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inclusion of Lincoln and Omaha school districts in the array was not significantly disparate, or finding that the Special Master was correct in requiring the parties to negotiate a 2-year contract even though sufficient comparability data were not available. We affirm the decision of the CIR.

AFFIRMED.

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## THE BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, APPELLANT, V. STATE COLLEGE EDUCATION ASSOCIATION, APPELLEE.

787 N.W.2d 246

Filed August 13, 2010. No. S-09-738.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

Appeal from the Commission of Industrial Relations. Affirmed.

Patrick J. Barrett, of Fraser Stryker, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

### NATURE OF CASE

The Board of Trustees of the Nebraska State Colleges (Board) appeals the decision of the Commission of Industrial Relations (CIR), which affirmed the Special Master's ruling implementing the final offer of the State College Education

Association (SCEA) for salary increases for the 2009-11 biennium. We affirm the decision of the CIR.

## SCOPE OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

## FACTS

The Board operates Nebraska's three state colleges: Chadron State College, Peru State College, and Wayne State College. The SCEA is a bargaining agent for a faculty bargaining unit established under Neb. Rev. Stat. §§ 81-1373(3) and 81-1379(2) (Reissue 2008) of the State Employees Collective Bargaining Act (Bargaining Act), Neb. Rev. Stat. §§ 81-1369 to 81-1390 (Reissue 2008). The SCEA represents approximately 265.01 full-time-equivalent faculty members who work at the three state colleges in the ranks of professor, associate professor, assistant professor, and instructor. The SCEA is the exclusive bargaining representative of the employees, and the parties have bargained on a system-wide basis for many years.

The SCEA and the Board reached an impasse during negotiations for a new collective bargaining agreement for the July 1, 2009, to June 30, 2011, contract year. Pursuant to the Bargaining Act, the parties exchanged final offers on January 12, 2009, and submitted those final offers to the Special Master by January 15.

## SCEA's Final Offer

The SCEA based its final offer on an array selected in 1997 by the Nebraska Coordinating Commission on Postsecondary Education, which included institutions located all across the

United States. It compiled a separate array for each of the three state colleges. For Chadron State College, the SCEA proposed an array consisting of Eastern New Mexico University, Fort Hays State University (Kansas), Lander University (South Carolina), North Georgia College and State University, Northern State University (South Dakota), Northwestern Oklahoma State University, Southern Arkansas University, Southern Oregon University, Southwest Minnesota State University, and University of North Carolina at Pembroke.

The array for Peru State College consisted of Black Hills State University (South Dakota), Concord University (West Virginia), Dakota State University (South Dakota), Dickinson State University (North Dakota), Indiana University-East, Northwestern Oklahoma State University, Southwest Minnesota State University, University of Arkansas at Monticello, University of South Carolina at Aiken, and Western State College of Colorado.

Wayne State College's array consisted of Bemidji State University (Minnesota), Eastern New Mexico University, Fort Hays State University (Kansas), Georgia Southwestern State University, Minot State University (North Dakota), Northern State University (South Dakota), Southeastern Oklahoma State University, Southern Arkansas University, and Southern Oregon University. The SCEA defends its geographically broad arrays on the ground that college and university faculty are part of a national labor pool. It also notes that the peer schools selected are classified as similar by the Nebraska Coordinating Commission on Postsecondary Education, are all public institutions of comparable size, and are located outside of metropolitan areas.

In arriving at its final offer, the SCEA relied on data indicating that state college faculty salaries as a whole were below market by 4.17 percent for the 2007-08 academic year. The SCEA calculated annual average increases for the past decade and predicted 4.22-percent increases for each of the next 2 years. It proposed a 7-percent across-the-board increase for 2009-10 and a 4-percent across-the-board increase for 2010-11 to maintain comparability. The offer provided for a 6-percent increase in the minimum promotion base salary and minimum

new-hire base salary of each academic rank for 2009-10 and a 3-percent increase in minimum base salary for each rank for 2010-11. It also proposed a $3,000 increase to faculty members who are promoted to a new rank.

The SCEA justifies its offer for an 11-percent increase over 2 years on the grounds that faculty members were 5.02 percent below market for 2007-08 and that the average annual faculty increase for 1996-97 through 2006-07 as calculated by the American Association of University Professors is 4.22 percent.

