

48-818. Commission; findings; order; powers; duties; orders authorized; modification.

(1) Except as provided in the State Employees Collective Bargaining Act, 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 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. Any order or orders entered may be modified on the commission'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.

(2) For purposes of industrial disputes involving public employers other than school districts, educational service units, and community colleges with their certificated and instructional employees and public employers subject to the State Employees Collective Bargaining Act:

(a) Job matches shall be sufficient for comparison if (i) evidence supports at least a seventy percent match based on a composite of the duties and time spent performing those duties and (ii) at least three job matches per classification are available for comparison. If three job matches are not available, the commission shall base its order on the historic relationship of wages paid to such position over the last three fiscal years, for which data is available, as compared to wages paid to a position for which a minimum of three job matches are available;

(b) The commission shall adhere to the following criteria when establishing an array:

(i) Geographically proximate public employers and Nebraska public employers are preferable for comparison;

(ii) The preferred size of an array is seven to nine members. As few as five members may be chosen if all array members are Nebraska employers. The commission shall include members mutually agreed to by the parties in the array;

(iii) If more than nine employers with job matches are available, the commission shall limit the array to nine members, based upon selecting array members with the highest number of job matches at the highest job match percentage;

(iv) Nothing in this subdivision (2)(b) of this section shall prevent parties from stipulating to an array member that does not otherwise meet the criteria in such subdivision, and nothing in such subdivision shall prevent parties from stipulating to less than seven or more than nine array members;

(v) The commission shall not require a balanced number of larger or smaller employers or a balanced number of Nebraska or out-of-state employers;

(vi) If the array includes a public employer in a metropolitan statistical area other than the

metropolitan statistical area in which the employer before the commission is located, only one public employer from such metropolitan statistical area may be included in the array;

(vii) Arrays for public utilities with annual revenue of five hundred million dollars or more shall include both comparable public and privately owned utilities. Arrays for public utilities with annual revenue of less than five hundred million dollars may include both comparable public and privately owned utilities. Public utilities that produce radioactive material and energy pursuant to section 70-627.02 shall have at least four members in its array that produce radioactive material and energy when employees directly involved in this production are included in the bargaining unit. For public utilities that generate, transmit, and distribute power, the array shall include members that also perform these functions. For a public utility serving a city of the primary class, the array shall only include public power districts in Nebraska that generate, transmit, and distribute power and any out-of-state utilities whose number of meters served is not more than double or less than one-half of the number of meters served by the public utility serving a city of the primary class unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar;

(viii) In constructing an array for a public utility, the commission shall use fifty-mile concentric circles until it reaches the optimum array pursuant to subdivision (2)(b)(ii) of this section; and

(ix) For a statewide public utility that provides service to a majority of the counties in Nebraska, any Nebraska public or private job match may be used without regard to the population or full-time equivalent employment requirements of this section, and any out-of-state job match may be used if the full-time equivalent employment of the out-of-state employer is no more than double and no less than one-half of the full time equivalent employment of the bargaining unit of the statewide public utility in question;

(c) In determining same or similar working conditions, the commission shall adhere to the following:

(i) Public employers in Nebraska shall be presumed to provide same or similar working conditions unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar;

(ii) Public employers shall be presumed to provide the same or similar working conditions if (A) for public employers that are counties or municipalities, the population of such public employer is not more than double or less than one-half of the population of the public employer before the commission, unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar, (B) for public employers that are public utilities, the number of such public employer's employees is not more than double or less than one-half of the number of employees of the public employer before the commission, unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar, or (C) for public employers that are school districts, educational service units, or community colleges with noncertificated and noninstructional school employees, the student enrollment of such public employer is not more than double or less than one-half of the student enrollment of the public employer before the commission, unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar;

(iii)(A) Public employers located within a metropolitan statistical area who meet the population

requirements of subdivision (2)(c)(ii)(A) of this section, if the public employer is a county or municipality, or the student enrollment requirements of subdivision (2)(c)(ii)(C) of this section, if the public employer is a school district or an educational service unit, shall be presumed to provide the same or similar working conditions if the metropolitan statistical area population in which they are located is not more than double or less than one-half the metropolitan statistical area population of the public employer before the commission, unless evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar.

