N.W.2d at 765, 766 (Clinton, J., dissenting; Boslaugh, J. and McCown, J., concurring). With the benefit of hindsight, it might have been better for the Supreme Court to have ordered this issue to be briefed and reargued.
9, Article XV, of the Constitution of Nebraska . . . ." The parties apparently assumed, as did Lincoln attorney C. Petrus Peterson, a principal proponent of both Article XV, Section 9 in 1920 and the implementing legislation in 1947, that governmental activities could constitute a "business or vocation affected with a public interest." The four judge majority opinion in School District of Seward Education Association v. School District of Seward did not focus expressly on whether governmental entities and employees are encompassed by Article XV, Section 9. Rather, it decided at the outset that Article XV, Section 9 is an independent part of the Constitution and not subject to the general rules pertaining to distribution of powers under Article II of the Constitution, a conclusion agreed with by one of the three dissenting judges. Article II of the Constitution calls for a separation of legislative, executive, and judicial powers of the government "except as hereinafter expressly directed or permitted." Five judges held that the Constitutional Convention clearly intended to authorize a commission having "combined administrative, legislative, and judicial powers" as an exception to Article II.

The four judge majority appeared to rely upon the plenary power of the Legislature with respect to public school districts, instead of Article XV, Section 9, for the substantive authority of the commission to establish teacher wages and conditions of employment. Two of the four judges, however, stated in a short concurring opinion, "[a]lthough there can be disagreement as to what [the language of Article XV, Section 9] means, it would appear that the terms business or vocation were used in an alternative sense and that legislation relating to controversies between employers and employees under this section is not..."
limited to a business affected with a public interest." 15 Finessing the issue of whether governmental entities and their employees may constitute "any business or vocation affected with a public interest" within Article XV, Section 9, the four judge majority opinion stated:

The Legislature has plenary power and control over school districts, including provision for the appointment or election of governing bodies thereof. Consequently, it may provide limitations on any authority to be exercised by a school board. If the Legislature has such complete control over public school districts, it follows, by the enactment of [the 1969 legislation], it was exercising that control. 16

The four judge majority holding that Article XV, Section 9, is an exception to Article II with respect to the exercise of legislative, executive, and judicial power was not linked to the question concerning "business or vocation affected with a public interest." One of the dissenting judges agreed with the four judge majority interpretation of Article XV, Section 9, concerning separation of powers and delegation of authority, but he objected to using the plenary power of the Legislature to create an agency possessing such powers and authority. 17 He reasoned that although the Legislature might use its plenary power to enact the provisions relating to public school districts, it could not entrust the enforcement powers to a commission established under Article XV, Section 9, because Article XV, Section 9, does not apply to governmental employers and employees. 18

In determining that the state and governmental subdivisions are not within the constitutional language "business or vocation affected with a public interest," two of the three dissenting judges relied extensively upon the history of the proposal for Article XV, Section 9, during the Constitutional Convention of 1920. 19 The third dissenting judge relied upon the language of Article XV, Section 9, but did so "without reference" to its consideration at the Constitutional Convention. 20 Additionally, the two dissenting judges argued that the powers of the commission unconstitutionally interfered with the governmental powers of taxation and appropriation of funds. 21

15. *Seward Educ. Ass'n*, 188 Neb. at 797, 199 N.W.2d at 766 (Boslaugh, J. and McCown, J., concurring)(emphasis on "or" in original). The concurring opinion added: "The legislative construction of a constitutional provision, although not controlling, should be given consideration, particularly in doubtful cases and when deliberately made." *Id.*
16. *Id.* at 779, 199 N.W.2d at 757.
17. *Id.* at 796-797, 199 N.W.2d at 765-766 (Clinton, J., dissenting).
18. *Id.*
19. *Id.* at 788-794, 199 N.W.2d at 761-764 (Newton, J., and P. White, C.J., dissenting).
20. *Id.* at 796, 199 N.W.2d at 765 (Clinton, J., dissenting).
The next case, three years later in 1975, involved the Orleans School District and Education Association. Judge Clinton, who had dissented in Seward on the basis that Article XV, Section 9 does not apply to government entities, authored a five judge opinion which included one of the other dissenters in Seward.

The reasoning of the five judge opinion in Orleans was straightforward:

One may be willing to concede the validity of the contention that [Article XV, Section 9] was intended to apply only to the regulation of public utilities. However, this does not answer the question of whether the Legislature otherwise has power to devise methods for dealing with the labor relations of governmental entities and departments.

It is clear that the Legislature did not need to look to the authority of Article XV, section 9, of the Nebraska Constitution when it entrusted to the Court of Industrial Relations authority pertaining to labor relations of governmental services. It has that authority by virtue of Article III, section 1.

The Nebraska Supreme Court went on to say that “the type of legislative delegation here being considered requires the statutory statement of guidelines to make it valid.” The Court held “that the

23. Judge Brodkey had replaced Judge Smith. District Court Judge Hastings and Retired District Court Judge Kuns sat on the Supreme Court in place of Judge Spencer, who had authored the four judge majority decision, and Judge McCown, one of the two concurring judges who had joined in the four judge majority decision.
24. Chief Justice P. White joined in the decision. Judge Newton again dissented. Judge Boslaugh, who had joined in the Seward decision and authored the concurring opinion on “business or vocation,” concurred in the result.
25. There is no indication whether this was written simply “for the sake of the argument” in resolving this litigation or as a considered decision by the Nebraska Supreme Court.
27. Id. at 682, 229 N.W.2d at 176. This, despite the fact that the statutes, themselves, stated a purpose “to make operative the provisions of section 9, Article XV, of the Constitution of Nebraska” and to carry out that purpose “there is hereby created an industrial commission.” See Neb. Rev. Stat. §§ 48-802, 48-803 (Reissue 1998). In an individual rejoinder to the dissenting opinion, the author of the majority opinion wrote:

The dissent contends that, because the Constitution authorized the Legislature to create an industrial commission for the purpose of dealing with certain labor relations problems, that constitutional provision restricts the Legislature from ever after entrusting to that same commission, later created by it, authority to deal with, in such manner as the Legislature shall direct, the labor relations of governmental subdivisions. Such a construction is contrary to the fundamental nature of the state legislative power under our system of government.

Id. at 692, 229 N.W.2d at 181 (Clinton, J., “respondente”).
standard contained in section 48-818, R.R.S. 1943 is clearly sufficient and the statute is constitutional.”

29. It recognized the Seward holding that “the act creating the Court of Industrial Relations grants that body a combination of administrative, legislative, and judicial powers.” With respect to the delegation of judicial powers to non-judicial bodies, it stated that “[t]he function it exercises is a legislative one; its quasi-judicial powers are purely incidental.” The decision also rejected the contention that the power to set wages and conditions of employment by the commission violated the constitutional authority of school districts with respect to budget-making or taxation.

The next year, the Nebraska Supreme Court applied the same analysis relying on the plenary powers of the Legislature in sustaining the jurisdiction of the commission over the State of Nebraska Department of Public Institutions. A three judge per curiam opinion held that the Legislature’s authority, under Article IV, Section 19, of the Nebraska Constitution, supported the Court of Industrial Relations jurisdiction over the Department of Public Institutions. The three judge per curiam opinion strongly indicates that a majority of the judges of the Nebraska Supreme Court did not consider governmental entities and employees to be within the language “any business or vocation affected with a public interest” in Article XV, Section 9. Two judges concurred in the result without a written opinion. Two judges dissented on the ground that the Constitution does not give the Legislature “complete control” over the Department of Public Institutions.

29. Id. at 685, 229 N.W.2d at 178.
30. Id.
32. Id. at 686-688, 229 N.W.2d at 178-180.
34. Id. at 258, 237 N.W.2d at 844 (“By giving the Court of Industrial Relations jurisdiction over the Department of Public Institutions, the Legislature is merely exercising the authority granted to it in Article IV, section 19.”).
35. Id. at 256-257, 237 N.W.2d at 843. The three judge per curiam opinion stated: The plaintiff argues that Article XV, section 9, gives the Legislature the authority to create a Court of Industrial Relations which has jurisdiction over public employees. The defendant, on the other hand, cites the proceeding of the Constitutional Convention of 1919-1920, to show that Article XV, section 9, was not intended to cover all public employees. Although correct in its interpretation of Article XV, section 9, the defendant fails to consider Article IV, section 19, of the Constitution of the State of Nebraska.
36. Id. at 259-260, 237 N.W.2d at 844-845 (Newton, J. and Spencer, J., dissenting). The three judge per curiam opinion represented the views of P. White, C.J., Mc-
Similarly, in a 1978 bargaining unit determination case, a four judge majority decision held that the Legislature's authority over the State Department of Roads could sustain the jurisdictional basis of the Court of Industrial Relations. In reviewing the prior decisions of the Court, the four judge majority opinion stated, "by implication the majority in the Seward decision suggested that the phrase 'employees in any vocation affected with a public interest' included employees of the State of Nebraska." Having determined that there was other legislative authority for the enactment, however, the Court "decline[d] the invitation" to base its decision on Article XV, Section 9, or to draw a "distinction between executive departments created by the Legislature and those specifically created by the Constitution." One judge concurred in the result. Two judges dissented, one of whom was the author of the four judge majority opinion in Seward, but was "now convinced that in adopting Article XV, Section 9, Constitution of Nebraska the Constitutional Convention of 1920 clearly intended to exempt the state and its political subdivisions from the operations of the Court of Industrial Relations."

