THE HISTORICAL DEVELOPMENT OF 
PUBLIC EMPLOYEE COLLECTIVE 
BARGAINING IN NEBRASKA

JANET STEWART ARNOLD*

INTRODUCTION

The expansion of collective bargaining in public employment is an increasingly controversial topic. The advent of this movement generally dates from the 1959 passage of Wisconsin's public employee bargaining legislation\(^1\) and President Kennedy's 1962 Executive Order 10988 permitting federal employee organization and bargaining.\(^2\) Nebraska, however, developed a system of labor-management dispute resolution much earlier.\(^3\) Nebraska's Court of Industrial Relations was created with a public policy mandate\(^4\) to resolve industrial disputes\(^5\) involving privately-owned public utilities and governmental service in a proprietary capacity.\(^6\) This was the basis upon which all public employee bargaining rights would be built in the state.

At its inception the Court of Industrial Relations was a unique institution\(^7\) and differed from other state public employee labor re-

\* B.A., University of Nebraska at Omaha, 1971; J.D., Creighton University, 1975. Clerk/Executive Director of the Nebraska Commission of Industrial Relations, 1975-80.


2. Id.


4. Id., § 2 and § 3 at 587-88.

5. The Nebraska statute uses the terminology "industrial" dispute instead of the more common "labor" dispute. Neb. Rev. Stat. § 48-801(7) (Reissue 1978). This has resulted in considerable confusion concerning the coverage of the act. This article will avoid the usage of that term.


7. Kansas had enacted similar legislation but it was declared unconstitutional. In Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923), the Court reversed the judgment of the Kansas Supreme Court, holding that the provisions of the act which permitted the Court of Industrial Relations to compel arbitration and set wages deprived the company of property and liberty of contract without due process of law. Id. at 544. After remand to the state court, the case again reached the Supreme Court on a writ of error. Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552 (1923). The Court held that the provisions of the state act permitting the Court of Industrial Relations to fix hours of labor was part of the same system of compulsory arbitration as those providing for the fixing of wages, and therefore unconstitutional. Id. at 569. These decisions were later overruled by
lations bodies that followed. Its organization, operation and function appeared closer to a judicial body than an administrative agency. Legislative and judicial action have changed the system substantially. It is appropriate to examine how Nebraska’s public employee labor relations system differs from other states and whether it still serves the purpose for which it was established.

I

In 1919 and 1920 a constitutional convention convened in Nebraska. Along with other significant state constitutional changes, the convention created article XV, section 9 which provides:

Laws 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, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission.

The Nebraska Legislature did not make use of this constitutional power until 1947, when L.B. 537 was enacted. Organized labor opposed L.B. 537 as it eliminated labor’s most powerful economic weapon—the strike. The Court of Industrial Relations (CIR) was created as an alternative means of settling labor disputes.

The public policy statement in L.B. 537 served as the foundation upon which the CIR developed:

The continuous, uninterrupted and proper functioning and operation of the governmental service...[for] the people of Nebraska are hereby declared to be essential to their
welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service . . . by reason of industrial disputes therein. It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom. It is therefore further declared that governmental service[s] . . . are 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 hereinafter provided .]

The CIR was given broad statutory authority. Following the filing of a petition the CIR had the authority to make temporary findings and orders necessary to “preserve and protect the public interest” pending final determination of the issues. The CIR could establish or alter wage scales, hours of labor, and conditions of employment. CIR orders were binding and had the same force as a district court proceeding, and were enforceable in court. Petitions could be filed by “any employer, employee, or labor organization, or the Attorney General of Nebraska on his own initiative or by order of the Governor.” Jurisdiction initially extended only to disputes involving governmental service in a proprietary capacity or service of a public utility.

The court's rule making authority included the filing of pleadings, the issuance of process and subpoenas, the administering of oaths, and the procedure for investigations, inspections, hearings and trials. Otherwise, proceedings were to conform to the Code of Civil Procedure applicable to the district courts of the state. CIR decisions were directly appealable to the state supreme court.

The CIR remained a relatively obscure body until the late six-

16. Id., § 2 at 587-88.
17. Id., § 16 at 591.
18. Id., § 18 at 592.
19. Id., § 19 at 593.
20. Id., § 11 at 590.
21. Id., § 10 at 590.
22. Id., § 9 at 590.
23. Id., § 12 at 590.
24. Id. CIR decisions are still appealable directly to the Nebraska Supreme Court. Neb. Rev. Stat. § 48-812 (Reissue 1978).
ties, adjudicating only one or two cases a year.\textsuperscript{25} Its greatest impact was probably the availability of a mechanism to resolve public utilities labor disputes and the accompanying prohibition of strikes. This statutory framework undoubtedly influenced the conduct of negotiations to an extent not revealed by the case filing statistics.

