

Legislative Performance Audit

Committee

Committee Members:
Senator John Harms, Chair
Senator Danielle Conrad, Vice Chair
Speaker Mike Flood
Senator Lavon Heidemann
Senator Arnie Stuthman
Senator Dennis Utter
Senator John Wightman

Legislative Audit Office
P.O. Box 94945, State Capitol
Lincoln, NE 68509-4945
402-471-2221

Section Staff:
Martha Carter, Legislative Auditor
Don Arp, Jr., Analyst
Clarence Mabin, Analyst
Angela McClelland, Analyst
Dana McNeil, Analyst
Stephanie Meese, Legal Counsel
Sandy Harman, Committee Clerk

Memorandum

To: Legislative Performance Audit Committee
From: Legislative Performance Audit Section, Dana McNeil and Steph Meese, Auditors
Date: November 13, 2009
Re: Standard of Review to be used by the Commission of Industrial Relations in an Appeal pursuant to § 81-1383

Recently, in four separate cases of state employee wage appeals under the State Employees Collective Bargaining ACT (SECBA), the Commission of Industrial Relations (Commission) denied the State's requests to admit additional evidence which was not considered by the Special Master. This has been alleged to be a reversal of past practice. As a result, the Committee has asked us to conduct a preaudit inquiry to determine whether this subject was appropriate for a full audit. We concluded that a full audit is unnecessary as the issue is a policy issue as we have outlined in this memo. We find that the statutory language is unclear and may not be consistent with the legislative intent for reasons discussed below. Consequently, further legislative action may be required.

Following is a brief overview of the bargaining process, followed by discussion on each of the following questions: (1) What is the statutory framework for the Commission's review of Special Master rulings? (2) Were the Commission's decisions in the four recent cases, in which the Commission did not allow additional evidence of comparability in its review of the Special Master rulings, consistent with prior decisions?¹ (3) Finally, if the standard of review to be used by the Commission is unclear, what are the Legislature's options for correcting the problem?

Bargaining Process Overview

When agreement cannot be reached on any state employee wage issue through the negotiations and mediation stages of the collective bargaining process, the issue(s) are submitted to a Special Master for resolution. A Special Master is a factfinder, who is not required to be an attorney, but who has some expertise in labor relations.² In issuing his or her decision, the Special Master must choose the most *reasonable final offer on each disputed issue*. In making this choice, s/he is directed to "consider factors relevant to collective bargaining between public employers and public employees, including comparable rates of pay and conditions of employment as described in § 48-818."³

¹ These cases are: No. 1207 (*Board of Regents of the University of Nebraska at Omaha v. University of Nebraska at Omaha Chapter of the American Associations of University Professors*), No. 1208 (*State of Nebraska v. Nebraska Association of Public Employees/AFSCME Local 61*), No. 1209 (*State of Nebraska v. State Code Agencies Teachers Association, NSEA -NEA*) and No. 1210 (*Board of Trustees of the Nebraska State Colleges v. State College Education Association*).

² Neb. Rev. Stat. § 81-1380 and meeting with Mark McGuire and Dalton Tietjen, Attorneys, July 27, 2009.

³ Neb. Rev. Stat. § 81-1382(2) and (3).

If either party is dissatisfied with the Special Master's decision, the case can be appealed to the Commission. Either party can appeal of the Commission's ruling to the Supreme Court.

Question 1: What is the statutory framework for the Commission's review of Special Master rulings?

Two sets of statutes are relevant to our analysis. SECBA sets out the negotiations and appeal process for state employee wage appeals and establishes a tight timeline for resolution of impasse issues to accommodate the timing of the legislative session and deadlines for making budgetary determinations.⁴ The Industrial Relations Act (IRA), and specifically § 48-818, defines the comparability review that the Commission must apply when a Special Master ruling is appealed.⁵

SECBA established some limits on the Commission's review of a Special Master ruling, including that the Commission:

- cannot review an issue that was not presented to, and ruled upon by, the Special Master;⁶
- must give "significant deference" to the Special Master's ruling; and
- if the Commission does overturn a Special Master's ruling, it must choose one of the *final offers* on *each issue* appealed.⁷

SECBA also establishes a standard of review for the Commission that differs from that used by the Special Master. The Special Master must base his or her review on *reasonableness*, while the Commission's must base its review on *comparability*. Specifically, the Commission:

- can only set aside the Special Master's ruling in circumstances where it is "significantly disparate from prevalent rates of pay and conditions of employment" when applying a § 48-818 *comparability* review.⁸

By requiring the Commission to use a different standard of review than that used by the Special Master, the statutes suggest the need for the Commission to receive evidence related to that standard. However, other statutory provisions, including the limits set on the Commission's review and the expedited timeframe, suggest that the Legislature did not envision the Commission receiving and evaluating new evidence. While the legislative history of LB 661 (1987), which created SECBA, contains some discussion about the potential problems resulting from the different review

⁴ Legislative History, LB 661 (1987), committee hearing remarks by Senator Jerome Warner, March 2, 1987, pgs. 39-40.

⁵ Neb. Rev. Stat. § 48-818 specifically provides: "Except as provided in the [SECBA], 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 [C.I.R.] 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 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."

⁶ Neb. Rev. Stat. § 81-1383(1).

⁷ Neb. Rev. Stat. § 81-1383(3).

⁸ Neb. Rev. Stat. § 81-1383(2).

standards,⁹ we believe it clearly reflects an intention by the Legislature that the primary and paramount goal of SECBA was to encourage resolution of issues, expedite the wage negotiation process and discourage litigation.¹⁰ That intention would seem to support an interpretation of the statutes that did not allow for the Commission to receive new evidence, in order to expedite the process.

Question 2: Were the Commission's 2009 decisions in case numbers 1207, 1208, 1209 and 1210, in which the Commission did not allow additional evidence of comparability in its review of the Special Master rulings, consistent with prior decisions?

No, the 2009 decisions were not consistent with past Commission decisions.

In the 2009 cases, the Commission held that it was not authorized to accept evidence beyond what had been considered by the Special Master. Specifically, it stated that “it could find no basis in any Nebraska statute of legislative intent to deviate from basic appellate procedure by allowing additional evidence to the record made before the Special Master.”¹¹ Further, the Commission ruled that if additional evidence was allowed, it would effectively permit the parties “to bolster what defects now apparently exists in the evidence.”¹²

Prior to the 2009 decisions, the Commission has only addressed the issue of the introduction of additional evidence in three cases.¹³ The language in two of these cases indicates either that additional evidence relevant to comparability was allowed, or that such evidence would have been allowed had it been offered. In the third case, the Commission expressed a concern that the different standard for the Commission’s review created a conflict with the Legislature’s goal of having an expedited review process.

In the first case, *State Law Enforcement Bargaining Council v. State of Nebraska*, the Commission explained that it needed evidence beyond what had been provided to the Special Master because it was charged with a review based on comparability, which is a different standard than that required of the Special Master. Specifically, the Commission stated:

Because the evidence needed by the Commission is not coextensive with the evidence appropriate for the Special Master to weigh and consider, the Commission finds that the parties must be allowed to make a record before the Commission which contains evidence which is otherwise admissible and which is relevant to the task

⁹ Jerry Kriha, Director of Collective Bargaining for NSEA, stated: “[W]hat we’re doing here is mixing two methods of impasse resolution . . . The Special Master concept in LB 661 is based upon last, best offer arbitration. The C.I.R. works on arbitration . . . is arbitration that’s based upon what’s comparable to the prevalent. I don’t believe the two methods for resolving disputes will work. I don’t think that you can mix the two methods and make it work. I think it’s going to raise more questions and create more litigation than choosing one or the other. Yes, last best offer arbitration does work in Iowa, and that is my understanding of what the Special Master is patterned after, but it works in Iowa because it is the final step of that process. The C.I.R. works in Nebraska because it is the final step of that process, and to mix the two, I believe, is asking for trouble.” Committee hearing remarks, March 2, 1987, pgs. 59-60.

¹⁰ Legislative History, LB 661 (1987), committee hearing remarks by Sen. Warner, March 2, 1987, pg. 39.

¹¹ *State of Nebraska v. NSEA-NEA*, Case No. 1209. pg. 2.

¹² *Id.*

¹³ These cases are: *State Law Enforcement Bargaining Council v. State of Nebraska*, 12 CIR. 32 (1993); *State Law Enforcement Bargaining Council v. State of Nebraska*, 13 C.I.R. 104 (1998) and *State of Nebraska v. Neb. Ass’n of Public Employees Local 61*, 15 CIR. 383 (2007).

assigned to the Commission. Other evidence should be excluded as irrelevant and immaterial.¹⁴

In the second case, *State of Nebraska v. Neb. Ass'n of Public Employees Local 61*, the Commission implied that additional evidence relevant to comparability should have been introduced by the State and would have been allowed.¹⁵ Both cases demonstrate that the past practice of the Commission was to admit additional evidence, only if relevant to its standard of review.