In 1979, the University of Nebraska was held subject to legislation conferring jurisdiction on the Court of Industrial Relations. The unanimous opinion of the Court is couched in terms that "no exception is made for UNL thereunder [in Article XV, Section 9]." The opinion also applies the "fundamental" rule that "in the legislative

Cown, J., and Brodkey, J., Boslaugh, J., and Clinton, J., concurred in the result without a written opinion.

38. Id. at 174, 263 N.W.2d at 645 (deletion in original).
39. Id. at 177, 263 N.W.2d at 647.
40. Id. at 181-182, 263 N.W.2d at 649 (Spencer, J., dissenting).
42. Id. at 10-11, 277 N.W.2d at 534. The Court stated:

In essence, UNL is granted the authority in the first instance to govern its operation, including the establishment of the salary schedules and compensation to be paid its employees. It is only when a dispute arises between UNL and its employees that the provisions of Article XV, section 9, and the provisions of sections 49-601 to 49-638, R.R.S. 1943, come into play. There appears to be nothing improper or inconsistent with such a result. To the extent that UNL can without controversy establish schedules of wages, terms and conditions of employment, and hours of labor, neither the Legislature nor anyone else may interfere. If, however, a controversy between UNL and its employees arises, the Constitution grants to the Legislature authority to enact laws to resolve that controversy. This is really nothing other than simply prescribing a forum wherein controversies involving a public employer and its employees may be arbitrated. Certainly UNL would not argue that their authority is so absolute that an employee could have no recourse anywhere if a dispute existed between the employer and the employee.

Id.
grant of power to an administrative agency, such power must be limited to the expressed legislative purpose and administered in accordance with standards described in the legislative act.”

The most recent language of the Nebraska Supreme Court concerning the scope of Article XV, Section 9, appears in a 1981 decision. A three judge plurality opinion, applying the traditional rule that an administrative body possesses only those powers conferred by statute, held that the Commission was without authority to order prejudgment interest. Two judges concurred in the result without a written opinion. The two judges who had been part of the four judge majority in the seminal Seward decision in 1972, but had also separately concurred in an opinion which relied expressly on Article XV, Section 9, dissented, again urging reliance on Article XV, Section 9. Their dissent asserted that “[m]any of the difficulties referred to in the opinion of the court would be eliminated if the court would follow its earlier decisions . . . [that] Article XV, section 9, Constitution of Nebraska, obviously was intended to be an exception to Article II of the Constitution.”

The Nebraska Constitution provides that “[n]o legislative act shall be held unconstitutional except by the concurrence of five judges.” Although majority and plurality opinions have made clear that some judges thought the Commission of Industrial Relations statutes violated Article XV, Section 9, of the Constitution, none of the opinions has been a holding of five judges of the Supreme Court. The Supreme Court has declined to sustain the statutes as the Legislature intended “to make operative the provisions of section 9, Article XV, of the Constitution of Nebraska.” Instead, it has relied upon an alternative legislative basis for the constitutionality of the statutes.

The present statutes relating to bargaining impasse resolution have been sustained under the plenary power of the Legislature with respect to public school districts and under the general rules relating to separation of powers and delegation of authority. Factually, there should be no doubt at the present time that public school teaching is a “vocation affected with a public interest”—a vital public interest from the standpoints of school districts, students, taxpayers, and the public generally. Perhaps current legislative findings might help validate a future exercise of legislative authority invoking Article XV, Section 9,
as to public school districts and other governmental employers. Statutes enacted under the authority of Article XV, Section 9 are an exception to the Nebraska constitutional rules of separation of powers and delegation of authority. Based on past precedent, however, it appears questionable whether public school districts and employees will be considered covered by the language "any business or vocation affected with a public interest" within Article XV, Section 9. That determination may have a significant influence on the dimensions of future legislative consideration of the statutory bargaining impasse resolution mechanism.

B. Privately Owned Public Utilities (1947): Establishment of a Statutory Mechanism

The 1947 Nebraska Legislature implemented Article XV, Section 9, of the Constitution, established an industrial commission, and created statutory standards for the determination of wages and conditions of employment. But the legislation had no application to public school districts. It covered only "governmental service in a proprietary capacity or service of a public utility" and stated expressly that the commission "shall have no jurisdiction with reference to employment in governmental service."

Nebraska was one of nine states passing statutes in 1947 that provided "for compulsory arbitration of labor disputes in public utilities." Senator C. Petrus Peterson, a principal proponent of what became Article XV, Section 9, from the Constitutional Convention of 1920, introduced LB 349, applicable to employments (1) "in a business or vocation affected with a public interest," (2) "in a private business and there is an existing written contract of employment or an existing written collective bargaining agreement," and (3) "in a private business and there is a jurisdictional dispute between two or more labor organizations." The same section of LB 349 expressly stated that it

48. See Neb. Rev. Stat. § 48-802(1) (Reissue 1998) ("It is therefor further declared that governmental service . . . [is] clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner herein provided"); School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 797-798, 199 N.W.2d 752, 766 (1972) (Boslaugh, J. and McCown, J., concurring) ("The legislative construction of a constitutional provision, although not controlling, should be given consideration, particularly in doubtful cases and when deliberately made.").


50. Id. § 10, 1947 Neb. Laws at 590.


52. 1947 LB 349 (Feb. 3, 1947), § 10(1), (2), and (3), p. 5.
did not apply "to employment in governmental service," which may be an additional indication that Senator Peterson considered governmental service to be within the constitutional language of Article XV, Section 9, and LB 349 "business or vocation affected with a public interest." The Bill was strongly opposed at its Committee hearing by both employers and unions.

On April 7, 1947, Governor Val Peterson personally appeared before the Legislature, warned of a potential telephone strike and possible "endless industrial strife" with serious consequences, and presented a legislative proposal "for the first time." The Governor's proposal became LB 537 and drew heavily upon the provisions of LB 349, which remained before the Labor and Public Welfare Committee. It covered "disputes involving employees in governmental service or of public utilities," but did not include "a private business." LB 537 was supported by private business employers and opposed by union representatives at the Committee hearing a week later. In an executive session following the public hearing, amendments submitted by Senator Peterson were unanimously adopted, LB 537 was advanced to General File on a seven to two vote, and LB 349 was indefinitely postponed by a unanimous vote.

As amended by the Labor and Public Welfare Committee, LB 537 was made applicable to "[a]ll industrial disputes involving governmental service in a proprietary capacity or service of a public utility." The sentence "[t]he Court of Industrial Relations shall have no jurisdiction with reference to employment in governmental service," from LB 349, reappeared in a mimeographed "Substitute Bill" adopted by

53. Id. § 10(4).
54. It could also be an indication that Senator Peterson thought governmental entities were not within Article XV, Section 9, and § 10(1) of LB 349. But he had previously explained that the events prompting the Constitutional Convention to adopt the provision included the Boston police strike and a threatened railroad strike "which partakes of a number of elements of a governmental function." See Peterson, supra note 5, at 489-91.
58. Id. § 10.
60. See id. at 4.
62. The mimeographed "Substitute Bill (including Committee Amendments)" can be found in the bound copy of 1947 Legislative Bills, 60th Session (Nebraska Legislative Council 1947). The mimeographed substitute bill notes that it is LB 537, "correlated with Legislative Bill 349 introduced by C. Petrus Peterson, Lancas-
the Legislature on April 28, 1947, "as a substitute for the original bill and all committee amendments."63

So the Court of Industrial Relations64 was given jurisdiction in the 1947 legislation over "industrial disputes involving governmental service in a proprietary capacity or service of a public utility."65 But in 1951, the Supreme Court of the United States invalidated similar Wisconsin statutes, also enacted in 1947, because of a conflict with federal labor laws applicable to privately owned public utilities.66 As a result, the Nebraska statutes were no longer effective with respect to privately owned public utilities, such as telephone companies, but since the relevant federal labor laws do not apply to "any State or political subdivision thereof,"67 the Commission has continued to have jurisdiction over Nebraska's public utilities which are political subdivisions of the State.