Under L.B. 537, the CIR was precluded from ordering bargaining in disputes involving public utilities operated by governmental bodies.\textsuperscript{26} In \textit{International Brotherhood of Electrical Workers Local 507 v. Board of Public Works},\textsuperscript{27} in an effort to eliminate or define the issues in dispute, the CIR ordered that the parties engage in "communications in good faith."\textsuperscript{28} The Nebraska Supreme Court reversed this order\textsuperscript{29} holding that, desirable as such discussions might be to encourage voluntary settlements and effectuate the purposes of the statute, the CIR lacked authority to issue such an order.\textsuperscript{30}

The CIR's authority to order bargaining when either party refused to bargain was limited to disputes between employers and employees of a public utility not operated by the government in its proprietary capacity.\textsuperscript{31} In 1967, the CIR's power to order bargaining was legislatively extended to include public utilities operated by government in its proprietary capacity.\textsuperscript{32} L.B. 583, enacted the same year, made clear that the CIR's jurisdiction covered all refusals to bargain.\textsuperscript{33} However, L.B. 583 also provided that governmental employers could not be compelled to enter into contracts with labor unions.\textsuperscript{34

II

In 1967, the Teachers' Professional Negotiation Act\textsuperscript{35} provided limited bargaining rights to professional employees of public school districts.\textsuperscript{36} Organizations were given the right to represent

\begin{itemize}
\item \textsuperscript{25} Table of cases filed by fiscal year, Commission of Industrial Relations Budget Request 12 (1982).
\item \textsuperscript{26} \textit{See} L.B. 537, § 16, 1947 Neb. Laws 591-92.
\item \textsuperscript{27} 1 CIR No. 17 (1964).
\item \textsuperscript{28} \textit{Id.} at 17-38.
\item \textsuperscript{29} IBEW Local 507 v. City of Hastings, 179 Neb. 455, 138 N.W.2d 822 (1965).
\item \textsuperscript{30} \textit{Id.} at 460, 138 N.W.2d at 826.
\item \textsuperscript{31} L.B. 537, § 16, 1947 Neb. Laws 591-92.
\item \textsuperscript{32} L.B. 298, 1967 Neb. Laws 823.
\item \textsuperscript{33} L.B. 583, § 1, 1967 Neb. Laws 827.
\item \textsuperscript{34} \textit{Id.}, § 2 at 827.
\item \textsuperscript{35} L.B. 485, 1967 Neb. Laws 1738.
\item \textsuperscript{36} \textit{Id.} The coverage of this act is limited to "certificated" employees. NEB. REV. STAT. § 79-1287 (Reissue 1976). Essentially, certificated employees are those
their members in matters of employment relations with public school districts.\textsuperscript{37} Exclusive representation rights were not given, and individual employees could represent themselves in such matters.\textsuperscript{38} Representative organizations were permitted to "meet and confer" with the governing boards but the boards could limit the issues or decline to enter into discussions altogether.\textsuperscript{39} If a school district elected to meet and confer, the resulting discussions were to be in good faith.\textsuperscript{40} If the parties were unable to reach an agreement, the disputes were submitted to a tripartite fact finding board which would recommend a basis for settlement.\textsuperscript{41} Such recommendations required the good faith consideration of both parties, but were not binding on the school district.\textsuperscript{42} The Teachers' Professional Negotiation Act has survived in virtually this same form until the present and now interlocks with the Commission of Industrial Relations Act.\textsuperscript{43} Thus, public school teachers must complete a preliminary step before their disputes may be brought to the CIR.

\section*{III}

The CIR's jurisdiction was initially limited to disputes involving public utilities and governmental services in a proprietary capacity. In 1969, growing concern over public employee strikes and the resulting interruption of important public services\textsuperscript{44} prompted legislative expansion of jurisdiction to include nonproprietary governmental services.\textsuperscript{45} The original bill sought to create a new administrative body to resolve disputes between public employers and employees.\textsuperscript{46} If this proposal had been enacted, Nebraska's system of public employee labor relations might have evolved more closely to what existed in other states. As the CIR already served this function in the areas of public utilities the legislature chose to assimilate government service employees within the jurisdiction of the CIR.\textsuperscript{47} L.B. 15 expanded the size of the CIR bench holding teaching certificates from the Nebraska Commissioner of Education. See \textit{Nebraska Rev. Stat.} § 79-1233 (Reissue 1976).

\begin{itemize}
\item \textsuperscript{37} L.B. 485, § 3, 1967 Neb. Laws 1739.
\item \textsuperscript{38} Id., § 2 at 1739.
\item \textsuperscript{39} Id., § 6 at 1739.
\item \textsuperscript{40} Id., § 7 at 1740.
\item \textsuperscript{41} L.B. 485, § 7, 1967 Neb. Laws 1740. The fact finding board would be composed of one member selected by each party and a jointly selected neutral member.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} \textit{Nebraska Rev. Stat.} §§ 48-801 to -839 (Cum. Supp. 1980).
\item \textsuperscript{44} L.B. 15, Legislative Floor Debate 134-35, 144 (1969).
\item \textsuperscript{45} L.B. 15, 1969 Neb. Laws 1405.
\item \textsuperscript{46} L.B. 15, Eightieth Session (1969) (as originally introduced).
\item \textsuperscript{47} L.B. 15, Legislative Floor Debate 299, 379 (1969).
\end{itemize}
from three to five judges and provided that the judges must be representative of the public.\textsuperscript{48} L.B. 15 gave the CIR jurisdiction over disputes involving virtually all public employees in the State of Nebraska including state, county, local, municipal, public school district, higher education and public utility employees.\textsuperscript{49} It also mandated that the CIR would have no jurisdiction over parties subject to the Teachers' Professional Negotiation Act until its provisions were exhausted.\textsuperscript{50}

In \textit{Seward Education Association v. School District of Seward}\textsuperscript{51} the supreme court upheld the CIR's constitutionality and determined that the CIR possessed legislative and quasi-judicial powers in addition to its administrative authority.\textsuperscript{52} This power derived from article XV, section 9 of the Nebraska Constitution and created an exception to the rule that the legislature may not lawfully delegate legislative powers to an administrative agency.\textsuperscript{53} Subsequent court decisions narrowed the apparent limits of the CIR's legislative and judicial powers.

