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Scottsbluff Police Officers Association, Inc., F.O.P. Lodge 38, appellee, v. City of Scottsbluff, Nebraska, a city of the first class, appellant.

805 N.W.2d 320

Filed November 4, 2011. No. S-10-960.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an 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.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from an order by the Commission of Industrial Relations regarding prohibited practices, an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Labor and Labor Relations: Federal Acts: Statutes.** Decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 2010), but are not binding.
4. **Labor and Labor Relations: Contracts.** Good faith bargaining includes the execution of a written contract incorporating the terms of an agreement reached pursuant to Neb. Rev. Stat. § 48-816(1) (Reissue 2010).
5. **Labor and Labor Relations.** Nebraska's Industrial Relations Act requires parties to negotiate only mandatory subjects of bargaining.
6. ____. Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining under Nebraska's Industrial Relations Act.
7. ____. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.
8. **Labor and Labor Relations: Insurance.** Health insurance coverage and related benefits, including health insurance exclusions, are akin to fundamental, basic, or essential concerns to an employee's financial and personal concern and, therefore, may be considered as involving working conditions and are thus mandatory subjects of bargaining under Nebraska's Industrial Relations Act.
9. **Commission of Industrial Relations: Labor and Labor Relations.** An employer subject to Nebraska's Industrial Relations Act may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission

of Industrial Relations. If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.

10. **Appeal and Error.** Error that does not prejudice a party does not provide grounds for relief on appeal.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded with directions.

Jerry L. Pigsley, of Harding & Shultz, P.C., L.L.O., for appellant.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

GERRARD, J.

The City of Scottsbluff, Nebraska (the City), appeals from a decision of the Nebraska Commission of Industrial Relations (CIR), which determined that the City violated Nebraska's Industrial Relations Act (IRA),[1] when the City implemented changes to health insurance coverage and related benefits without bargaining with the Scottsbluff Police Officers Association, Inc. (the Union). The City appeals. For the following reasons, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

The Union represents Scottsbluff law enforcement officers below the rank of captain. The City and the Union negotiate these officers' contracts on a year-to-year basis. Past contracts typically ran on a fiscal year basis, from October through September of the following year. However, health insurance premiums were determined on a calendar year basis, so past contracts between the City and the Union contained a reopen clause, which stated that during the term of the contract,

[1] See Neb. Rev. Stat. § 48-801 et seq. (Reissue 2010).

negotiations could be reopened for individual, specifically defined issues, such as cost-of-living increases, salary comparisons and increases, and health and dental premiums.

The present dispute arose out of contract negotiations for the October 2009 through September 2010 term. During negotiations, the City presented several proposed changes, including changes to the article of the contract which allowed for the reopening of negotiations for health and dental premiums each year prior to open enrollment. After several negotiation sessions, on June 24, 2009, the parties arrived at a tentative agreement, subject to ratification of the agreement by the parties.

On July 30, 2009, the City adopted an amendment to its health insurance plan which pertained to hazardous hobbies or activities, effective August 1. The previous hazardous hobbies or activities provision had generally excluded health insurance plan coverage for injuries which resulted from hazardous activities, and the provision had identified some of those activities. The City's amendment clarified the provision by further defining hazardous pursuits, hobbies, and activities, and enumerating several examples of such hazardous activities. The examples included "ultimate fighting," reckless operation of machinery, all-terrain vehicle use, and travel to countries with advisory warnings. The City did not negotiate these changes with the Union and later stated that it did not view the health insurance exclusion as a negotiable item. The City informed the Union of the changes to the health insurance plan on August 4.

On August 19, 2009, the Union ratified the agreement for the 2009-10 term and, thereafter, informed the City of the Union's decision. However, according to the Union, after it ratified the agreement, individual union members approached the Union's president and voiced concerns about the unilateral changes to the hazardous hobbies or activities exclusion in the health insurance plan. Though the Union had voted to ratify the agreement for the 2009-10 term, the Union's president sent an e-mail to the City asking the City to refrain from presenting the agreement to the city council for approval until the health insurance exclusions could be discussed between the parties.