The statutory standard of Section 48-818 for setting wages and conditions of employment had an interesting birth during the 1947 enactment, clearly showing that it was designed primarily to deal with the features of privately owned public utilities. There was a close similarity between the Nebraska statute and the statutory impasse standards of public utility legislation passed in 1947 in Florida,68 Indiana,69 Pennsylvania,70 and Wisconsin.71

LB 349 proposed that for a business or vocation affected with a public interest, "such wages, hours of labor, conditions of employment, or other matters affecting harmonious relations between employer and employee shall conform to those generally prevailing in like or ter," a notation also carried on the Final Reading Bill and in the 1947 Session Laws.

64. The name of the Court of Industrial Relations was changed to Commission of Industrial Relations in 1979. See 1979 Neb. Laws 1235, 1240, LB 444, §§ 1, 9.
69. 1947 Ind. Acts, ch. 341, § 10, 1355, 1358-59 (current version at IND. CODE ANN. § 22-6-2-10 (1997)).
71. 1947 Wis. Laws, No. 485, § 111.57, 713, 716-17 (current version at WISC. STAT. ANN. § 111.57 (1997)). Massachusetts, Michigan, Missouri, New Jersey, and Virginia also passed public utility employment dispute statutes, but without impasse resolution mechanisms containing the same degree of specificity in the statutory standards for resolution, particularly the work skills comparisons of the Nebraska, Florida, Indiana, Pennsylvania, and Wisconsin enactments.
similar fields of employment in the state."\textsuperscript{72} LB 537 as introduced contained identical language.\textsuperscript{73}

The amendments of the Labor and Public Welfare Committee, adopted in the executive session following the public hearing on LB 537,\textsuperscript{74} incorporated language from the Indiana statute which had become effective on March 14, 1947.\textsuperscript{75} The only substantive change from this portion of the Indiana law was that the worker comparisons in the Committee amendment referred to "like governmental or public utility employers,"\textsuperscript{76} whereas the Indiana law referred only to "like public utility employers."\textsuperscript{77} This limitation, however, was entirely eliminated in the mimeographed Substitute Bill adopted by the Legislature.\textsuperscript{78} The Substitute Bill also changed the requirement that separate wages and conditions of employment "shall" be established with respect to each labor market area. Instead, the Bill stated that the separate wages and conditions of employment "may" be established.\textsuperscript{79} The uses of "shall" and "may" throughout this section seem especially significant in considering whether each provision is mandatory or permissive.\textsuperscript{80}

As finally enacted in 1947, the statute stated:

The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions, in the same labor market area and, if none, in adjoining labor market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area. The court shall determine in each case, what constitutes "the same labor market area" or "adjoining labor market areas" in the state. If an employer has more than one plant or office and some or all of such plants or offices are found to be located in separate labor market areas, the court may

\textsuperscript{72} 1947 LB 349 § 19, p. 7 (Feb. 3, 1947).
\textsuperscript{73} 1947 LB 537 § 18, p. 7 (Apr. 7, 1947).
\textsuperscript{74} 1947 NEB. LEGIS. J. 1063, 1066-67 (Apr. 16, 1947).
\textsuperscript{75} 1947 Ind. Acts, ch. 341, § 10, 1355, 1358-59. Old working files of the legislative bill drafter contain a copy of the Indiana Act as published by the Commerce Clearing House Labor Law Service, with handwritten markings, and other handwritten "Amendments to Legislative Bill 537" with a notation ("Here Copy from Indiana Law submitted"). The authorship of the markings and notation is not known.
\textsuperscript{76} 1947 NEB. LEGIS. J. 1063, 1066.
\textsuperscript{77} 1947 Ind. Acts, ch. 341, § 10, 1355, 1359.
\textsuperscript{78} 1947 LB 537 Substitute Bill § 18, p. 8-9, adopted by the Legislature Apr. 28, 1947.
\textsuperscript{79} Id.
\textsuperscript{80} See NEB. REV. STAT. § 49-802(1) (Reissue 1998)("When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed.").
establish separate wage rates or schedules of wage rates, and separate conditions of employment, for all plants and offices in each such labor market area. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. Any order or orders entered may be modified on the court's own motion or on application by any of the parties affected, but only upon a showing of a change in the conditions from those prevailing at the time the original order was entered.81

C. Public School Districts and Other Governmental Employers (1969): Substantial Amendment of the Statutory Standards

LB 15 was introduced early in the 1969 legislative session to establish a Public Employment Relations Board.82 Its provisions were patterned after the New York Public Employees' Fair Employment Act (popularly known as the "Taylor Act") adopted in 1967.83 Public school districts were included within its coverage.84 The purpose of LB 15, as introduced, was to "give the public employees the same rights and privileges of employees in the private sector."85 The Public Employment Relations Board version of LB 15 was placed on General File by the Committee on Labor,86 considered on the floor of the Legislature,87 and advanced to Select File.88 One week after being placed on Select File,89 an amendment was printed in the Legislative Journal offering a substitute Bill.90 The substitute version eliminated the Public Employment Relations Board concept and contained extensive changes in the existing Court of Industrial Relations statutes.91 Some provisions of the Public Employment Relations Board version were incorporated in the substitute amendment, but within the framework of the existing Nebraska statutes. Two days later, the substitute Bill was adopted by unanimous consent of the Legislature on Select File.92

83. See Taylor Act, ch. 392, 1967 N.Y. LAWS 1102 (current statutes at N.Y. CIVIL SERVICE LAW, art. 14, §§ 200-214 (1999)).
84. 1969 LB 15, § 2(7)(b) and (c), 3 (Jan. 8, 1969).
87. Id. at 416-418 (Feb. 5, 1969).
88. Id. at 426-427 (Feb. 6, 1969).
89. Id. at 456 (Feb. 10, 1969).
90. Id. at 607-612 (Feb. 17, 1969).
91. Id.
92. Id. at 658 (Feb. 19, 1969).
LB 15 broadened the statutes to cover "[a]ll industrial disputes involving governmental service," rather than merely "governmental service in a proprietary capacity."93 "Governmental service" includes "all services performed under employment by the State of Nebraska, [or] any political or governmental subdivision thereof," so that public school districts and employees were brought within the statutes by LB 15 in 1969.94

LB 15 also significantly modified the statutory criteria for establishing wages and conditions of employment.95 It deleted the previous statutory factors of "the same labor market area," "adjoining labor market areas within the state," "which in addition bear a generally comparable relationship to wages and conditions of employment maintained by all other employers in the same labor market area," and the provisions relating to different plants or offices of the same employer in more than one labor market area.96

There have been no substantive changes in the resulting language of Section 48-818 since LB 15 in 1969.97 The 1995 Legislature established a less formal special master proceeding for school districts, educational service units and community colleges.98 It requires the agreement of "both parties" after a petition has been filed with the Commission.99 The special master is directed to "choose the most reasonable final offer on each issue in dispute . . . as described in section 48-818."100 However, a party dissatisfied with the special master's decision retains a right to have the Commission formally decide the unresolved issues and "[s]uch proceeding shall not constitute an appeal

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94. Neb. Rev. Stat. § 48-801(2) (Reissue 1998). LB 15 also provided that the Court of Industrial Relations did not have "jurisdiction over any persons, organizations, or school districts subject to the provisions of the Nebraska Teachers' Professional Negotiations Act, sections 79-1287 to 79-1295, Revised Statutes Supplement, 1967, until all provisions of such act have been exhausted without resolution of the dispute involved." 1969 Neb. Laws ch. 407, § 3, 1405, 1407. The Nebraska Teachers' Professional Negotiations Act, a "meet and confer" type of statute, was repealed in 1987 and the limitation eliminated. 1987 Neb. Laws 1319 (LB 524).
96. See 1969 LB 15, Final Reading (Second), § 6, 7-8 (Apr. 21, 1969).
98. Neb. Rev. Stat. § 48-811.02(1) (Reissue 1998). The procedure has not been invoked during the first five years of its existence.
99. § 48-811.02(2).
100. § 48-811.02(4).
of the special master’s decision, but rather shall be heard by the commission as an action brought pursuant to section 48-818.101

III. PRIMARY FEATURES OF THE BARGAINING IMPASSE RESOLUTION MECHANISM

A. Judicial Characteristics

Although the process is sometimes referred to as “arbitration,”102 and the Nebraska Supreme Court has stated that “its quasi-judicial powers are purely incidental,”103 the statutory proceedings entrusted to the Commission of Industrial Relations contain significant judicial characteristics. In describing the role of a public school board in a contested nonrenewal of a probationary teacher’s employment contract, the Supreme Court recently stated that “[a] board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.”104 The judicial characteristics of the Commission of Industrial Relations, and the absence of other judicial characteristics from the Commission’s authority, importantly shape the substantive results of the dispute resolution mechanism. Additionally, they distinguish Nebraska’s statutory scheme from those of other states.