\section*{IV}

While L.B. 15 enlarged the jurisdiction of the CIR to include disputes involving all public employees,\textsuperscript{54} it did not provide any procedure to determine issues of a labor organization's representative capacity. An employer could refuse to recognize a representative organization, recognize more than one organization, or attach certain conditions to recognition. In \textit{International Brotherhood of Electrical Workers Local 1536 v. City of Lincoln},\textsuperscript{55} the CIR held that it was permissible for the employer to require participation of eighty percent of the eligible employees in a representation election as a condition to its being bound by the results.\textsuperscript{56}

In 1972, the Nebraska Legislature enacted L.B. 1288 which mandates the procedure under which an employer must recognize

\textsuperscript{49} \textit{Id.}, § 1 at 1406.
\textsuperscript{50} \textit{Id.}, § 3 at 1407. In \textit{Sidney Educ. Ass'n v. School Dist. of Sidney}, 189 Neb. 540, 543, 203 N.W.2d 762, 766 (1973), the supreme court held that a school district's refusal to recognize an employee association exhausted the provisions of the Teachers' Professional Negotiations Act to give the CIR jurisdiction.
\textsuperscript{51} 188 Neb. 772, 199 N.W.2d 752 (1972).
\textsuperscript{52} \textit{Id.} at 778, 199 N.W.2d at 756.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} The Nebraska National Guard or State Militia was later specifically excluded. L.B. 1228, § 1, 1972 Neb. Laws 841.
\textsuperscript{55} 1 Case No. 48 (C.I.R. 1971).
\textsuperscript{56} \textit{Id.} at 48-16.
the exclusive representation rights of a labor organization.\textsuperscript{57} The CIR was granted the power to determine appropriate bargaining units and conduct elections upon the filing of a petition by thirty percent of the eligible employees.\textsuperscript{58} A majority of the votes cast in any representation election was required for an organization to be certified as the exclusive bargaining representative for the bargaining unit in question.\textsuperscript{59} A certified collective bargaining representative would have exclusive rights to represent all employees in the appropriate unit with respect to wages, hours and conditions of employment.\textsuperscript{60} However, an individual employee was still permitted to bring matters to the attention of his employer and choose his representative in any grievance or legal action.\textsuperscript{61} An employer was not precluded from consulting with lawful, religious, social, fraternal or similar associations on general matters affecting employees so long as such contacts did not constitute formal negotiations over wages, hours, or conditions of employment.\textsuperscript{62}

The 1972 legislation considerably enhanced the development of public employee bargaining power which increased the CIR case docket.\textsuperscript{63} L.B. 819, passed in 1974, sought to expedite the processing of CIR cases in response to an increasing case backlog.\textsuperscript{64} It provided for the election of a presiding judge every two years to supervise the CIR's business and assign the workload.\textsuperscript{65} The CIR could conduct business with a quorum of the judges present.\textsuperscript{66}

L.B. 819 exempted the CIR from the requirement of the Rules of Administrative Agencies,\textsuperscript{67} created and defined the administrative duties of the Clerk of the Court,\textsuperscript{68} and eliminated the required summons procedure for service of process.\textsuperscript{69} Section 7 of the bill directed that a hearing be held within sixty days of the filing of a petition and that an order be entered within thirty days of the hearing.\textsuperscript{70} The CIR has had little success in meeting the time re-

\textsuperscript{57} L.B. 1228, 1972 Neb. Laws 840.
\textsuperscript{58} Id., § 4 at 844.
\textsuperscript{59} Id. at 845.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Table of cases filed by fiscal year, Commission of Industrial Relations Budget Request 12 (1982).
\textsuperscript{65} Id., § 1 at 709.
\textsuperscript{66} Id.
\textsuperscript{67} NEB. REV. STAT. § 84-901 (Reissue 1976).
\textsuperscript{68} L.B. 819, § 3, 1974 Neb. Laws 710.
\textsuperscript{69} Id., § 7 at 711. A new procedure for service by mail was enacted. Id. at 712.
\textsuperscript{70} Id. at 712.
quirements. The supreme court held that these sixty day and thirty day requirements were not jurisdictional prerequisites.

V

Beginning in 1975 a series of supreme court decisions determined the CIR's jurisdictional boundaries. This process ultimately limited the CIR's authority. This metamorphosis surprised those who viewed the broad grant of article XV, section 9 of the Nebraska Constitution and the Court of Industrial Relations Act as authority for the CIR to protect the public from interruptions in essential services by resolving all public sector labor disputes.

The Seward case had seemed to indicate that by creating article XV, section 9, the 1919-1920 Convention carved out a constitutional exception to the separation of powers doctrine by creating a tribunal vested with legislative, administrative and judicial powers. The supreme court later restricted the CIR's authority primarily, and perhaps not surprisingly, in the judicial area.