(B) The presumption created by subdivision (2)(c)(iii)(A) of this section may be overcome in situations where evidence establishes that there are substantial similarities which cause the work or conditions of employment to be similar, allowing the commission to consider public employers located within a metropolitan statistical area even if the metropolitan statistical area population in which that employer or employers are located is more than double or less than one-half the metropolitan statistical area population of the public employer before the commission. The burden of establishing sufficient similarity is on the party seeking to include a public employer pursuant to this subdivision (2)(c)(iii)(B) of this section; and

(iv) Public employers other than public utilities which are not located within a metropolitan statistical area shall not be compared to public employers located in a metropolitan statistical area. For purposes of this subdivision, metropolitan statistical area includes municipalities with populations of fifty thousand inhabitants or more;

(d) Prevalent shall be determined as follows: (i) For numeric values, prevalent shall be the midpoint between the arithmetic mean and the arithmetic median. For fringe benefits, prevalent shall be the midpoint between the arithmetic mean and the arithmetic median as long as a majority of the array members provide the benefit; and (ii) for nonnumeric comparisons, prevalent shall be the mode that the majority of the array members provide if the compared-to benefit is similar in nature. If there is no clear mode, the benefit or working condition shall remain unaltered by the commission;

(e) For any out-of-state employer, the parties may present economic variable evidence and the commission shall determine what, if any, adjustment is to be made if such evidence is presented. The commission shall not require that any such economic variable evidence be shown to directly impact the wages or benefits paid to employees by such out-of-state employer;

(f) In determining total or overall compensation, the commission shall value every economic item even if the year in question has expired. The commission shall require that all wage and benefit levels be leveled over the twelve-month period in dispute to account for increases or decreases which occur in the wage or benefit levels provided by any array member during such twelve-month period;

(g) In cases filed pursuant to this subsection (2) of this section, the commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than those adopted by rule pursuant to section 48-809. The commission shall receive evidence relating to array selection, job match, and wages and benefits which have been assembled by telephone, electronic transmission, or mail delivery, and any such evidence shall be accompanied by an affidavit from the employer or any other person with personal knowledge which affidavit shall demonstrate the affiant's personal knowledge and competency to testify on the matters thereon. The commission, with the consent of the parties to the dispute, and in the presence of the parties to the dispute, may contact

an individual employed by an employer under consideration as an array member by telephone to inquire as to the nature or value of a working condition, wage, or benefit provided by that particular employer as long as the individual in question has personal knowledge about the information being sought. The commission may rely upon information gained in such inquiry for its decision. Opinion testimony shall be received by the commission based upon evidence provided in accordance with this subdivision. Testimony concerning job match shall be received if job match inquiries were conducted by telephone, electronic transmission, or mail delivery if the witness providing such testimony verifies the method of such job match inquiry and analysis;

(h) In determining the value of defined benefit and defined contribution retirement plans and health insurance plans or health benefit plans, the commission shall use an hourly rate value calculation as follows:

(i) Once the array has been chosen, each array member and the public employer of the subject bargaining unit shall provide a copy of its most recent defined benefit pension actuarial valuation report. Each array member and the public employer of the subject bargaining unit shall provide the most recent copy of its health insurance plans or health benefit plans, covering the preceding twelve-month period, with associated employer and employee costs, to the parties and the commission. Each array member shall also provide information concerning premium equivalent payments and contributions for health savings accounts. Each array member and the public employer of the subject bargaining unit shall indicate which plans are most used. The plans that are most used shall be used for comparison;

(ii) Once the actuarial valuation reports are received, the parties shall have thirty calendar days to determine whether to have the pensions actuarially valued at an hourly rate value other than equal. The hourly rate value for defined benefit plans shall be presumed to be equal to that of the array selected unless one or both of the parties presents evidence establishing that the actuarially derived annual normal cost of the pension benefit for each job classification in the subject bargaining unit is above or below the midpoint of the average normal cost. Consistent methods and assumptions are to be applied to determine the annual normal cost of any defined benefit pension plan of the subject bargaining unit and each array member. For this purpose, the entry age normal actuarial cost method is recommended. The actuarial assumptions that are selected for this purpose should reflect expectations for a defined benefit pension plan maintained for the employees of the subject bargaining unit and acknowledge the eligibility and benefit provisions for each respective defined benefit pension plan. In this regard, different eligibility and benefit provisions may suggest different retirement or termination of employment assumptions. The methods and assumptions shall be attested to by an actuary holding a current membership with the American Academy of Actuaries. Any party who requests or presents evidence regarding actuarial valuation of a defined benefit plan shall be responsible for costs associated with such valuation and testimony. The actuarial valuation is presumed valid, unless a party presents competent actuarial evidence that the valuation is invalid;