The City refused to remove the agreement from the city council's consideration, and the city council ratified the agreement on September 8 and then notified the Union that the approved contract had been signed by the mayor and was available for the Union president's signature. The Union's president refused to execute the agreement until the parties could "get the insurance issues taken care of."

The parties then met three times to discuss the health insurance hazardous activities exclusion. However, the City maintained that the terms of the health insurance plan were solely within its control as long as reasonable coverage was provided. On November 10, 2009, the City informed the Union that the City intended to review the group insurance rates and benefits for 2010. The Union declined to discuss those issues without the presence of the Union's attorney. The City then implemented changes to the City's health insurance plan, including changes to the deductibles, copays, and maximum out-of-pocket amounts. The City later admitted to implementing changes in the health care benefits and hazardous activities exclusion section because the City believed those changes to be within its management control.

The Union then filed a petition with the CIR, alleging that the City had violated § 48-824(1) by unilaterally implementing changes in the health insurance hazardous activities exclusion and by unilaterally changing the group health care benefits. The City counterclaimed that the Union had violated §§ 48-816(1) and 48-824(3)(c) when the Union failed to execute a written contract incorporating the agreement reached by the parties for the 2009-10 term. The City also claimed that the Union had refused to negotiate and meet with the City in good faith to discuss calendar year increases in health and dental premiums for 2010, in violation of §§ 48-816(1) and 48-824(1) and (3)(c).

The CIR noted that § 48-816(1) requires parties to negotiate only mandatory subjects of bargaining. Ultimately, the CIR determined that both the health insurance exclusion and the health care benefits were mandatory subjects of bargaining and that the City had violated § 48-824(1) in refusing to bargain with the Union regarding those issues. The CIR determined

that the Union had not violated the IRA in refusing to execute the written contract incorporating the parties' prior agreement for the 2009-10 term, nor had the Union refused to negotiate the calendar year increases in health and dental premiums for 2010. The CIR ordered the City to return the parties to the status quo ante and ordered the parties to commence good faith negotiations within 30 days. Finally, the CIR denied the Union attorney fees, determining that the City's violation was not repetitive, egregious, or willful.

ASSIGNMENTS OF ERROR

The City assigns, summarized and restated, that the CIR erred when it (1) determined that the Union had not violated the IRA when it refused to execute a written contract incorporating an agreement ratified by the Union, (2) determined that the City had violated the IRA by unilaterally implementing changes to the health insurance exclusions and to health care benefits, (3) determined that the Union had not failed to bargain in good faith with the City over insurance premiums, and (4) considered the Union's request for attorney fees although the Union had not pled for the award of such fees.

STANDARD OF REVIEW

[1] Under § 48-825(4), any order or decision of the CIR may be modified, reversed, or set aside by an 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.[2]

[2] In an appeal from an order by the CIR regarding prohibited practices, an appellate court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[3]

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[2] *IBEW Local 763 v. Omaha Pub. Power Dist.*, 280 Neb. 889, 791 N.W.2d 310 (2010).

[3] *Id.*

ANALYSIS

Union's Failure to Execute Agreement

The City argues that the CIR erred when it determined that the Union had not violated the IRA when the Union refused to execute a written contract which it had previously ratified. Section 48-824(3)(c) provides that it is a prohibited practice under the IRA to refuse to bargain collectively with an employer, and § 48-816(1) states that collective bargaining includes the "execution of a written contract incorporating any agreement reached if requested by either party." The City argues that the parties reached an agreement on June 24, 2009, subject to ratification by the Union and city council and that both parties later ratified the agreement; so the Union committed a prohibited practice under § 48-824(3)(c) when the Union's president later refused to execute the written contract which embodied the earlier agreement.

[3,4] We have previously noted that decisions under the National Labor Relations Act (NLRA)[4] are helpful in interpreting the IRA, but are not binding.[5] Section 48-824(3)(c) is substantially similar to the NLRA's § 8(b)(3), codified at 29 U.S.C. § 158(b)(3), and decisions interpreting § 8(b)(3) are instructive. Under the NLRA, it is well established that a union refuses to bargain collectively with an employer, in violation of § 8(b)(3), when the union refuses to execute a written collective bargaining agreement reached with the employer which incorporates all the terms of its agreement.[6] We agree. Because collective bargaining includes the "execution of a written contract incorporating any agreement reached" pursuant to § 48-816(1), the Union's failure to execute the agreement after both parties

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[4] See 29 U.S.C. § 151 et seq. (2006).