In Orleans Education Association v. School District of Orleans, the supreme court reexamined the constitutional basis of the CIR's jurisdiction over government entities. Although the court in Seward had emphasized the grant of authority in article XV, section 9, the Orleans court concluded that the legislature's power to create a body with appropriate powers to deal with the labor relations of governmental entities was not dependent on that section. The key language of this article was "business or vocation affected with a public interest" which would seem to need some stretching to cover strict governmental activities. The court did find that the legislature had the power apart from article XV, section 9 to create an administrative body to resolve labor disputes involving government entities. This power emanated from article III, section 1, the general grant of legislative power in the Nebraska Constitution.

The Orleans opinion dealt at length with the CIR's most controversial power—the authority to set wage rates, hours and condi-

71. See Letter from Judges of Commission of Industrial Relations to the people of Nebraska, July 1980, for average time per case statistics. The 1975-1976 fiscal year average was 174 days.
73. See notes 51-53 and accompanying text supra.
74. 193 Neb. 675, 299 N.W.2d 172 (1976).
75. See 188 Neb. at 774-79, 199 N.W.2d at 755-57.
76. 193 Neb. at 680, 229 N.W.2d at 176.
77. Id.
78. Id.
tions of employment for public employees. This power derives from section 48-818 of the Nebraska Statutes which provides:

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. 79

In Orleans, the supreme court held that this grant of authority did not impermissibly delegate legislative authority to the CIR because it contained sufficient standards to guide the administrative body. 80 Nor did the legislature attempt to delegate judicial power to the CIR in violation of article V, section 1 of the Nebraska Constitution, as the quasi-judicial powers of the CIR were purely incidental to its legislative function. 81 Finally, the court held that the CIR's power to set wages, hours and conditions of employment did not unconstitutionally usurp the governmental authority of taxation or budget making. 82 The constitutionality of the CIR's jurisdiction was subsequently upheld as to state agencies, 83 executive departments, 84 state colleges, 85 and universities. 86 However, two decisions reversed the twelve year trend of expanding CIR jurisdiction.

VI

The CIR had first used the term "unfair labor practices" in Lo-

80. 193 Neb. at 684-85, 229 N.W.2d at 177-78.
81. Id. at 685, 229 N.W.2d at 178.
82. Id. at 686-87, 229 N.W.2d at 178-79.
While the language of the CIR opinion is open to interpretation, it seems likely that the CIR sought not to expand its jurisdiction to encompass "unfair labor practices" as they exist in other areas of labor law, but rather to apply the terminology as a catchword for practices otherwise illegal under its own statute.

In University Police Union v. University of Nebraska the supreme court held that the CIR was without statutory authority to declare unfair labor practices. The opinion of the court emphasized the use of the term "unfair labor practices" by the CIR and noted that the act did not contain enumerated unfair practices as are found in the National Labor Relations Act and other state statutes. The court concluded that the CIR had exceeded its jurisdiction.

The statute's deficiency was its failure to specifically mention "unfair labor practice." Section 48-810 grants jurisdiction to the CIR to resolve all industrial disputes. These disputes are defined in section 48-801(7) to include "any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment . . ." Section 48-837 gives public employees the rights to form, join and participate in a labor organization for the purpose of collective bargaining or to refrain from doing so. Section 48-823 provides that the statute shall be liberally construed to effectuate the public policy purposes of the act. These provisions read together appear to authorize the CIR to reach the alleged illegal activities in the University Police case—harrassment of employees for union activities. The supreme court, refusing to go this far, stated that the "only provisions which can be found in the act concerning activities of the employer are found in section 48-811 . . . ." That section prohibits coercive action against an employee during the pendency of a representation petition. While section 48-837 does not specifically refer to employer activity, it grants public employees the right to join labor organizations for

87. 3 CIR 142, 147 (1975).
88. 203 Neb. 4, 17, 277 N.W.2d 529, 537 (1979).
89. Id. at 13, 277 N.W.2d at 535.
90. Id.
93. Neb. Rev. Stat. § 48-823 (Reissue 1978). Unfortunately this provision was never amended to include section 48-837 which was added to the statute by L.B. 15 in 1969. This omission weakens the CIR's position to some degree.
94. 203 Neb. at 16, 277 N.W.2d at 537.
the purpose of collective bargaining. Thus, the employer is at least one of the parties to whom this provision is addressed. Although the supreme court had previously affirmed CIR decisions which declared employer anti-union activity unlawful, these prior holdings were not cited in University Police.

In Transport Workers of America Local 223 v. Transit Authority, the CIR interpreted a short term disability provision in a collective bargaining contract, and ordered an accounting between the parties. The supreme court reversed, holding that the CIR had no jurisdiction to declare duties and obligations under an existing contract or to grant equitable relief such as an accounting. Once a collective bargaining agreement is reached, disputed terms must be brought before the courts. The supreme court based this decision on article II, section 1 and article V, section 1 of the Constitution of Nebraska. The court declared that the Nebraska Constitution vested the judicial power solely in the courts, not an administrative body such as the CIR. If the legislature intended to vest the CIR with judicial powers the act would be unconstitutional. The supreme court interpreted the statute to avoid this result. This holding was subsequently followed in State College Education Association v. Board of Trustees, Plattsmouth Police Department Collective Bargaining Committee v. City of Plattsmouth, and Saltz v. School District of Norfolk.