The SCEA argues for across-the-board increases, because prior CIR wage comparability cases involving institutions of higher education measured the amount by which all bargaining unit members were below comparability and then ordered across-the-board increases for the unit. See, *Metropolitan Tech. Comm. College Educ. Ass'n v. Metropolitan Comm. College Area*, 14 C.I.R. 127 (2003); *Board of Regents of the University of Nebraska v. American Association of University Professors*, 7 C.I.R. 1 (1983). It claims that any attempt to differentiate salary raises by faculty rank is not consistent with CIR precedent.

### Board's Final Offer

In calculating its final offer, the Board used an array of nine colleges and universities located within 500 air miles of the nearest Nebraska state college. The array consisted of Black Hills State University (South Dakota), Dakota State University (South Dakota), Fort Hays State University (Kansas), Minot State University (North Dakota), Northern State University (South Dakota), Northwestern Oklahoma State University, Southeastern Oklahoma State University, Southwest Minnesota State University, and Western State College of Colorado. The proposed array members were located in rural, nonmetropolitan areas and had student enrollment similar to the Nebraska state colleges. All of these institutions were also included in the SCEA's array.

From this array, the Board proposed salary increases based on academic rank. It performed comparability analyses on a system-wide basis using data from the "Integrated Postsecondary

Education Data System" for the most recent academic year available, 2007-08, for each rank. The Board concluded that for 2007-08, professors were above market by .73 percent, associate professors were below market by 6.78 percent, assistant professors were below market by 11.73 percent, and instructors were below market by 4.36 percent. Relying on *Douglas County Health Department Employees Association v. County of Douglas*, 8 C.I.R. 208 (1986), *affirmed* 229 Neb. 301, 427 N.W.2d 28 (1988), the Board claimed that salaries of job classifications above comparability need not be increased.

Accordingly, the Board proposed raises as follows: Professors receive no increase in their base salary in either year, associate professors receive a 3.39-percent increase in each year, assistant professors receive a 5.87-percent increase for 2009-10 and a 5.86-percent increase for 2010-11, and instructors receive a 2.18-percent increase for both years. The Board also proposed eliminating sections appearing in the 2007-09 contract that provided for increases in minimum promotion base salaries and minimum new-hire base salaries of each academic rank.

### Special Master Hearing

The Special Master held a hearing on January 20, 2009, at which time both parties presented evidence. The SCEA and the Board also filed posthearing briefs. The Special Master issued his ruling on February 27. The Special Master made clear that he was required to choose between two "decidedly unattractive" final offers. He observed that each party submitted an "in your face" salary offer that was "highly unpalatable" to the other party but that he was nonetheless required to select one of the final offers as presented.

Reviewing the proposed arrays, the Special Master found that both arrays were reasonable. He compiled an array consisting of 12 Midwestern schools located in states adjacent to Nebraska or in a state adjacent to those adjacent states. The resulting array consisted of the nine schools proposed by the Board plus Bemidji State University in Minnesota, Dickinson State University in North Dakota, and Eastern New Mexico State University.

The Special Master used this array and calculated comparability figures similar to those reached by both the Board and the SCEA. He found that for 2007-08, professor salaries were approximately even with the market, associate professor salaries were almost 5 percent below market, assistant professor salaries were almost 13 percent below market, instructor salaries were about 2 percent below market, and the entire bargaining unit as a whole was 4.5 percent below market. The Special Master also determined that based on these parties' past practices and negotiating history, faculty ranks did not constitute separate job classifications.

Noting the inherent timelag in calculating comparability with data from 2007-08, the Special Master projected salary increases for 2008-09, 2009-10, and 2010-11. He used the Board's 2008-09 salary increase data from eight of the schools in the Board's proposed array. These eight schools reported mean, median, and midpoint salary increases of 3.75 percent, 4 percent, and 3.88 percent, respectively. The mean is the arithmetic average of the salaries in the array. The median is the middle value in the array. The midpoint is calculated by taking the average of the mean and median figures. As these figures were actual salary increases, the Special Master found the data superior to the projections proposed by the SCEA. As Nebraska state college faculty received a 4-percent increase in 2008-09, the Special Master found that the comparability results from 2007-08 did not change in any meaningful way in 2008-09.