[5] See *IBEW Local 763, supra* note 2.

[6] See *Teamsters Local 589 (Jennings Distribution)*, 349 N.L.R.B. 124 (2007). See, also, *H. J. Heinz Co. v. Labor Board*, 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941); *Ivaldi v. N.L.R.B.*, 48 F.3d 444 (9th Cir. 1995); *N.L.R.B. v. Quinn Restaurant Corp.*, 14 F.3d 811 (2d Cir. 1994); *N. L. R. B. v. Ralph Printing & Lithographing Company*, 433 F.2d 1058 (8th Cir. 1970).

ratified that agreement constitutes a prohibited practice within the meaning of § 48-824(3)(c).

The Union argues that the parties agreed to "ground rules" which stated, in part: "It is agreed by the parties that all agreements shall be considered as tentative, and not final, until the execution of the final agreement or contract, unless otherwise specified." However, the fact that the parties agreed to ground rules which stated that the parties' agreements were to be considered tentative until the execution of a final agreement does not change the scope of the parties' statutory duty to execute a ratified agreement pursuant to § 48-816(1). And though the Union argues that it attempted to remove the agreement from going before the city council for ratification, the Union had already ratified the agreement and notified the City of the Union's ratification, so the City was under no duty to honor the Union's request to withdraw the agreement from going before the city council for consideration.

The Union also argues that it was under no duty to execute the ratified agreement because of the City's unilateral change to the insurance hazardous activities exclusion section. As will be discussed in detail below, the City's unilateral implementation of changes to the insurance exclusions indeed constituted a prohibited practice under the IRA. The Union's argument appears to be that the City's unilateral change to the insurance exclusion excused the Union's statutory duty to execute the ratified agreement. However, the record reflects that the City's unilateral change to the insurance exclusion occurred before the Union ratified the agreement, that the Union was given notice of the unilateral change before it voted to ratify the agreement, and that the terms of the agreement did not contain any provisions pertaining to insurance exclusion provisions. So, though the City committed a prohibited practice under the IRA when the City unilaterally changed the scope of the insurance exclusions, the Union remained under a duty to execute any agreement that the parties ratified pursuant to § 48-816(1).

The undisputed evidence in the record indicates that the Union refused to execute the parties' ratified agreement. The Union therefore committed a prohibited practice within the meaning of § 48-824(3)(c), regardless of the City's unilateral

changes to the insurance exclusions. The CIR's determination that the Union did not violate § 48-824(3)(c) when it refused to execute the ratified agreement is therefore contrary to law. Accordingly, we reverse the decision of the CIR with regard to the Union's violation of § 48-824(3)(c). Because the CIR did not determine that the Union committed a prohibited practice when it failed to execute the ratified agreement, the CIR did not determine what remedies might be available to the City. We remand to the CIR to determine what, if any, remedies are available to the City for the Union's § 48-824(3)(c) violation.

City's Changes to Health Plan

The City argues that the CIR erred in determining that the City had violated the IRA when the City unilaterally implemented changes both to the design of the health insurance plan regarding the health insurance exclusion and to the group health care benefits regarding premiums, copays, deductibles, and maximum out-of-pocket expenses.

[5-7] The IRA requires parties to negotiate only mandatory subjects of bargaining.[7] However, management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining.[8] A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.[9]

[8] The CIR has previously determined that health insurance benefits are mandatory subjects of bargaining.[10] And notably, it is well established under the NLRA that health insurance coverage and related benefits are mandatory subjects of bargaining,

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[7] See § 48-816(1)(b).

[8] *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007).

[9] *Id.*

[10] See, *Communications Workers of America v. County of Hall*, 15 C.I.R. 95 (2005); *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994).

if the coverage or benefits are not provided for by statute but are left to the discretion of the employer.[11] We agree. Health insurance coverage and related benefits, including health insurance exclusions, are akin to fundamental, basic, or essential concerns to an employee's financial and personal concern and, therefore, may be considered as involving working conditions. Accordingly, we determine that health insurance coverage and related benefits are mandatory subjects of bargaining under the IRA.