VII

Following the University Police and Transport Workers decisions, the legislature enacted L.B. 444 in 1979. Apparently mindful of the supreme court’s admonition that the CIR is not a court, the legislature changed the name of the body to the Commission of Industrial Relations, while retaining the designation of judge.

98. Id. at 30, 286 N.W.2d at 105. See, e.g., Survey of Nebraska Law, Labor Law, 14 CREIGHTON L. REV. 397 (1980).
99. Id. at 33-34, 286 N.W.2d at 106-07.
100. Id. at 33, 286 N.W.2d at 107.
101. Id. at 34, 286 N.W.2d at 107.
102. Id. at 30, 286 N.W.2d at 105.
103. Id. at 35, 286 N.W.2d at 107.
108. Id., § 9 at 1240. See L.B. 444, Legislative Floor Debate at 4327-32.
Section 8 of L.B. 444 granted the CIR specific authority to remedy unlawful acts and sought to eliminate the gap in CIR jurisdiction which resulted from the University Police decision. This section provides that:

Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of sections 48-801 to 48-838, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in sections 48-801 to 48-838, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802 and to resolve the dispute.

L.B. 444 significantly amended the statute in several other respects. Section 5 established an affirmative duty to bargain in good faith once a labor organization has been certified by the commission or recognized by the employer. This was an important addition as the prior statutory language allowed an employer to refuse to bargain with a union until the CIR ordered it to do so. Furthermore, section 5 mandated the CIR to "required good faith bargaining concerning the terms and conditions of employment." This "good faith bargaining" obligation was specifically defined:

To bargain in good faith shall mean the performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

L.B. 444 amended section 48-812 so that an appeal could not be

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111. Id.
112. Id., § 5 at 1237-38.
113. The supreme court opinion in Sidney Educ. Ass'n v. School Dist. of Sidney, 189 Neb. 540, 549, 203 N.W.2d 782, 768 (1973), made this obstacle crucial for school districts subject to the Teachers' Professional Negotiation Act. The court held that such employers could not be compelled to bargain at all. The CIR, however, could resolve the underlying dispute.
115. Id. at 1237-38.
taken from a CIR order determining a bargaining unit until after the results of a representation election were certified.\textsuperscript{116} This legislative change was in response to a supreme court decision in \textit{American Association of University Professors v. Board of Regents}\textsuperscript{117} which held that a bargaining unit determination was a "final order" and appealable prior to the election.\textsuperscript{118} That court opinion was a considerable aid to employers who could delay representation elections for about a year by filing an appeal to the unit determination. It is extremely difficult for a union to continue to generate enthusiasm for that length of time. L.B. 444 eliminated this employer advantage.\textsuperscript{119}

L.B. 444 specifically authorized the CIR to use hearing officers to hear its cases.\textsuperscript{120} The CIR did this prior to the passage of L.B. 444,\textsuperscript{121} but it has not used hearing officers since that time. This authority may be useful at some later date as a cost saving procedure, particularly if the CIR caseload significantly increases.

L.B. 444 authorized the Commission to order mediation and factfinding as preliminary dispute resolution procedures.\textsuperscript{122} These two procedures seek to encourage the parties in a bargaining impasse to reach a voluntary settlement. Mediation is the more informal process. A neutral mediator works with the parties, and suggests possible settlements while maintaining the confidentiality of their bargaining positions.\textsuperscript{123} Factfinding is quasi-judicial, involving the submission of evidence by the parties and the factfinder making a recommended settlement.\textsuperscript{124} While neither party is required to accept a factfinder's recommendations, they are often made public, thus generating pressure upon the parties through public opinion, news media and political processes.\textsuperscript{125} Mediation and factfinding are used extensively in states with developed public employee collective bargaining.\textsuperscript{126} These methods of

\textsuperscript{116} \textit{Id.}, § 4 at 1237.
\textsuperscript{117} 198 Neb. 243, 253 N.W.2d 1 (1977).
\textsuperscript{118} \textit{Id.} at 258, 253 N.W.2d at 9.
\textsuperscript{119} L.B. 444, § 4, 1979 Neb. Laws 1237.
\textsuperscript{120} \textit{Id.}, § 6 at 1239.
\textsuperscript{122} L.B. 444, § 5, 1979 Neb. Laws 1237.
\textsuperscript{123} \textit{See} \textit{PORTRAIT OF A PROCESS, supra} note 1, at 196-208.
\textsuperscript{124} \textit{Id.} at 204.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 240, 242 and 248-49 nn.15 and 21.
impasse settlement are desirable because they seek to enable the parties to reach their own agreement. This seems preferable to binding resolution procedures like arbitration or decisions rendered by the CIR under section 48-818 regarding disputes over wages, hours, and terms and conditions of employment.

Final binding arbitration or section 48-818 determinations by the CIR impose a settlement upon the parties which neither party may like or want. Proponents of binding resolution have argued that such procedures would eliminate public employee strikes, and thereby protect the public from interruptions in governmental services. Opponents have argued that this would be true only if the employee groups were satisfied with the awards. Opponents fear that binding arbitration would have a "chilling" effect on the bargaining process itself—that the parties would be reluctant to make concessions knowing they had arbitration ahead of them. Forced settlements could distort market forces and result in agreements far different from those which collective bargaining would produce. Finally, there is the possibility that governing bodies will use forced settlements as an excuse for shirking their budgetary responsibilities.