Looking forward to the 2009-11 contract term, the Special Master took judicial notice of the worsening national economy and concluded that there was no basis for the SCEA's assumption that wages in peer institutions would increase by 4.22 percent in 2008-09, 2009-10, and again in 2010-11. Instead, the Special Master forecast average salary increases of 2.5 to 3 percent. He based this prediction on the fact that eight state government bargaining units represented by the Nebraska Association of Public Employees/AFSCME Local 61 agreed to increases of 2.9 percent and 2.5 percent for the next 2 years—equivalent to a 5.47-percent compounded increase. Therefore,

the Special Master assumed a 2-year market increase figure of 5.5 percent for comparability purposes.

The Special Master noted that faculty salaries were 4.5 percent below market in 2007-08 and had remained at the same rate below market in 2008-09. He then predicted a 5.5-percent increase among comparable institutions during the next 2 years and determined that the salary increase needed to maintain comparability during the 2009-11 contract term was about 10 percent. He noted that although the Board's offer moved some faculty (assistant professors and associate professors) closer to comparability than they are now, professors and instructors would fall below comparability over the next 2 years.

For the 2009-11 contract, the Special Master concluded that the SCEA's final offer of 11 percent did a better job of moving all unit members toward comparability and keeping them comparable for the duration of the contract than did the Board's offer of 4.33 percent. He also noted that the Board provided no rationale for removing provisions appearing in the 2007-09 contract regarding rank base minima. The Special Master selected the SCEA's offer as being the most reasonable.

## CIR Hearing

The Board appealed the Special Master's decision to the CIR. Before the hearing, the SCEA filed a motion in limine to prevent the Board from offering new evidence or new witness testimony for the CIR to consider. The Board opposed the motion and indicated it wished to submit evidence refuting the Special Master's conclusions. The CIR granted the motion in limine, noting that the further introduction of additional evidence was "in conflict with the intent of the Legislature in providing a speedy and inexpensive resolution to an appeal filed" to the CIR. It also noted that the CIR is required to show significant deference to the Special Master's ruling and set the ruling aside only if it finds the ruling is significantly disparate from prevalent rates of pay or conditions of employment as determined by the CIR pursuant to Neb. Rev. Stat. § 48-818 (Reissue 2004). The Board submitted an offer of proof for the record.

After a May 20, 2009, hearing, the CIR issued its "Opinion and Order on Appeal," affirming the Special Master's order. It found that "[e]ffective changes in the salary structure are not achieved by having the Special Master impose substantial structural changes requested by one party over the vehement objections of the other party." Accordingly, it found that the Special Master's selection of the SCEA's proposal instituting across-the-board increases over the Board's faculty rank increases was not disparate pursuant to § 48-818.

The CIR also determined that the Bargaining Act required parties to negotiate a 2-year contract despite the fact that accurate data for § 48-818 did not exist. It concluded that the Special Master's consideration of speculative data for the purpose of determining future comparability for the 2-year contract was not disparate pursuant to a § 48-818 analysis.

Finally, the CIR reviewed the Special Master's numbers and calculations and concluded that the comparability analysis was correct. Accordingly, the comparability figure of 10 percent fell between the Board's offer of 4.33 percent and the SCEA's offer of 11 percent. Giving the Special Master significant deference, the CIR concluded that the ruling was not significantly disparate from prevalent rates of pay or conditions of employment. The CIR affirmed the Special Master's ruling implementing the SCEA's final offer.

The Board appealed, and we granted its petition to bypass the Court of Appeals.

## ASSIGNMENTS OF ERROR

The Board alleges, combined and restated, that the CIR erred in (1) granting the SCEA's motion in limine and refusing supplemental evidence and (2) affirming the Special Master's order.

## ANALYSIS

### Motion in Limine and Denial of Additional Evidence

The first issue is whether pursuant to the Bargaining Act, parties can present additional evidence to the CIR after the Special Master hearing. We recently addressed this issue in

*State v. State Code Agencies Teachers Assn., ante* p. 459, 788 N.W.2d 238 (2010), and we adopt the reasoning set forth therein. We conclude that pursuant to the Bargaining Act, the CIR's review of a Special Master's ruling is an appeal and that the CIR did not err in granting the motion in limine and denying the Board's request to offer new evidence.