In that regard, we do not disagree with the dissent's suggestion that the Legislature could and perhaps should decide whether "health plan design," such as an exclusion like the one at issue in this case, is mandatorily bargainable or a management prerogative. This question implicates public policy, the declaration of which is the Legislature's function.[12] But the fact remains that the Legislature has not spoken to the issue. And the question must be answered, regardless of whether we have legislative guidance.

The dissenting opinion suggests that there is a difference between "health insurance benefits" and "health plan design" and criticizes the authority cited above as neglecting that distinction. But the dissenting opinion counters with no authority of its own—particularly, no authority making the distinction the dissent suggests. Nor is that distinction particularly easy to make. What the dissenting opinion characterizes as "health plan design" is, in fact, the essence of health insurance benefits: what, exactly, the insurance *covers*. A prudent consumer shopping for insurance considers not only the bare fact of coverage, or the cost of coverage, but the *scope* of coverage offered by an insurer. The distinction between "benefits" and "design" disappears if the design narrows the scope of coverage to the point

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[11] See *Larry Geweke Ford*, 344 N.L.R.B. 628 (2005). See, also, *Mid-Continent Concrete*, 336 N.L.R.B. 258 (2001), *enforced sub nom. N.L.R.B. v. Hardesty Co., Inc.*, 308 F.3d 859 (8th Cir. 2002); *F.D.I.C. v. Federal Labor Relations Authority*, 977 F.2d 1493 (D.C. Cir. 1992); *Bastian-Blessing, Div. of Golconda Corp. v. N. L. R. B.*, 474 F.2d 49 (6th Cir. 1973).

[12] See, e.g., *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

that benefits to the insured are lost. Yet the dissenting opinion suggests that the scope of coverage—an essential part of the bargain in evaluating the value of an insurance policy—is outside the bounds of what is mandatorily bargainable.

The dissenting opinion suggests that the scope of coverage is too complex for such negotiation, such that it would be "unmanageable and unrealistic" to require an employer to enter into negotiations over all the details of coverage. Again, we do not disagree—but we also anticipate that most of those details would prove noncontroversial and would not require exhaustive negotiation. And we are not in a particularly good position to evaluate which details will be important to either employees or employers.

We obviously agree, as the dissenting opinion suggests, that it is prudent public policy for the City to control insurance costs. Employees certainly have an interest in that as well. But employees also have an interest in enjoying the full range of hobbies and recreational activities that any citizen is entitled to pursue, including many that might involve "risk-taking," such as skiing, water sports, or martial arts. As with many aspects of collective bargaining, there is a balance to be struck. And, in the absence of a clear legislative mandate, that balance should be struck by the parties through negotiation, not by this court.

In short, while we agree with several of the practical concerns raised by the dissenting opinion, we cannot agree with the dissent's conclusion that there is a meaningful difference between the mere fact of health insurance benefits and the "plan design" that actually describes what those benefits are. Health insurance coverage—and the *scope* of that coverage—is a meaningful and important part of an employee's compensation and, as such, should be mandatorily bargainable. Until the Legislature says otherwise, it is not this court's place to decide what aspects of that coverage are nonnegotiable.

And in this case, those negotiations did not occur. The record clearly indicates that the City unilaterally implemented changes to the health insurance plan exclusions and to the group health benefits regarding premiums, copays, deductibles, and maximum out-of-pocket expenses. On appeal, the

City argues that the Union refused to negotiate with the City and waived the Union's right to bargain over health insurance benefits.

The record reflects that the parties never previously bargained over health insurance benefits other than premium amounts. But, there is no evidence contained in the record that the Union clearly waived its right to bargain over those terms. The record indicates that both parties were long under the misapprehension that health care benefits were not mandatory subjects of bargaining. That misapprehension is not sufficient to establish that the Union waived its right to collectively negotiate regarding a mandatory subject of bargaining. And though the Union committed a prohibited practice when it refused to execute the ratified agreement, the Union's refusal did not excuse the City from negotiating mandatory subjects of bargaining.