It was at least confusing, and perhaps a mistake, for the 1947 Legislature to use the name Court of Industrial Relations. Article XV, Section 9, authorizes the creation of an “Industrial Commission.” The constitutional drafters intended that the Industrial Commission would be vested with authority outside of the normal rules for distribution of powers. The goal was for the Commission to possess both

101. § 48-811.02(5).
102. See, e.g., University Police Officers Union v. Univ. of Nebraska, 203 Neb. 4, 11, 277 N.W.2d 529, 534 (1979)(opinion by Krivosha, C.J.) (“This is really nothing other than simply prescribing a forum wherein controversies involving a public employer and its employees may be arbitrated.”); Transport Workers of America v. Transit Authority of Omaha, 205 Neb. 26, 31-32, 286 N.W.2d 102, 106 (1979)(opinion by Krivosha, C.J.) (“The Act is intended to provide public employees who do not otherwise have the right to strike an opportunity to mediate and arbitrate matters of employment which have not yet been agreed to by the employer.”); Donald E. Pursell & William D. Torrence, The Impact of Compulsory Arbitration on Municipal Budgets—The Case of Omaha, Nebraska, 12 J. OF COLLECTIVE NEGOTIATIONS IN THE PUBL. SECTOR 119 (1983)(“The Nebraska Commission of Industrial Relations engages in compulsory arbitration to resolve public sector labor management disputes and has the authority to establish wages, conditions of employment, and/or hours of work.”).
104. McQuinn v. Douglas County Sch. Dist. No. 66, 259 Neb. 720, 731, 612 N.W.2d 198, 206 (2000). The McQuinn court also stated, “‘Adjudicative facts’ are those ascertained from proof adduced at an evidentiary hearing which relate to a specific party.” Id.
legislative and judicial authority, and possibly some executive responsibilities. Public school districts, themselves, have very substantial and broad authority which cuts across traditional legislative, judicial and executive divisions of responsibility. The important consideration is the existence of suitable judicial authority by an industrial commission, not whether it is called Court or Commission.

There is no particular harm in using the term "arbitration" to describe Nebraska's bargaining impasse resolution mechanism. In a very loose sense, it can be described as "interest arbitration," arbitration to establish the substantive terms and conditions of an "agreement." But that is different than the use of "arbitration" in the Nebraska Constitution, as amended in 1996, which authorizes "arbitration agreements, and other forms of dispute resolution which are entered into voluntarily." And it is not consistent with the ordinary understanding of "arbitration" as involving a binding decision of a neutral person or persons chosen by the parties, under rules of procedure agreed to by the parties, without requirements for formal findings of fact or conclusions of law, and which can be modified by a court solely for extremely limited grounds.

Nebraska was the only state enacting public utility legislation in 1947 which established a "Court" of Industrial Relations. From their introduction, and before the mimeographed Substitute Bill incorporated the Indiana impasse resolution language, both LB 349 and LB 537 required that the "proceedings before the court shall conform to the Code of Civil Procedure applicable to the District Courts of the state" and that "[i]n the taking of evidence, the rules of evidence prevailing in the trial of civil cases in Nebraska shall be observed by the Court of Industrial Relations." These provisions remain in the current Nebraska statutes.

The Supreme Court has stressed these judicial characteristics of the Commission in holding that the Commission can obtain evidence on its own investigation only after "the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions." A four judge majority reasoned:

107. 1947 LB 349 § 13, p. 6 (Feb. 3, 1947) and 1947 LB 537 § 12, p. 5 (Apr. 7, 1947)("[e]xcept as modified by the Court of Industrial Relations under its rule making power or by the provisions of this act").
110. General Drivers and Helpers Union, Local 554 v. City of West Point, 204 Neb. 238, 242, 281 N.W.2d 772, 775 (1979).
While this position may seem to exalt form over substance, it must be remembered that the CIR's sole function is to settle industrial disputes, and the principal onus in producing evidence is on the parties. The adversary nature of proceedings has been preserved in the CIR by the Legislature in providing that proceedings shall conform to the code of civil procedure applicable to District Courts . . . ; by the decision of this court as to burden of proof . . . ; and, for that matter, by the procedures adopted and followed by the CIR itself. The result is that the CIR cannot, in a section 48-818, R.R.S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. 111

Two judges dissented, 112 relying on the statutory authority of the Commission to consider evidence obtained through an investigation after notice to all parties, 113 the authority of the Commission to conduct studies and make analyses relevant to its responsibilities, 114 and the authority of the commission to modify the code of civil procedure 115 under its statutory "full power to adopt all reasonable and proper regulations to govern its proceedings." 116 The dissent also relied on the directions that "all grants of power, authority, and jurisdiction made in such act to the commission shall be liberally construed to effectuate the public policy" and "[a]ll incidental powers necessary to carry into effect the Industrial Relations Act are hereby granted to and conferred upon the commission." 117

Chief Justice Krivosha, who had joined in the four judge majority opinion, later stated that "[o]n further reflection I now think that we have imposed a rule which is contrary to the entire scheme of the industrial relations law in Nebraska." 118 His analysis illustrates the serious consequences of allowing these judicial features of the Commission procedures to predominate:

The purpose of the law is to insure continuous, uninterrupted, and proper functioning and operation of governmental services. In attempting to do so

111. Id. (one other judge concurred in the result).
112. Id. at 243, 281 N.W.2d at 776 (Brodky, J., and T. White, J., dissenting).
113. See Neb. Rev. Stat. § 48-817 (Reissue 1998) ("[T]he commission shall give no consideration to any evidence or information which it may obtain through an investigation or otherwise receive, except matters of which the district court might take judicial notice, unless such evidence or information is presented and a part of the record in a hearing and opportunity is given, after reasonable notice to all parties to the controversy of the initiation of any investigation and the specific contents of the evidence or information obtained or received, to rebut such evidence or information either by cross-examination or testimony.").
114. The version of Section 48-816 then in effect was 1972 Neb. Laws 840, 842-44, LB 1228 § 3.
115. See Neb. Rev. Stat. § 48-812 (Reissue 1998) ("Except as modified by the commission under section 48-809 or the other provisions of the Industrial Relations Act . . . ").
118. Lincoln County Sheriffs Employees Ass'n v. County of Lincoln, 216 Neb. 274, 282, 343 N.W.2d 735, 741 (1984) (concurring opinion joined by Grant, J.).
the Legislature has struck a balance. On the one hand, public employees are prohibited from interrupting the delivery of public services by strike or other means. On the other hand, to protect the economic interests of such public employees, there has been developed a statutory scheme whereby an administrative agency is authorized to resolve public sector employer-employee disputes. To therefore suggest that if the employees fail to make a prima facie case, the government employer in some manner is then absolved of its statutory obligation to pay comparable wages is to ignore the entire scheme. The Commission of Industrial Relations is not a court; it is an administrative agency. As such, it should be authorized and permitted to operate as an administrative agency, authorized to consider all of the evidence, whether brought by the employer or brought by the employee. The purpose of the act is to attempt to adjust labor disputes in the public sector as quickly as possible and not to engage in meaningless legal technicalities.119

There has been some softening in the practical application of the judicial format. The burden of factual proof is on the moving party to show that overall compensation and conditions of employment are not comparable to the prevalent overall compensation and conditions of employment by others.120 The standard on the admission of evidence "is that, generally, the reception of evidence is within the broad discretion of the [Commission of Industrial Relations]."121 The burden of proof can be "satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence."122 The opposing party's expert witness can be called by the moving party to establish its case-in-chief.123 And the Commission has broad authority to allow the moving party to withdraw its rest, reopen the hearing on its own motion, and then allow the moving party to call the other party's expert witness.124 In reviewing decisions of the Commission, the Supreme Court is "restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable."125

In other circumstances, the absence of judicial characteristics from the Commission's statutory authority can be an impediment to an effective resolution of the issues in dispute between the parties. As an administrative agency, the Commission has only the authority ex-

119. Id. at 282-283, 343 N.W.2d at 741 (citations omitted).
120. See Douglas County Health Dep't Employees Ass'n v. County of Douglas, 229 Neb. 301, 308, 427 N.W.2d 28, 35 (1988).
121. Id. at 304, 427 N.W.2d at 33.
124. See id. at 94, 337 N.W.2d at 720-21 ("It is within the sound discretion of a District Court in a civil case to allow a party to withdraw its rest and introduce additional evidence.").
pressly given by, or necessarily implied in, the statutes.\textsuperscript{126} There is no authority provided by statute for the Commission to issue declaratory judgments\textsuperscript{127} or summary judgments,\textsuperscript{128} enforce its own orders,\textsuperscript{129} or exercise other judicial authority. It is counterproductive that the Commission cannot issue declaratory judgments or summary judgments within the subject matter of its responsibilities.