The Bargaining Act clearly defines the CIR's role in state employee cases to be an appellate body and not a redundant finder of fact. § 81-1383. The CIR is to show significant deference to the Special Master's ruling and is to set the ruling aside only upon a finding pursuant to § 48-818 that the ruling is significantly disparate. § 81-1383(2). The Special Master's decision is *not* significantly disparate if the prevalent rates of pay fall between the final offers of the parties. *Id.*

For these reasons, the CIR did not err in granting the SCEA's motion in limine and disallowing additional evidence to be submitted for its consideration.

### Affirming Special Master's Order

The Board next claims that the CIR erred in affirming the Special Master's order because the order was significantly disparate. Its contention is based on the CIR's exclusion of additional evidence and the Special Master's classification of the four faculty ranks as a single job classification. The Board also claims that second-year wages were based on speculative data. The Board argues that the CIR should have found that the Special Master's order was significantly disparate and implemented the Board's final offer.

We may modify, reverse, or set aside an order of the CIR on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005). There is no evidence that the CIR acted without or in excess of its powers or that the order was procured by fraud or is contrary to law.

In reviewing the CIR's order, we note that pursuant to § 81-1383(2), the CIR cannot find the Special Master's ruling to be significantly disparate from prevalent rates of pay when the prevalent rates of pay and conditions of employment, as determined by the CIR pursuant to § 48-818, fall between the final offers of the parties. Therefore, our review is limited to whether the facts found by the CIR support the CIR's conclusion that the prevalent rates of pay and conditions of employment fall between the final offers of the parties and whether the order is supported by a preponderance of the competent evidence on the record considered as a whole.

The Board's claim that the prevalent rates of pay were not between the final offers of the parties is based on the exhibits the Board submitted as an offer of proof in response to the SCEA's motion in limine. As discussed above, the CIR properly declined to consider the supplemental evidence when determining the prevalent rates of pay. See *State v. State Code Agencies Teachers Assn., ante* p. 459, 788 N.W.2d 238 (2010). In viewing the facts considered by the CIR, the evidence supports the CIR's conclusion that the prevalent rates of pay fell between the final offers of the parties.

The Board also argues that the CIR erred in affirming the Special Master's order on the ground that it found that the faculty ranks of professor, associate professor, assistant professor, and instructor constitute a single job classification. In its analysis, the Board overlooks or ignores the reasoning stated by the Special Master and the CIR for that decision. As noted by the CIR, the parties' past practice has been to impose across-the-board salary increases. The Board did not offer any evidence in support of changing this practice. We agree with the CIR that substantial changes in salary structure are not achieved by imposition over the "vehement objections of the other party." Indeed, this decision is in line with the CIR's history of leaving changes in salary structure to collective bargaining. See, *Board of Regents of the University of Nebraska v. American Association of University Professors*, 7 C.I.R. 1 (1983) (citing *West Holt Faculty Ass'n v. School District Number 25 of Holt County*, 5 C.I.R. 301 (1981), and *Omaha Association of*

*Firefighters, Local 385 v. City of Omaha, Nebraska*, 2 C.I.R. 117 (1975), *affirmed* 194 Neb. 436, 231 N.W.2d 710 (1975)). We likewise conclude that the facts support the CIR's determination that the Special Master's refusal to unilaterally impose salary structure changes was not disparate when reviewed pursuant to § 48-818. The order is supported by a preponderance of the competent evidence on the record considered as a whole.

Finally, the Board claims that the CIR erred in giving deference to the Special Master's order, because it was based on speculative evidence for future wage increases. We also addressed this issue in *State v. State Code Agencies Teachers Assn., supra*, concluding that the Bargaining Act requires 2-year contracts. And, as second-year comparability data are not always available at the time of negotiations, we observed that failing to predict salary increases for future years would result in bargaining unit members' salaries constantly being significantly below actual comparability and in a constant catchup status. *Id.* Accordingly, the CIR did not err in deferring to the Special Master on this issue, and this assignment of error is without merit.

## CONCLUSION

The Bargaining Act does not permit additional evidence to be submitted to the CIR after the order is issued by the Special Master, and therefore, the CIR properly granted the SCEA's motion in limine. Furthermore, the CIR did not err in finding that the Special Master's order was not significantly disparate. We affirm the decision of the CIR.

AFFIRMED.