Despite the arguments against binding resolutions, a growing number of states have adopted arbitration procedures. However, most states restrict the coverage of binding resolution provisions to a few classes of essential public employees, such as police and firefighters, from whose labor stoppage the public would most suffer. Nebraska and its neighboring state, Iowa, both provide binding impasse settlement for all classes of public employees. Iowa, however, also uses mediation and factfinding as

127. Bargaining impasses over wages and other employment terms are commonly referred to as “interest disputes.” For a general discussion of the arguments over arbitration of such matters, see PORTRAIT OF A PROCESS, supra note 1, at 209-23. 128. Id. at 213-14. 129. Id. at 214. 130. Id. at 215. 131. In 1978 the City of Omaha requested a sales tax increase relying primarily on a CIR wage award to the Omaha Police Union. See L.B. 902, Committee Statement 1, January 30, 1978. 132. PORTRAIT OF A PROCESS, supra note 1, at 221, 249 n.21. See also [1979] 1 PUBLIC EMPLOYEE BARGAINING (CCH) ¶¶ 400-1396 [hereinafter cited as PUBLIC EMPLOYEE BARGAINING]. 133. The “essential” groups of employees can be quite a bit broader. Alaska, for example, includes police, fire, guards, hospital, public utility, snow removal, sanitation, public school, and educational institutions. ALASKA STAT. § 23.40.200 (1972). 134. IOWA CODE ANN. §§ 20.3 - 20.4, 20.22 (West 1978). L.B. 15, which extended CIR jurisdiction to governmental employees, as originally introduced, provided for factfinding with final resolution by the legislative body of the government employer,
mandatory preliminary steps.\textsuperscript{136} Since the passage of L.B. 444 Nebraska has used these procedures inconsistently.\textsuperscript{137} This may be due to the fact that the statute leaves the implementation of mediation or factfinding to the CIR's discretion.\textsuperscript{138} The CIR subsequently has not adopted a rule establishing mediation or factfinding procedures.\textsuperscript{139} Rather, the CIR has not utilized factfinding and has relied primarily on the parties' request for mediation.\textsuperscript{140} But the parties may not always be the best judges of whether they need mediation. They have bargained to impasse over the issues and are, therefore, somewhat hardened in their positions and viewpoints.

Many states have the public policy of favoring voluntary settlements and encouraging them through mediation and factfinding; Nebraska should consider making more use of these important tools. Parties to a labor dispute will undoubtedly be happier with terms to which they have voluntarily agreed as opposed to CIR-imposed settlements. Finally, it would remove the anomaly requiring one group of public employees, teachers, to submit to an additional step not required of other public employee groups.\textsuperscript{141}

\section*{VIII}

As a supplement or alternative to binding impasse resolution, a few states have accorded certain classes of public employees a limited or conditional right to strike. The Alaska public employee bargaining statute\textsuperscript{142} designates three classes of public employees. The first, police, fire, guards, and hospital employees, are denied the right to strike and must submit their disputes to binding arbitration.\textsuperscript{143} The second class includes public utility, snow removal, sanititation, public school and educational institution employees.\textsuperscript{144} These employees can strike until the public health and safety is threatened and then they must submit their dispute to arbitra-

\textsuperscript{136} IOWA CODE ANN. § 20.20 - 20.22 (West 1978).
\textsuperscript{137} See CIR case files, Case Nos. 343-442 (case filings up to October 22, 1981).
\textsuperscript{138} NEB. REV. STAT. § 48-816 (Reissue 1978).
\textsuperscript{139} See Rules of the Commission of Industrial Relations, as amended (November 13, 1979).
\textsuperscript{140} See CIR case files, Case Nos. 343-442 (May 12, 1979-October 22, 1981).
\textsuperscript{141} Currently, only disputes involving Class III, IV and V school districts are required to go to factfinding prior to CIR determination. NEB. REV. STAT. § 79-1287 to -1294 (Reissue 1976).
\textsuperscript{142} ALASKA STAT. § 23.40.200 (1972).
\textsuperscript{143} Id.
\textsuperscript{144} Id.
The remaining groups of employees may refuse to go to arbitration and strike upon a majority of vote of the bargaining unit.146

Hawaii permits strikes by all but essential public employees and bargaining units subject to final and binding arbitration.147 Following good faith compliance with the statutory impasse, mediation, and factfinding procedures, employee groups can strike.148 Unions must give ten days notice to the employer and the Public Employee Relations Board (PERB) prior to striking.149 The PERB may set requirements on the strike if it would endanger the public health and safety.150

Oregon permits public employee strikes upon notice following mediation and factfinding.151 Employees who provide "essential" services such as police, firefighters and guards are excluded and must go to arbitration instead.152 Montana153 and Pennsylvania154 have also granted extensive strike rights to public employee groups.