[9] The first of the City's unilateral changes—the change to the health insurance exclusions—took place before the Union's refusal to execute the ratified agreement. Though the City's other unilateral changes occurred after the Union's refusal, it remains that an employer subject to the IRA may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the CIR.[13] If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.[14] Here, there is no evidence in the record that the City's unilateral changes to the health insurance premiums, copays, deductibles, and maximum out-of-pocket expenses were bargained to impasse, and no evidence that they were contained in a final offer.

The CIR determined the evidence established that the City created the design of the plan, the plan benefits, and the

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[13] See *IBEW Local 763, supra* note 2.

[14] *Id.*

contribution amounts independently from the negotiation process. The CIR also determined that the City had presented no evidence that the Union clearly and unmistakably waived its right to bargain. There is competent evidence in the record to support these determinations, and we cannot say the determinations were unreasonable.

The City's unilateral implementation to the health insurance exclusions, premiums, copays, deductibles, and maximum out-of-pocket expenses constituted a per se violation of the duty to bargain in good faith, which is not excused by the Union's refusal to execute the ratified agreement. We therefore affirm the CIR's determination that the City committed a prohibited practice by unilaterally implementing the previously mentioned health insurance changes.

Did Union Refuse to Bargain in Good Faith?

The City argues that the CIR erred when it denied the City's counterclaim that the Union had violated the IRA by failing to bargain in good faith on proposed increases in health insurance premiums. The City argues that when it refused to change the health insurance exclusions, the Union refused to meet with it to negotiate health and dental insurance premiums.

The City's argument that the Union violated the IRA by failing to bargain in good faith on the proposed increases in health insurance premiums is without merit. Given our standard of review, the question is whether the CIR's findings were unreasonable or unsupported by competent evidence. As the CIR determined, the record reflects that the Union did not refuse to meet with the City to negotiate health and dental premiums, but, rather, attempted to resolve the health insurance issues through the use of its attorney. The City repeatedly and continuously said that it was under no duty to bargain with the Union in regard to health insurance plan exclusions or health care benefits, other than negotiating premiums. In spite of the City's assertion that it was under no duty to negotiate the previously mentioned issues, the record reflects that the Union suggested dates and times for negotiations in an attempt to bargain with the City. And though the record shows that the Union refused

to negotiate without the assistance of counsel, that refusal did not amount to a refusal to negotiate in good faith. There is competent evidence in the record supporting the CIR's determination that the Union did not refuse to bargain in good faith for failing to meet to negotiate health and dental premiums, and the CIR's conclusion was not unreasonable.

Attorney Fees

[10] The City argues that the CIR erred in considering the Union's request for attorney fees, because the Union failed to plead for such fees. The City argues that this was a violation of CIR rule 42,[15] which requires, in relevant part, that a complaint filed for prohibited practices must include a demand for the relief to which the party supposes itself entitled. The Union's petition and amended petition in fact do not contain a demand for attorney fees. However, the issue of whether the Union was required to plead for the award of attorney fees in order for the CIR to award the fees is one we need not decide. The CIR refused to award attorney fees in this case, so the City was not prejudiced by the CIR's consideration of the attorney fees issue. Error that does not prejudice a party does not provide grounds for relief on appeal.[16] Because the City was not prejudiced by the CIR's consideration of attorney fees, there are no grounds for relief available on appeal, so we do not consider the City's last assignment of error.

CONCLUSION

Because we determine that the Union's refusal to execute the previously ratified agreement constitutes a prohibited practice under the IRA, we reverse the order of the CIR in relevant part. We note that the contract year at issue is past, but the record is not clear as to what liabilities may have been incurred during the pendency of these proceedings. It is not entirely clear to us, from the record, how the parties would propose

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[15] See Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2011).

[16] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

to remedy the Union's refusal to execute the agreement. So, rather than simply directing the agreement to be enforced, we remand the cause to the CIR to determine what, if any, remedies are available to the City for the Union's violation. The portion of the CIR's order requiring the parties to commence good faith negotiations on the health insurance issues within 30 days is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., concurring in part, and in part dissenting.

I join that portion of the majority's opinion which concludes the CIR erred in failing to find that the Union's refusal to execute the previously ratified agreement was a prohibited practice under the IRA. I also concur with the majority that the City is required to bargain with the Union with respect to costs of insurance coverage, including premiums, copayments, and maximum out-of-pocket amounts. But because I would hold that health plan design, at least as presented in this case, is a management prerogative, I disagree with the portion of the majority opinion which orders the parties to enter into good faith negotiations regarding that topic of bargaining. As such, I concur in part, and in part dissent from the decision of the court.