(iii) The hourly rate value for defined contribution plans shall be established upon comparison of employer contributions;

(iv) The hourly rate value for health insurance plans or health benefit plans shall be established based upon the public employer's premium payments, premium equivalent payments, and public employer and public employee contributions to health savings accounts;

(v) The commission shall not compare defined benefit plans to defined contribution plans or defined contribution plans to defined benefit plans; and

(vi) The commission shall order increases or decreases in wage rates by job classification based upon the hourly rate value for health-related benefits, benefits provided for retirement plans, and wages;

(i) For benefits other than defined benefit and defined contribution retirement plans and health insurance plans or health benefit plans, the commission shall issue an order based upon a determination of prevalency as determined under subdivision (2)(d) of this section; and

(j) The commission shall issue an order regarding increases or decreases in base wage rates or benefits as follows:

(i) The order shall be retroactive with respect to increases and decreases to the beginning of the bargaining year in dispute;

(ii) The commission shall determine whether the hourly rate value of the bargaining unit's members or classification falls within a ninety-eight percent to one hundred two percent range of the array's midpoint. If the hourly rate value falls within the ninety-eight percent to one hundred two percent range, the commission shall order no change in wage rates. If the hourly rate value is less than ninety-eight percent of the midpoint, the commission shall enter an order increasing wage rates to ninety-eight percent of the midpoint. If the hourly rate value is more than one hundred two percent of the midpoint, the commission shall enter an order decreasing wage rates to one hundred two percent of the midpoint. If the hourly rate value is more than one hundred seven percent of the midpoint, the commission shall enter an order reducing wage rates to one hundred two percent of the midpoint in three equal annual reductions. If the hourly rate value is less than ninety-three percent of the midpoint, the commission shall enter an order increasing wage rates to ninety-eight percent of the midpoint in three equal annual increases. If the commission finds that the year in dispute occurred during a time of recession, the applicable range will be ninety-five percent to one hundred two percent. For purposes of this subdivision (2)(j) of this section, recession occurrence means the two nearest quarters in time, excluding the immediately preceding quarter, to the effective date of the contract term in which the sum of the net state sales and use tax, individual income tax, and corporate income tax receipts are less than the same quarters for the prior year. Each of these receipts shall be rate and base adjusted for state law changes. The Department of Revenue shall report and publish such receipts on a quarterly basis;

(iii) The parties shall have twenty-five calendar days to negotiate modifications to wages and benefits. If no agreement is reached, the commission's order shall be followed as issued; and

(iv) The commission shall provide an offset to the public employer when a lump-sum payment is due because benefits were paid in excess of the prevalent as determined under subdivision (2)(d) of this section or when benefits were paid below the prevalent as so determined but wages were above prevalent.

Source: Laws 1947, c. 178, § 18, p. 592; Laws 1969, c. 407, § 6, p. 1410; Laws 1987, LB 661, § 28; Laws 2011, LB397, § 10.

Operative Date: October 1, 2011

Cross References

State Employees Collective Bargaining Act, see section 81-1369.

Annotations

1. Commission of Industrial Relations, powers and duties

2. Establishing wage rates

3. Miscellaneous

1. Commission of Industrial Relations, powers and duties

A prevalence determination by the Commission of Industrial Relations is a subjective determination, and the standard inherent in the word "prevalent" will be one of general practice, occurrence, or acceptance. *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

A valid prevalence analysis by the Commission of Industrial Relations does not require as a prerequisite a complete identity of provisions in the array. *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

When discussing the Commission of Industrial Relations' authority under this section, the Nebraska Supreme Court has acknowledged that a prevalent wage rate to be determined by the commission must almost invariably be determined after consideration of a combination of factors. *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

In industrial disputes involving governmental services, the Commission of Industrial Relations is empowered to establish rates of pay and conditions of employment comparable to those prevalent for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. Employers selected for the comparative array must be demonstrated to be similar. The Commission is required to take into consideration the overall compensation received by the employees, including all fringe benefits, but dollar-for-dollar costing out of each benefit is not required. The Commission's findings and order may establish or alter the scale of wages, including establishing wage-step progression schedules. *Lincoln Firefighters Assn. Local 644 v. City of Lincoln*, 253 Neb. 837, 572 N.W.2d 369 (1998).