If the substantive standards in Section 48-818 for establishing wages and conditions of employment are changed in the future, the Commission's procedural authority should be reexamined. That may necessitate a reconsideration in terms of Nebraska's constitutional provisions of the concept that "as a general rule administrative agencies have no general judicial powers, notwithstanding they may perform some quasi-judicial duties."\textsuperscript{130} The Supreme Court reasoned that the Nebraska Constitution "firmly establishes that the judicial power in Nebraska is vested solely in the courts. Art. II, § 1, and Art. V, § 1, Constitution of Nebraska. As an administrative body, the CIR may not exercise judicial functions."\textsuperscript{131} It added that "if we were to hold that the Legislature had in fact granted to the CIR judicial powers, we would be compelled to find that such delegation violated the Constitution of the State of Nebraska and was invalid."\textsuperscript{132}

Article II, Distribution of Powers, of the Nebraska Constitution states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly

\textsuperscript{126} See Nebraska Pub. Employees v. City of Omaha, 235 Neb. 768, 769, 457 N.W.2d 429, 431 (1990) ("The CIR is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission."). The Commission is not subject to the general state Administrative Procedure Act. See Neb. Rev. Stat. § 84-901(1) (Reissue 1999).

\textsuperscript{127} See Transport Workers of America v. Omaha Transit Authority, 205 Neb. 26, 34, 286 N.W.2d 102, 107 (1979) ("The entering of a declaratory judgment and the ordering of an accounting are clearly judicial functions.").

\textsuperscript{128} See Jolly v. State of Nebraska, 252 Neb. 289, 562 N.W.2d 61 (1997).

\textsuperscript{129} See Neb. Rev. Stat. § 48-819 (Reissue 1998) ("Orders, temporary or final, entered by the Commission of Industrial Relations ... shall be deemed to be of the same force and effect as like orders entered by a district court and shall be enforceable in appropriate proceedings in the courts of this state."); International Bhd. of Elec. Workers v. Omaha Pub. Power Dist., 209 Neb. 335, 339-342, 307 N.W.2d 795, 798-799 (1981). The authority of the Commission "is limited to situations in which the parties have not yet reached an agreement." Transport Workers of America v. Omaha Transit Authority, 205 Neb. 26, 286 N.W.2d 102 (1979)(Syllabus of the Court); Saltz v. School Dist. of Norfolk, 208 Neb. 740, 305 N.W.2d 635 (1981).

\textsuperscript{130} Transport Workers of America, 205 Neb. at 34, 286 N.W.2d at 107 (1979).

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 34-35, 286 N.W.2d at 107.
belonging to either of the others, except as hereinafter expressly directed or permitted.\textsuperscript{133}

The Court's analysis ignored the language "except as hereinafter expressly directed or permitted."\textsuperscript{134} The Court also ignored the clear purpose of the Constitutional Convention of 1920—to place the authority for an industrial commission in the Nebraska Constitution as an exception to the Distribution of Powers Article\textsuperscript{135}—by stating that the constitutional "absolute prohibition upon the exercise of the executive, legislative and judicial powers by the same person or the same group of persons . . . has remained a part of the Constitution unchanged since 1875."\textsuperscript{136} And it is at variance with the well reasoned five-judge holding in the 1972 \textit{Seward} decision\textsuperscript{137} that Article XV, Section 9 is a constitutional exception to Article II of the Constitution.

The 1947 Nebraska Legislature thought in judicial terms when it established the Court of Industrial Relations. Other states created commissions in similar circumstances. The Supreme Court decisions changed the underlying policy from a "Court" established under Article XV, Section 9 of the Constitution to an administrative agency relying upon the plenary powers of the Legislature and subject to the normal rules of separation of powers and delegation of authority. As a consequence, today the Commission must comply with some judicial formalities which may not best suit the situation involved and the Commission is denied some judicial authority which would be advantageous in carrying out its statutory responsibilities.

B. \textbf{Mandatory Single Standard}

A defining feature of Section 48-818 is that the Commission of Industrial Relations is required to base its decision on a single standard of overall compensation and conditions of employment which are comparable to other workers in similar employments.\textsuperscript{138} The sole bar-

\begin{itemize}
  \item \textsuperscript{133} Neb. Const. art. II, § 1.
  \item \textsuperscript{134} \textit{Transport Workers of America}, 205 Neb. at 34-35, 286 N.W.2d at 107.
  \item \textsuperscript{135} See Gradwohl, supra note 3, at 673-75. To invoke Article XV, Section 9, would also require a determination that governmental service, education, or public education is a "business affected with a public interest," or that teaching, public school teaching, employment by a public school district, or government employment in general is a "vocation affected with a public interest."
  \item \textsuperscript{136} \textit{Transport Workers of America}, 205 Neb. at 34, 286 N.W.2d at 107 (quoting \textit{Laverty v. Cochran}, 132 Neb. 118, 271 N.W. 354 (1936), which invalidated legislation giving the board of the state bonding fund and the Governor power to remove bonded constitutional officers).
  \item \textsuperscript{138} See Nebraska City Educ. Ass'n v. School Dist. of Nebraska City, 201 Neb. 303, 305-306, 287 N.W.2d 530, 532 (1978)"Section 48-818, R.R.S. 1943, states specifically those factors which the Court of Industrial Relations shall look to when establishing wage rates and conditions of employment in disputes before it. Sec-
gaining impasse resolution authority of the Commission is that it "shall" apply the statutory comparability standard which "shall" take into consideration overall compensation. The statute does not allow the Commission to apply, or exercise discretion with respect to, any other substantive factors.

Fiscal constraints of public school districts are certainly a vital public concern. Section 48-818 does not contain authority for the Commission to consider evidence of "ability to pay." This reflects an underlying policy that the teaching staff should be adequately compensated based upon prevalent wages and conditions of employment, but the general control of public school finances, under the statutes relevant to public education, should be a responsibility of the governing school boards. Thus, absent legislative directions, the Commission applies the comparability standard without taking into account "ability to pay" or other matters relating to public school finance.

By comparison, the Iowa statutes contain a true arbitration procedure under which arbitrators:

shall consider, in addition to any other relevant factors, the following factors:

a. Past collective bargaining contracts between the parties including the bargaining that led up to such contracts;

b. Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

c. The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services.

d. The power of the public employer to levy taxes and appropriate funds for the conduct of its operations.

The Iowa statutory standards relating to collective bargaining history, interests and welfare of the public, ability to pay, and the power

139. Nebraska City Educ. Ass'n, 201 Neb. at 305-06, 267 N.W. at 532.

140. See State Code Agencies Educ. Ass'n v. Nebraska Dep'ts of Pub. Insts., Educ. and Correctional Servs., 219 Neb. 555, 558, 364 N.W.2d 44, 46 (1985)("Although the Legislature has appropriated funds generally for the departments and agencies of the state in the cases before us, the appropriations bill enacted by the Legislature does not specifically allocate sums as salaries or wages for particular jobs or positions of employment in those departments or agencies. Allocation of funds among employees as salaries or wages is a matter for discretion in administration of the department or agency.").


of the public employer to levy taxes can be applied much more effectively in an arbitration setting than with the procedures presently required of the Nebraska Commission of Industrial Relations. It would be a monumental undertaking for the parties and the Commission to apply the Iowa standards under Nebraska’s existing formal procedural requirements and judicial precedents. For example, giving consideration to “the ability of the public employer to finance economic adjustments,” would require an examination of the entire school district budget, all of the school district’s potential sources of funds, and its determinations concerning education policy and the expenditure of its available resources. To broaden Nebraska’s statutory impasse resolution yardstick would require not only substantial revision of the present procedural requirements, but also a reexamination of the constitutional basis for the existence of the Commission and the constitutional rules concerning separation of powers and delegation of authority.

C. Application to Public School Districts

The substantive requirements of the statutory standard in Section 48-818 appear to have been applied to public school employment of certificated teachers and other employees without major difficulties. Section 48-818 requires that the Commission [1] “shall establish rates of pay and conditions of employment”; [2] “which are comparable to the prevalent wage rates paid and conditions of employment”; [3] “maintained for the same or similar work of workers exhibiting like or similar skills”; [4] “under the same or similar working conditions”; and [5] “take into consideration the overall compensation presently received by the employees.”

Four decisions of the Commission, which were appealed to the Supreme Court between 1972 and 1978, involved certificated teachers in public school districts and determined the basic contours of Section 48-818. Each case affirmed the Commission’s application of the

143. Neb. Rev. Stat. § 48-818 (Reissue 1998). The first sentence of the section also states that the order may establish “hours of labor.” But the authority of public school boards “to schedule work” has been said “to be exclusively within the management prerogative.” School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 188 Neb. 772, 784, 199 N.W.2d 752, 759 (1972). See Metropolitan Technical Community College Educ. Ass’n v. Metropolitan Technical Community College, 203 Neb. 832, 281 N.W.2d 201 (1979) (faculty “contact hours”).