In the third case, *State Law Enforcement Bargaining Council v. State of Nebraska*, the Commission pointed out the difficulty in determining its standard of review from the statutory language by stating:

The Legislature could have made it easy for us to carry out its intention by simply requiring that we affirm the Special Master unless there was a clear showing that the Special Master had abused his/her discretion. This is a standard of review in Nebraska that is well established.

Although the Legislature made its intention clear, it prescribed a standard of review substantially different from the legislative charge to the Special Master. Because of this substantial difference in what can be considered, it may be very difficult to carry out the intent of the Legislature.¹⁶

This apparent conflict between the need for additional evidence and the need for an expedited review invites the inconsistency that has occurred in the application of a different standard of review in the four recent wage determination appeals. The Commission explained its deviation from past practice in this way:

The hearing before the Commission in [*State Law Enforcement Bargaining Council v. State of Nebraska (1998)*], appears to be in conflict with the intent of the Legislature in providing a speedy and inexpensive resolution to an appeal filed in front of the Commission. To allow the parties, to essentially have a “second bite of the apple,” ignores basic legislative intent.¹⁷

¹⁴ *State Law Enforcement Bargaining Council v. State of Nebraska*, 13 CIR. 104, 112 (1998).

¹⁵ At the appeal hearing in front of the Commission, the State presented no evidence that the Special Master was incorrect in his decision. Without any additional evidence to prove the Special Master was incorrect in his analysis that the Union's offer was not the most comparable, the Commission cannot overrule his decision. *State of Nebraska v. Neb. Ass'n of Public Employees Local 6*, 15 CIR 383, 388 (2007).

¹⁶ *State Law Enforcement Bargaining Council v. State of Nebraska*, 12 CIR 32, 41 (1993).

¹⁷ *Board of Regents of the University of Nebraska at Omaha v. University of Nebraska at Omaha Chapter of the American Association of University Professors*, Case No. 1207, pg. 5 and *Board of Trustees of the Nebraska State Colleges v. State College Education Association*, Case No. 1210, pg. 6.

Question 3: If the standard of review to be used by the Commission is unclear, what are the Legislature's options for correcting the problem?

The Committee may wish to introduce legislation to clarify the Legislature's intent; however, it may want to wait until the Nebraska Supreme Court has ruled on the pending appeals so it may address issues identified by the court.

The Court's decision will set a precedent for how appeals to the Commission are to be reviewed in the future. In cases where the statutory language is unclear or conflicting, the Court will look to the legislature's intent "as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language."¹⁸ Thus, the Court's ruling may resolve the issues without the need for legislative action.

However, if the Legislature feels that the Court has not accurately interpreted the legislative intent behind SECBA, or if it chooses to proceed directly to legislative action without waiting for a Court determination, it may amend SECBA accordingly. Following are three suggestions for how this might be accomplished.

1. If the Legislature determines that the two different standards of review should be maintained (i.e., reasonableness at the Special Master level and comparability at the Commission level), then the statutory language should be amended to allow the admission of *limited* additional evidence *relevant to comparability* on an appeal to the Commission. If this option is implemented, the statute should also be amended to require that a record be made by the Special Master in case of a later appeal to the Commission.¹⁹
2. Establish a single review standard by changing the Special Master's standard under SECBA from reasonableness to comparability.
3. Remove the Special Master review entirely so that all state employee wage appeals go directly to the Commission.

Conclusion

Audit staff conclude that the questions relating to the Commission's review of Special Master decisions are policy issues that the Committee may address with legislation if it believes change is needed. Consequently, we recommend that the Committee not pursue a full audit.

¹⁸ *Harvey v. Nebraska Life and Health Ins. Guar. Ass'n*, 277 Neb. 757 (2009).

¹⁹ The parties in case no. 1207 mutually agreed to make no written record of the Special Master proceedings in order to reduce costs. According to Dalton Tietjen, Counsel for University of Nebraska at Omaha, Chapter of the American Association of University Professors, this practice occurs frequently with these parties. Meeting with Mark McGuire and Dalton Tietjen, July 27, 2009.