My first concern is that the majority opinion acknowledges the two distinct questions presented to the court—health insurance benefits and health plan design—but then reaches a conclusion without engaging in any analysis addressing these distinct issues. The majority simply concludes that "[h]ealth insurance coverage and related benefits, including health insurance exclusions . . . involve[] working conditions." In reaching this decision, the majority cites only the general proposition that health insurance benefits are mandatory subjects of bargaining, but does not discuss any cases that address the distinction at issue here.

Nor do I find the reasoning of the CIR persuasive. In its order, the CIR noted that the issue of health plan design had not been previously addressed by the CIR. In support of its ultimate conclusion that the City erred in not negotiating with regard to design, the CIR cited *F.D.I.C. v. Federal Labor*

Relations Authority.[1] In this case, decided under the Federal Service Labor-Management Relations Act,[2] the Circuit Court of Appeals for the District of Columbia was presented with two health insurance related issues—the requirement that employees with family coverage pay more for coverage, as well as a change in "open season" for enrolling for coverage. But I find this case of limited utility. First, *F.D.I.C. v. Federal Labor Relations Authority* deals with two distinct areas, one involving plan cost and the other involving plan design. Yet the court does not separately address the two issues; instead, it concludes without much analysis that the employer should have engaged in bargaining.

And we are not bound by federal decisions in this area. We have held that decisions under the National Labor Relations Act (NLRA)[3] (and technically *F.D.I.C. v. Federal Labor Relations Authority* was not a decision under the NLRA) are helpful in interpreting the NLRA, but are not binding.[4]

More substantively, I disagree with the conclusion that health plan design, in this case, the hazardous activities exclusion, is mandatorily bargainable. I would instead conclude that this exclusion is an example of a management prerogative and is not subject to mandatory bargaining.

I agree with the majority's view that "[a] matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions . . . ."[5] But management prerogative excludes from mandatory bargaining certain issues, like the right to hire, to maintain order and efficiency, and to control transfers and assignments.[6]

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[1] *F.D.I.C. v. Federal Labor Relations Authority*, 977 F.2d 1493 (D.C. Cir. 1992).

[2] See 5 U.S.C. § 7101 et seq. (2006 & Supp. IV 2010).

[3] See 29 U.S.C. § 151 et seq. (2006).

[4] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[5] *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 77-78, 736 N.W.2d 375, 382 (2007).

[6] *Id.*

In my view, the exclusion at issue in this case deals primarily with the employer's right to maintain order and efficiency. Here, the City has a police force in order to provide for public safety. The City also has numerous other employees in a variety of roles that also provide services to the public. Like most public employers, the City has been assigned the obligation to provide health insurance coverage for all those employees. It is prudent public policy for the City to both discourage employee risk-taking and control insurance costs for both it and the individuals it employs.

The conclusion reached by the majority thwarts both management objectives. And unlike copayments and maximum out-of-pocket payments, the cost of exclusions such as the hazardous activities exclusion would appear to be much more complex to calculate and will depend greatly on variables under the control of yet another party, the health insurance provider. Making such details subject to mandatory bargaining seems unworkable. An examination of the City's health insurance plan includes at least 47 separate exclusions from coverage, including controversial exclusions such as abortion. It would be unmanageable and unrealistic to require the City to enter into negotiations as to all of these exclusions, particularly when one considers that the City has relationships with multiple unions and other employees. Yet the majority's conclusion could lead to such a result.

Simply put, this is a close case. The CIR is not a court, and it has limited jurisdiction. Notably, it has no power or authority other than that specifically conferred on it by statute.[7] Under these circumstances, I feel the Legislature should be the last word in whether health plan design, particularly an exclusion such as the one at issue in this case, is mandatorily bargainable or is a management prerogative.

For these reasons, I respectfully concur in part, and in part dissent.

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[7] *Central City Ed. Assn. v. Merrick Cty. Sch. Dist.*, 280 Neb. 27, 783 N.W.2d 600 (2010).