144. Seward Educ. Ass’n v. Sch. Dist. of Seward, 188 Neb. 772, 199 N.W.2d 752 (1972) (affirming the Commission’s findings and order for an increased base salary without discussion); Crete Educ. Ass’n v. School Dist. of Crete, 193 Neb. 245, 226 N.W.2d 752 (1975) (affirming the Commission’s methodology and decision); Orleans Educ. Ass’n v. School Dist. of Orleans, 193 Neb. 675, 688-689, 229 N.W.2d 172, 180 (1975) (declining to address the issue since the assigned error, that the order was not supported by the evidence, was not discussed or argued in the School District’s brief); Nebraska City Educ. Ass’n v. School Dist. of Nebraska
statutory elements in establishing wages and conditions of employment. There has been no Supreme Court decision involving the establishment of public school teachers’ wages and conditions of employment since 1978.

The Supreme Court decisions drew a line between “conditions of employment” within the jurisdiction of the Commission and “management prerogatives” which are not subject to the public employee bargaining statutes. Recognizing that “there are many nebulous areas that may overlap,” the term “conditions of employment can be interpreted to include only those matters directly affecting the teacher’s welfare,” but school “boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education.” The reasoning is that the public employee bargaining statutes are:

not intended to in any way remove the lawful responsibility or the proper prerogative of public employers in the exercise of their recognized management rights, or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the CIR in resolving industrial disputes as prescribed by the statutes.

The Supreme Court, in its first teachers’ wage case, stated that:

Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: 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.

Matters of a teacher’s financial or personal welfare fall within the definition of “conditions of employment.” Matters of determining educational policy, management prerogatives in carrying out educational policy, and statutory duties are outside of the scope of “conditions of employment.” But the financial impact upon teachers of “manage-

City, 201 Neb. 303, 267 N.W.2d 530 (1978) (affirming the Commission’s establishment of a base salary and other benefits, particularly as to the Commission’s refusal to consider evidence relating to the ability of the school district to finance the Commission’s determinations).


146. Seward Educ. Ass’n, 188 Neb. at 784, 199 N.W.2d at 759.

147. University Police Officers Union v. Univ. of Nebraska, 203 Neb. 4, 15, 277 N.W.2d 529, 536 (1979)(stating that “not all matters about which the public employer and its employees disagree constitute an industrial dispute over which the CIR obtains jurisdiction”).

148. Seward Educ. Ass’n, 188 Neb. at 784, 199 N.W.2d at 759; see Douglas County Health Dep’t Employees Ass’n v. County of Douglas, 229 Neb. 301, 317, 427 N.W.2d 28, 40 (1988)(discussing “reassignment of individuals within certain job classifications”).
ment prerogatives" is a "condition of employment" within the statutory bargaining impasse mechanism.\textsuperscript{149}

The elements of work skills comparability have not been an issue with respect to certificated teachers under the statutory language, "maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions."\textsuperscript{150} The Supreme Court has stated that "the essence of the statutory test established by § 48-818 is one of work comparability, not employer comparability."\textsuperscript{151} Nevertheless, from the outset of litigation involving the applicability of Section 48-818 to certificated teachers (and equally with respect to other public employees), the parties, the Commission, and the Supreme Court have focused primarily on comparable school districts as the standard for determining an "array" for establishing "overall compensation" which is "comparable to the prevalent." The Commission has, based on the evidence presented by the parties, "also recognized that teachers in Nebraska are fungible, that all schools are somewhat comparable and all working conditions for teachers are somewhat similar."\textsuperscript{152}

The focus on comparable school districts, rather than work skills, can be traced to the Commission's 1971 decision in the \textit{Seward} litigation.\textsuperscript{153} The 1969 Legislature had recently brought public school districts within the public employment bargaining statutes.\textsuperscript{154} The Legislature also deleted from Section 48-818 the former economic factors of "the same labor market area," "adjoining labor market areas within the state," and "which in addition bear a generally comparable relationship to wages and conditions of employment maintained by all other employers in the same labor market area."\textsuperscript{155} The Commission's wage determination proceeding was conducted by both parties on the basis of comparisons with employments of other teachers in comparable school districts. A member of the Seward Board of Educa-

\textsuperscript{149} Metropolitan Technical Community College Educ. Ass'n v. Metropolitan Technical Community College, 203 Neb. 832, 842, 281 N.W.2d 201, 206 (1979).
\textsuperscript{150} NEB. REV. STAT. §§ 48-818 (Reissue 1998).
\textsuperscript{151} Douglas County Health Dep't Employees Ass'n, 229 Neb. at 313, 427 N.W.2d at 37.
\textsuperscript{153} School Dist. of Seward Educ. Ass'n v. School Dist. of Seward, 1 C.I.R. 34-1, 34-20 to 34-51 (Order entered Aug. 9, 1971), aff'd 188 Neb. 772, 199 N.W.2d 752 (1972). Candor requires a note that the author of this article was the Judge of the Court of Industrial Relations who wrote the Order and is at least partially responsible for whatever faulty statutory interpretation is alleged to be contained in the determination that it is appropriate to examine "comparable school districts" in establishing the "array" for a consideration of "overall compensation" which is "comparable to the prevalent."
\textsuperscript{154} 1969 Neb. Laws, ch. 407, § 1, 1405, 1406.
\textsuperscript{155} Id. § 6, 1969 Neb. Laws at 1410-1411.
tion testified that “[w]e have always tried to stay in line with, for example, the Central Ten [Athletic Conference]” in establishing Seward wages and conditions of employment for certificated teachers.156 Relying on this line of testimony, and the testimony of the Association’s expert witness as to comparability of work skills and working conditions,157 the Commission (then the Court) of Industrial Relations wrote:

Section 48-818 requires that the Court shall establish rates of pay “which are comparable to the prevalent wage rates paid . . . for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.” In a sense, this statutory language as to “comparable” and “prevalent” requires the Court to measure the settlement of the industrial dispute before the Court by the standards set by the “peers” of the parties before the Court.

. . . .

. . . Mr. Tuma and the Seward Board of Education have relied heavily in the past on salaries set by other school districts in the Central Ten Athletic Conference. We do likewise in settling the present industrial dispute. Additionally, the information introduced in evidence with respect to other school districts for 1971-1972 is supportive of the quality of “prevalence” for salaries and overall compensation paid by districts in the Central Ten Athletic Conference.158

Since then, determinations under Section 48-818 have consistently been made using comparable employments in determining “prevalence.” The first decision in which the Supreme Court expressly examined the statutory components of Section 48-818 came in March 1975 and involved the Crete School District.159 The Court stated that “[t]he 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.”160 It adopted a dictionary definition of “comparable” as “having enough like characteristics or qualities to make comparison appropriate,”161 reviewed the Commission’s methodology in the Seward and other decisions,162 and held that the Commission had not committed error “in not making exactly the same comparison in this case that it did in the Seward

157. See id. at 34-36.
158. Id. at 34-37 and 34-38.
160. Id. at 255, 226 N.W.2d at 758-759. Later, in interpreting Section 48-818, the Court repeated: “Thus, again we are left with the ultimate question of whether, as a matter of fact, the school districts selected for comparison in this case are adequately similar to the subject district to fulfill the requirements of section 48-818.” Id. at 256, 226 N.W.2d at 759.
161. Id. at 252-253, 226 N.W.2d at 757 (citing Webster’s New Third International Dictionary).
162. Id. at 253-256, 226 N.W.2d 752, 757-759.
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case," even though Crete and Seward were both members of the Central Ten Athletic Conference. The Supreme Court quoted, with approval, a portion of the Commission's decision which tracked the 1969 legislative amendment of Section 48-818 and stated "[t]he requirement of similarity of working conditions helps the judges develop that judgment [application of the standard "of general practice, occurrence, or acceptance"] or a receptivity to the proper connotation of the word 'prevalent.'" Five months later, the Supreme Court, relying on the Crete decision, approved the Commission's methodology in determining wages and conditions of employment for Omaha Firefighters, which also involved comparisons with fire departments outside of the State of Nebraska.