Minnesota provides a limited right to strike for public employees other than confidential, essential, managerial, and supervisory employees.155 Strikes are permitted after mediation and notification if the employer has refused either to bargain in good faith, participate in a binding arbitration required under a contract, or obey an arbitration award.156

A limited right to strike for public employees permits the market forces to work to the greatest extent possible. Only those employees who provide services essential to the public health and safety are completely prohibited from striking. Other employee groups may bargain with their employers on terms similar to the private sector, and compensation levels can theoretically be determined by economic factors. However, any state considering this approach must carefully determine what groups of employees are

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145. Id.
146. Id.
147. HAWAI'I REV. STAT. § 89-12 (Supp. 1980).
148. Id.
149. Id.
150. Id.
152. Id. at §§ 243.836, 243.742 (1973).
155. MINN. STAT. ANN. § 179.64 (Supp. 1980).
156. Id.
essential to the public welfare, and all of the ramifications of permitting public employee strikes.

IX

Statutory impasse procedure timetables constitute another variation in public employee bargaining legislation. For example, the Iowa statute provides that impasse settlement procedures should commence with mediation 120 days before the budget submission date of the applicable governing body. This provides an opportunity for the parties to reach an agreement prior to the time a budget is set for the forthcoming year. A governing body can thus avoid the difficulties of agreeing to a contract settlement and not having funds to pay for it. The CIR has the unenviable task of setting wage rates retroactively. Public employee groups can be very dissatisfied waiting six months to a year or more for their regular annual wage increases. This is a critical consideration in light of the public policy behind the public sector bargaining laws—the minimization or elimination of employee strike activity. The supreme court partially addressed this problem in Local 2088, American Federation of State, County and Municipal Employees v. County of Douglas, holding that during the pendency of a dispute a public employer should pay the wage rate which it would otherwise implement.

It would be prudent for Nebraska to enact legislation for the CIR to hear public employment negotiation impasses before they reached a supercritical stage. Such legislation was introduced in 1979, but was not enacted. A suggested procedure would be to instruct parties to commence bargaining a certain number of days prior to a contract expiration or budget submission date. If an agreement is not reached by a certain date, mediation and/or factfinding should be implemented, and failing settlement within a certain time frame, the parties could bring their dispute to the CIR for binding resolution. The combination of mandatory mediation, factfinding and a statutory timetable sufficiently in advance of

158. This difficulty also arises from CIR settlements. See Omaha Police Union Local No. 1 v. City of Omaha, 3 CIR 356, 363, 373 (1977) and note 132 supra.
161. 209 Neb. at 597-98, 309 N.W.2d at 65-66.
budget submissions, would place more responsibility on the parties to resolve their disputes.

Current procedure results in a misallocation of political responsibility from public employers to the CIR. Under the existing system a government employer may set its appropriation level and allocate its budgetary resources before receiving the terms of a labor settlement from the CIR. Thus, elected officials, who should be responsible to the public for their expenditures, escape blame for any budgetary or tax increases. The establishment of a timetable for bargaining impasse resolution procedures commencing prior to the appropriation process would improve political accountability.\textsuperscript{163}

Public sector collective bargaining utilizes predetermined occupational bargaining units, a characteristic not commonly found in the private sector.\textsuperscript{164} This is done primarily with state employees and reflects a legislative policy of avoiding undue fragmentation of units.\textsuperscript{165} The Florida Public Employee Relations Commission, for example, has established five statewide occupational units: administrative and clerical, operational services, professional health care, and law enforcement.\textsuperscript{166} Hawaii,\textsuperscript{167} Massachusetts,\textsuperscript{168} New York,\textsuperscript{169} and Wisconsin\textsuperscript{170} provide broad occupational units for state employees. State governments have a multiplicity of departments, agencies, and institutions of higher education. The establishment of statewide occupational units seeks to avoid the burden of bargaining with a large number of units.

In \textit{International Brotherhood of Electrical Workers v. Nebraska Educational Television Commission},\textsuperscript{171} the CIR examined the danger of over-fragmentation of bargaining units,\textsuperscript{172} but was unable to reach total agreement on the exact nature of the threat posed by

\begin{footnotesize}
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\item One commentator suggested that tying negotiating schedules to election dates provided the ultimate in political accountability. An administration that agrees to an unpopular labor settlement could be immediately voted out of office. This concern for the short memory of the electorate seems unfounded, however, because the candidate's opposition will always be around to refresh the recollection of interested voters. M. LIBERMAN, \textit{PUBLIC-SECTOR BARGAINING} 90 (1980).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 118.
\item \textit{Id.} at 119.
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\item \textit{Id.} at 120.
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\item \textit{Id.} at 121.
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proliferation of bargaining units in the public sector.\textsuperscript{173} One CIR judge, however, felt "invidious comparison" would result in whip-saw bargaining where several unions bargain with the same employer and compete for the best collective bargaining agreement.\textsuperscript{174} Since that decision, the Nebraska Supreme Court has declared the policy of avoiding over-fragmentation of bargaining units,\textsuperscript{175} and has required the CIR to consider this as an important factor in determining bargaining units.\textsuperscript{176}

In 1979, L.B. 108 was introduced in the Nebraska Legislature and sought to legislatively determine bargaining units for state higher educational institutions.\textsuperscript{177} While this legislation was not enacted, it illustrates that there is some concern over proliferation of units at the state level. The major concern should be in the area of state departments and agencies, as there are a limited number of state post-secondary educational institutions. The CIR has not established large occupational bargaining units at the state level,\textsuperscript{178} and it would probably be questionable to do so without legislative guidance. The issue of bargaining unit proliferation may become more critical as state level labor organization grows.\textsuperscript{179}