The Commission of Industrial Relations is without the power to declare that interest shall be due on its orders from the date of their entry since the power is not specifically conferred by statute, and such a construction is not necessary to accomplish the plain purpose of the act. *IBEW Local 763 v. Omaha P.P. Dist.*, 209 Neb. 335, 307 N.W.2d 795 (1981).

The Commission of Industrial Relations does not have authority to alter the terms of an existing agreement. *Transport Workers of America v. Transit Authority of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979).

The Commission of Industrial Relations has no jurisdiction to hear breach of contract cases. Such cases must be heard in a court of competent jurisdiction. The Commission of Industrial Relations also lacks jurisdiction to grant declaratory or equitable relief, both of which are judicial functions and may not be exercised by an administrative agency. *Transport Workers of America v. Transit Authority of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979); *State Coll. Ed. Assoc. & Chadron State Coll. v. Bd. of Trustees*, 205 Neb. 107, 286 N.W.2d 433 (1979).

The Commission of Industrial Relations cannot in a section 48-818 case obtain evidence on its own motion unless the moving party has first made a prima facie case of noncomparability with prevalent conditions. *General Driver and Helpers Union v. City of West Point*, 204 Neb. 238, 281 N.W.2d 772 (1979).

The Commission of Industrial Relations' authority is limited to the provisions of this section which, at the time, provide that Commission of Industrial Relations' findings and orders may only establish or alter the scale of wages, hours of labor, or condition of employment. *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979).

While Court of Industrial Relations may not order a school district to enter into a contract, it has the power to settle a dispute. *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972).

2. Establishing wage rates

Employees have no vested right to placement on the top step of a new pay plan based upon 1 year of employment, and the employer does not act arbitrarily or capriciously in placing the employees on the new pay plan. *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 528 N.W.2d 297 (1995).

In a case to establish or alter the scale of wages under this section, the burden is on the moving party to demonstrate that existing wages are not comparable to the prevalent wage rate. *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988).

Where large number of job classifications exist and established lines of progression and relationships are present, key job classifications may be utilized to establish wages, provided reasonable requirements of prevalence and relevance are met. *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984).

With regard to comparability, the Commission of Industrial Relations will enter an

order either adjusting condition of employment or find subject city's condition to be lesser or greater than prevalent and adjust overall compensation accordingly. *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984).

The Commission of Industrial Relations is required to consider every possible array which is sufficiently representative so as to determine whether the wage paid or benefits given are comparable. The Commission of Industrial Relation's determination of an array consisting of Nebraska counties excluding outstate counties fully complied with the statutory standard. *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984).

Absent evidence to show dissimilarities of work performed, or working conditions, where there are local comparisons which can or should be made, the Commission of Industrial Relations cannot disregard them and create an array which is not reflective of the local labor market. The use of the "key job" classification system in situations involving a large number of employee classifications is approved. *AFSCME Local No. 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981).

Determinations made as to the acceptance and rejection of proposed "comparables" were within the expertise of the commission, were made after consideration and comparison of the evidence, and were arrived at by methods in accord with the requirements of this section, and are affirmed. *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980).

Prevalent wage rates for firemen must be determined by comparison with wages paid for comparable services in similar labor markets, determined upon the factors in this section, and adjusted for economic dissimilarities shown to exist with the compared markets. *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977).

In establishing wages, the Court of Industrial Relations must consider overall compensation, including fringe benefits, and it may compare with wages in similar labor markets. *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 231 N.W.2d 710 (1975).

In selecting school districts for purpose of comparison, the ultimate question is whether those selected are sufficiently similar to the subject district and in establishing wage rates the entire situation, including fringe benefits, should be considered. *Crete Education Assn. v. School Dist. of Crete*, 193 Neb. 245, 226 N.W.2d 752 (1975).

3. Miscellaneous

Act establishing Court of Industrial Relations does not violate any constitutional provision and the standards for its guidance are adequate. *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975).

This section lists the factors that the Court of Industrial Relations should consider in establishing wage scales, hours of labor, and conditions of employment. *International Brotherhood of Electrical Workers v. City of Hastings*, 179 Neb. 455, 138 N.W.2d 822 (1965).