In its most recent decision involving Section 48-818, the Supreme Court reiterated that "[i]n selecting employment units . . . for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make a comparison appropriate." After noting "which employers should be included in an array is dependent upon the issues in the case in question," the Court concluded that "[o]f necessity, determining comparables requires the granting of some discretion to the com-

163. Id. at 255, 226 N.W.2d at 758-59 ("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."). The Supreme Court sustained the Commission's consideration of only "school districts within 60 miles of Crete and expressly refused to consider the wage rates and conditions of employment in certain other school districts for the reason that they were 'too small and too distant.'" Id.; see also Lincoln Firefighters Ass'n v. City of Lincoln, 253 Neb. 837, 843, 572 N.W.2d 369, 374 (1998)("[W]hich employers should be included in an array is dependent upon the issues in the case in question, for it does not necessarily follow that the use of an array in a particular case requires that it be used in a subsequent case involving the same parties.").

164. The use of athletic conference as a means of selecting an array for comparison purposes has been subject to considerable misunderstanding through the years. The Seward decision used the Central Ten Athletic Conference as an array based upon the testimony and documentary evidence in the record in that case with respect to the Seward School District. Other CIR cases, before and after the Seward decision, have used a variety of factors such as geographic proximity, size of school measured by the number of resident pupils, and community of interest. See Genoa Educ. Ass'n v. Nance County School Dist., 10 C.I.R. 179 (Neb. 1989).

165. Id. at 254, 226 N.W.2d 758 (quoting Fremont Educ. Ass'n v. School Dist. of Fremont, 1 C.I.R. 50-1, 50-8 (Neb. 1972)).


167. Lincoln Firefighters Ass'n v. City of Lincoln, 253 Neb. 837, 842, 572 N.W.2d 369, 373 (1998)("As a general rule, it may be said that the factors most often used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions.").
mission, and unless there is no substantial evidence upon which the commission could have concluded that the factors it used resulted in an appropriate array, we may not as a matter of law disallow the commission's determination."168

Even the 1988 Supreme Court decision, stating that "the essence of the statutory test established by § 48-818 is one of work comparability, not employer comparability," affirmed the Commission's methodology in "selecting comparable employers for inclusion in an array to determine the prevalent wage rates paid and conditions of employment for establishing wages and fringe benefits for the Association."169 And the opinion further stressed that "[i]t is the selection of comparables which is the most critical part of the process performed by the CIR as the task of the CIR is to determine prevalent wage rates paid and conditions of employment."170

The Section 48-818 determinations involving Nebraska public school districts have all been made using other Nebraska public school districts for comparison. No salary disputes involving the Omaha Public School District or the Lincoln Public School District have been settled by the Commission under Section 48-818. With the Omaha and Lincoln public school districts being the only ones in their respective statutory classifications, there has been no occasion to compare with school districts outside of the State of Nebraska.

The Supreme Court has stated that "there are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists."171 It is comfortable for the parties and the Commission to utilize arrays of comparable Nebraska school districts since Nebraska school conditions are well understood by the parties and the parties can even utilize the same basic factual information which is publicly available. On the other hand, to the extent that the economic market for certificated public school teachers is a national market, the mechanism featuring geographic proximity, number of students, and other local considerations does not give full economic effect to the "essence" of Section 48-818, "same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." In considering employments outside the State of Nebraska, however, the Commission "is required to weigh, compare, and adjust for any economic dissi-

168. Id. at 843, 572 N.W.2d 374 ("Stated another way, determinations made by the commission in accepting or rejecting claimed comparables are within the field of its expertise and should be given due deference.").
170. Id. at 308, 427 N.W.2d at 35.
171. Id. at 312, 427 N.W.2d at 37 (quoting Lincoln County Sheriff's Employees Ass'n v. County of Lincoln, 216 Neb. 274, 278-279, 343 N.W.2d 735, 739 (1984)).
larities shown to exist which have a bearing on prevalent wage rates."172 The economic impact of the national market for certificated teachers is delivered through general hiring and salary schedules of Nebraska public school districts, but not by Section 48-818.

D. Overall Compensation

Section 48-818 requires that:

In establishing wage rates the commission shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees.173

The statutory requirement is merely that the Commission "shall take into consideration" the overall compensation, which provides considerable leeway in how wages and conditions of employment can be adjusted within the total parameters of Section 48-818.174 The Supreme Court has made clear that "Section 48-818 requires only that the 'overall compensation' be addressed."175

The basic methodology for applying the criteria relating to "overall compensation" was hammered out in the Crete litigation in the mid-1970s.176 The Commission "after first comparing the base salaries paid by the [Crete School District] with that of the other districts, then went on to compare the fringe benefits of the different districts in an item-by-item manner."177 The Commission increased the base salary amount and ordered the School District to contribute to the monthly cost of the teachers' income protection insurance.178 The Nebraska Supreme Court stated that the Commission "is compelled by section

172. Id. at 319, 427 N.W.2d at 41 ("Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on the prevalent wage rates.").


174. But see Lincoln Fire Fighters v. City of Lincoln, 198 Neb. 174, 180, 252 N.W.2d 607, 611 (1977)(reversing the Commission since "[t]his was not done in this case as no evidence was presented on fringe benefits received by the firemen in those cities used for comparison.").

175. Lincoln Firefighters Ass'n v. City of Lincoln, 253 Neb. 837, 845, 572 N.W.2d 369, 375 (1998)("We recognize the impossibility or impracticality of retroactively changing fringe benefits for an expired contract year, and we question the practicality of assigning a monetary value to a fringe benefit such as the number of employees allowed to participate in negotiations.").


177. Id. at 257, 226 N.W.2d 760.

178. Id. at 247, 226 N.W.2d at 754-755.
48-818, R.R.S. 1943, to consider the entire situation regarding the fringe benefits made available by the subject school district and those made available by comparable school districts.”\textsuperscript{179} And in doing so, the Commission "is required to offset possible unfavorable comparisons between districts with other comparisons which are favorable when reaching its decisions establishing wage rates.”\textsuperscript{180} It held that the Commission "did make the 'overall' consideration called for in section 48-818.”\textsuperscript{181}

There is no linkage between the subject matters which the parties have discussed or negotiated during the process of collective bargaining leading up to the impasse and a subsequent determination under Section 48-818. The Commission is apparently free to proceed as if the prior bargaining had not taken place. From the statutory language and the discretion of the Commission in establishing wages, benefits, and working conditions, however, it does not appear mandatory for the Commission to do so if the dispute can be resolved within the requirements of Section 48-818 by adjusting the items actually discussed or negotiated during bargaining. The Supreme Court has held that "[i]t is clearly within the authority of the CIR to order a reduction of wages . . . whether or not lowering wages was an issue at the bargaining table.”\textsuperscript{182} But there is no requirement that the Commission do so if the matter can be properly decided under the overall compensation standard without reducing wages.

The Commission has stated in a long-standing series of decisions, not appealed to the Supreme Court on this issue, that "negotiations held prior to the filing with the Commission are irrelevant and immaterial.”\textsuperscript{183} The rationale given by the Commission is that "[t]his is a sensible rule, based on the conviction that the parties should not be constrained or prejudiced in any subsequent submittal to the CIR by what transpires during these negotiation sessions.”\textsuperscript{184} This reasoning ignores the underlying policy of the public employment bargaining scheme that negotiated agreements of the parties are preferable to the statutory impasse resolution provisions. That policy is especially important since the parties are engaged in a course of continuous relationships, past, present and future. It would be much more sensible for the Commission to preserve its broad discretionary authority in fashioning an appropriate tailoring of wages and conditions of employ-

\begin{itemize}
\item \textsuperscript{179} Id. at 257-258, 226 N.W.2d 760.
\item \textsuperscript{180} Id. at 258, 226 N.W.2d at 760.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Douglas County Health Dept' Employees Ass'n v. County of Douglas, 229 Neb. 301, 316, 427 N.W.2d 28, 39 (1988).
\item \textsuperscript{184} Id.
\end{itemize}
ment to the ongoing relationships of the parties. The Commission should accept evidence with respect to the negotiations of the parties leading to the impasse at issue for the limited purpose of maximizing its statutory discretion in establishing “overall compensation” under Section 48-818. The Commission would not lose its authority to establish or vary the matters not raised during negotiations should it, in its discretion, determine that it is appropriate to do so in the application of Section 48-818.

There is some legislative support for a policy of considering the subjects involved in the negotiations of the parties leading to a bargaining impasse, in the special master procedures enacted in 1995 applicable to public school districts, educational service units, and community colleges. The special master procedures require that the special master “shall choose the most reasonable final offer on each issue in dispute” considering the criteria of Section 48-818, and “the commission shall resolve, pursuant to the mandates of such section, all of the issues identified by either party and which were recognized by the special master as an industrial dispute.” But the special master proceeding can be invoked only if both parties agree after the filing of a petition with the Commission, and it has not yet been invoked.