X

Contract administration comprises a substantial deficiency in Nebraska's public sector bargaining law. Since the supreme court decision in \textit{Transport Workers of America Local 223 v. Transit Authority},\textsuperscript{180} the CIR cannot adjudicate questions of contract inter-

\textsuperscript{173} Id. at 30 (concurring opinion).
\textsuperscript{174} Id. at 30, 32.
\textsuperscript{177} L.B. 108, indefinitely postponed, 2 Legis. Journal 2071 (1980).
\textsuperscript{179} Annual salary and fringe benefit levels for state employees are set by the legislature. See, e.g., L.B. 556-60, 1981 Neb. Laws 1769-1907; L.B. 459, 1981 Neb. Laws 1477, L.B. 244, 1981 Neb. Laws 932. These compensation terms could be the subject of collective bargaining. The legislature retains the power to ratify all labor contracts covering state employees. NEB. REV. STAT. § 48-837 (Reissue 1978).
pretation. Accordingly, all questions involving the rights and obligations under an existing collective bargaining agreement must be taken to a district court. This can be a costly and time-consuming process, and could result in labor unrest. Such a result seems adverse to the public policy consideration specified in the Commission of Industrial Relations Act—the continuous uninterrupted functioning of public services.\textsuperscript{181} Several states faced with these considerations have mandated that public sector collective bargaining agreements contain grievance procedures ending in final and binding arbitration to resolve contractual grievances.\textsuperscript{182} This might be a beneficial approach for Nebraska to consider.

Nebraska law limits the determinative effect of arbitration agreements. In \textit{Rentschler v. Missouri Pacific Railroad Co.},\textsuperscript{183} and \textit{Poppert v. Brotherhood of Railroad Trainmen},\textsuperscript{184} the Nebraska Supreme Court enunciated a constitutional rule based upon article I, section 13 of the Nebraska Constitution which provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."\textsuperscript{185} The court concluded that under Nebraska law prior exhaustion of contractual or administrative remedies is not required to bring a court action on a contractual dispute.\textsuperscript{186} While this holding diminishes the value of arbitration agreements, it does not entirely obliterate their effectiveness. Contractual grievance procedures and binding arbitration are means by which parties may resolve their disputes without resorting to litigation. This should be encouraged as a matter of public policy. Moreover, in the public sector where strikes are prohibited, it is vital that adequate procedures exist for the resolution of labor-management disputes. Since the CIR is no longer a forum for questions of contractual interpretation the state should seek an alternative.

\textbf{CONCLUSION}

The Commission of Industrial Relations has evolved since 1947 from a unique entity vested with broad legislative, administrative, and judicial powers into essentially a traditional administrative agency with substantial authority. The CIR's mission to protect

\textsuperscript{181} \textit{NEB. REV. STAT.} § 48-802 (Reissue 1978).
\textsuperscript{182} \textit{See} \textit{ALASKA STAT.} § 23.40.210 (1972); \textit{FLA. STAT. ANN.} § 447.401 (1981); \textit{HAWAI REV. STAT.} § 89.11 (1970); \textit{PA. STAT. ANN. tit.} 43 § 1101.903 (Purdon 1970).
\textsuperscript{183} 126 Neb. 493, 253 N.W.2d 694 (1934).
\textsuperscript{184} 187 Neb. 297, 189 N.W.2d 469 (1971).
\textsuperscript{185} \textit{NEB. CONST. art.} I, § 13.
\textsuperscript{186} 187 Neb. at 303-04, 189 N.W.2d at 473-74; 126 Neb. at 505, 253 N.W. at 700.
the public from public employee strikes and the dangers inherent in the interruption of public services is identical to that of agencies in other states. It differs from public employment relations agencies in other states in two areas: its organization and procedures are still very judicial in nature,\textsuperscript{187} and the CIR judges adjudicate interest disputes themselves rather than referring the matters to outside arbitrators.\textsuperscript{188} Both of these variations are more procedural than substantive. Thus the CIR is functionally very similar to public employee relation boards and commissions in other states. In fulfilling its public policy mission the CIR could benefit from the adoption of procedures used in other states.

Other states have not found it necessary or desirable to provide binding impasse resolution for all classes of public employees and have restricted this procedure to “essential” employee groups. Some states have permitted a limited right to strike. Mediation and factfinding are more extensively used in other states to encourage voluntary settlements. Tying negotiations and impasse procedures more closely to budget submission dates might result in more effective and realistic bargaining, and minimize the political game-playing which currently overshadows the process. Public employee organizations and public employers should consider whether they might ultimately be better off with broader bargaining units and arbitration of contractual grievances.

It should be emphasized that the CIR has served the citizens of Nebraska well over the past thirty years. Public employee strikes have been virtually absent from the state.\textsuperscript{189} This does not guarantee that similar results will be achieved in the future. It is time for citizens and state legislators to look afresh at the CIR and evaluate its effectiveness as perceived by public employee and employer groups. Timely modifications may assure satisfactory results in the years to come.


\textsuperscript{189} An illegal work stoppage occurred on July 1, 1975, involving employees of the City of Omaha transit authority. The work stoppage ended on July 2, 1975. Seven members of the union were subsequently discharged and this employer action was upheld by the CIR. Transport Workers Union Local 223 v. Transit Auth., 3 CIR 173 (1976).