E. “Comparable to the Prevalent”

The bottom line of the Section 48-818 mechanism is to “establish rates of pay and conditions of employment which are comparable to the prevalent.” Based on the evidence, the Commission must ascertain “the prevalent wage rates paid and conditions of employment.” The “prevalent wage rates paid and conditions of employment,” are compared with those of the employer before the CIR, and then wage rates and fringe benefits are adjusted accordingly. Section 48-818 requires that “the commission shall take into consideration the overall compensation presently received by the employees.” Within those parameters, the Commission has broad discretion in formulating its final resolution of the dispute.

186. Id. § 48-811.02(4).
187. Id. § 48-811.02(5).
188. Id. § 48-811.02(2).
189. A “prevalent” benefit is one “widely or generally offered within the array,” but “if a majority of the array does not offer a benefit, it is not prevalent, even if [the employer before the CIR] offers such a benefit.” See Lincoln Firefighters Ass’n v. City of Lincoln, 253 Neb. 837, 849, 572 N.W.2d 369, 377 (1997) (affirming the Commission’s determination).
The word "comparable" appears only once in the text of Section 48-818, but it serves two distinct purposes. It is used in selecting "comparable" employments for determining the "array" used to ascertain "prevalent wage rates paid and conditions of employment." In this sense, the standard is "whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make a comparison appropriate."191 "Comparable" is also used as the yardstick in fashioning the order of the Commission establishing the "rates of pay and conditions of employment which are comparable to the prevalent." In that sense, the rates of pay and conditions established must be "comparable to the prevalent," taking "into consideration the overall compensation."

The resolution of public school district teacher compensation cases has fit relatively easily within the bottom line calculations of Section 48-818. Due to the many similarities which exist among the large number of Nebraska public school districts, it has been possible for the Commission, as stated by the Supreme Court in the Crete decision in 1975, to establish a "salary base for the teachers at the approximate midpoint of the total compensation paid by the schools selected by it for comparison, according to its customary practice."192 The Commission is required by Section 48-818 "to consider the entire situation regarding the fringe benefits made available by the subject school district and those made available by comparable school districts... [and] is required to offset possible unfavorable comparisons between districts with other comparisons which are favorable when reaching its decisions establishing wage rates."193 When the evidence warrants a decrease, "[i]t is clearly within the authority of the CIR to order a reduction of wages."194 It is possible that some teachers would receive decreases in wages while other teachers would receive increases.195

The Commission also has a broad discretion with respect to conditions of employment. If a condition of employment is clearly shown to be "prevalent," the Commission "may enter an order either as to that

condition of employment or find that the subject [employer's] condition in this regard is lesser or greater than the prevalent, and adjust the 'overall compensation' accordingly.\textsuperscript{196} The 1975 \textit{Crete} decision stated that although the Commission had established the salary schedule "at the approximate midpoint of the total compensation paid by the schools selected by it for comparison," it was proper for the Commission "to compare the fringe benefits of the different districts in an item-by-item manner."\textsuperscript{197}

The requirement of "comparable to the prevalent" gives predictability to the level of wages and conditions of employment for certificated teachers in public school districts. It represents sound personnel management in looking to "peers" for guidance in setting employment practices. It can assist the bargaining process by indicating a potential result if negotiations do not produce an agreement. It has proven to be a workable standard by which the Commission can resolve bargaining impasses in a manner that avoids interruptions of the educational activities of public schools.

But the major shortcoming of "comparable to the prevalent" is that it relates only to somewhat fewer than half of the school districts in an array of comparable districts. Only those districts below the "prevalent" in terms of overall compensation are at risk under Section 48-818. The element of "comparable," coupled with the hazards and costs of litigation and possible decreases in some items of overall compensation, means that only school districts which are demonstrably below the "prevalent" are likely to be affected by the bargaining impasse resolution mechanism. Thus, the actual bottom line effect of Section 48-818 is merely to increase those levels of teacher compensation which are substantially less than "prevalent" up to the "approximate midpoint" of comparable school districts. It is truly just an impasse resolution mechanism. It is a significant factor in determining the overall compensation of relatively few certificated teachers in Nebraska.

IV. CONCLUSION

Nebraska's public employment bargaining impasse resolution mechanism has had a curious and convoluted history. It is a product of these historical circumstances rather than design.

The 1920 Nebraska Constitutional Convention created what it considered to be cutting edge constitutional authority for the Legislature to deal with industrial disputes involving "any business or vocation affected with a public interest." It intentionally placed the authority in what became Article XV, Section 9, of the Constitution so that it


\textsuperscript{197} Crete Educ. Ass'n v. School Dist. of Crete, 193 Neb. 245, 257-58, 226 N.W.2d 752, 760 (1975).
would operate as an exception to the normal constitutional standards of separation of powers and delegation of authority. This constitutional authority was not invoked prior to World War II, however, due in large part to the changing positions of the Supreme Court of the United States concerning the significance of "business or vocation affected with a public interest" under the Constitution of the United States.

In 1947, the Nebraska Legislature passed statutes, expressly implementing Article XV, Section 9, to deal with industrial disputes involving privately owned public utilities and Nebraska's publicly owned public utilities. The mechanism for establishing wages and conditions of employment was particularly suited for privately owned public utilities. Unlike several other states which enacted similar legislation in 1947, however, Nebraska created a "Court of Industrial Relations" with some judicial features rather than a typical industrial commission. Four years later, the Supreme Court of the United States held that state statutes involving employment matters of privately owned public utilities were preempted by federal labor laws. But the Nebraska statutes remained on the books, applicable only to Nebraska's publicly owned public utilities, "governmental service in a proprietary capacity."

The 1969 Nebraska Legislature brought all public employers, including public school districts, within the 1947 privately owned public utility legislation enacted to implement Article XV, Section 9, of the Constitution. It altered the impasse resolution criteria by deleting some of the prior requirements of the statutes, but without rewriting the remaining portions of the statute, Section 48-818.

Soon thereafter, a number of cases were filed in the Court of Industrial Relations involving certificated teachers in public school districts. The early litigation involving public school districts shaped the contours of the entire mechanism applicable to all public employers and employees. In 1972, the Nebraska Supreme Court took up the impasse resolution issues for the first time. It seemed to dodge the issue of whether public schools and certificated teachers in public schools are within the language "any business or vocation affected with a public interest." Five judges did agree, however, that Article XV, Section 9 is an exception to the constitutional requirements of separation of powers and delegation of authority. But those issues continued to persist throughout subsequent litigation for nearly a decade. Before a final resolution of the issues pertaining to Article XV, Section 9, the Supreme Court developed an alternative basis for its decision — that since the Legislature has plenary power over public school districts, the statutes were validly enacted in any event. The Supreme Court, in subsequent decisions, held that the Legislature also has authority, apart from Article XV, Section 9, with respect to all other state and local governmental agencies to support the enactment...
of the statutory bargaining impasse resolution system. The focus of the Supreme Court shifted quietly from the five judge holding in the Seward decision that Article XV, Section 9 is a constitutional exception to Article II, to holding that the Commission (then the Court) of Industrial Relations is merely an ordinary administrative agency to which the normal rules of separation of powers and delegation of authority do apply. To this day, the Supreme Court has not expressly decided the underlying issues concerning Article XV, Section 9, despite the statutory language that the statutes are intended to "make operative the provisions of section 9, Article XV, of the Constitution of Nebraska."

As a result, the Commission remains vested with some judicial characteristics which can be a disadvantage in some instances but does not have other judicial characteristics, such as the authority to issue declaratory judgments and summary judgments in its proceedings, which could be of considerable advantage in carrying out the purposes of the statutes. A more effective system would combine elements of administrative authority and judicial authority in the Commission of Industrial Relations, just as the Constitutional Convention of 1920 and the 1947 Nebraska Legislature envisioned.

The single standard of establishing rates of pay and conditions of employment which are "comparable to the prevalent," designed for privately owned public utilities, has proven workable for the Nebraska governmental sector to date. The Commission and the Supreme Court have engaged in sensible, pragmatic, and perhaps "creative" interpretations of the statutory language of Section 48-818, especially in terms of what is "comparable."

The statutory impasse resolution formula has two significant aspects which may call for reconsideration in the future. The formula contains only a single standard of "overall compensation" for work skills in comparable employments. It does not take into account school district finance, the history of the bargaining relationships, and other elements commonly found in the statutes of other states. The bottom line determination of "comparable to the prevalent" affects just those situations in which the "overall compensation" of the subject school district and its teachers is substantially below the "prevalent." It is exclusively an impasse resolution formula, not a general standard for teacher compensation in Nebraska.

Increasing pressures on public school finance and adequate teacher compensation will require a reexamination of the statutory bargaining impasse resolution mechanism. The substantive criteria of Section 48-818, the procedural authority of the Commission of Industrial Relations in settling industrial disputes, and most of all, the constitutional authority of the Legislature under Article XV, Section 9, of the Constitution, should each be a part of that reexamination.