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Commission of Industrial Relations:
Wreaking Havoc on City Budgets and Governance in Nebraska

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Executive Summary

Nebraska city governments are struggling to make ends meet. Shrinking tax revenues and growing personnel budgets are forcing city governments to ask increasingly tougher questions in increasingly tougher times: "Should we raise city taxes? Cut city services? *Lay-off* city employees?" Such anxious queries are undoubtedly related to the current economic crisis. However, Nebraska's unique method of resolving city employee salary disputes is making matters worse.

The Commission of Industrial Relations, or "CIR" as it is commonly known, is *the* state administrative agency responsible for resolving all city employee salary disputes in Nebraska. The CIR suffers from a number of problems, however, problems which directly threaten the economic vitality of city governments across the state.

The main problem with the CIR is that it fails to take into account a city's *ability to pay* before setting the new – and generally higher – city employee salaries.

Other problems with the CIR include the lack of a "Nebraska First" requirement (to be explained later) and the lack of any meaningful legislative oversight or appellate review.

As a result of these problems, the CIR has wreaked havoc on city budgets and city governance – during the worst economic crisis since the Great Depression. Therefore, it is recommended that the following changes be made immediately:

- The CIR statute should be amended to require that the CIR consider a city's ability to pay before setting new city employee salaries.
- The CIR statute should be amended to require that the CIR consider Nebraska cities first when setting new city employee salaries.
- The CIR statute should be amended to provide meaningful legislative oversight and appellate review of all CIR salary decisions.

Section 1 - Introducing the CIR

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way...

Charles Dickens' famous opening in *A Tale of Two Cities* describes Revolutionary France in the late 18th Century and Recessionary America in the early 21st Century equally well. While America is not beset with the revolutionary fervor and political unrest characteristic of France during those times, it is beset with a regulatory fervor and bailout hysteria that would make Karl Marx blush. Congress has already bailed out Bear Stearns, JP Morgan, Bank of America, Fannie Mae, Freddie Mac, AIG, American Express, Citigroup, Chrysler and GM. Additional companies are likely not far behind. At a price tag in the *trillions* of dollars, the question on everyone's mind – outside of Washington D.C. anyway – is: "How are we going to pay for *all this*? *And* Social Security? *And* Medicare? *And* (God forbid) Universal Healthcare? Print more money? Borrow *more*? – the very thing that got us into this mess in the first place?"

While Congress punts the ability to pay for these bailouts to our children, grandchildren, and great-grandchildren, state and local governments across the country are reexamining – out of the virtue of economic necessity – their payrolls, programs, and projects based on their ability to pay. Many cities are taking extreme measures to make ends meet: "Battered by record foreclosures and falling tax revenues, cities are laying off workers, raising fees and closing libraries and recreation centers."[1] Other cities are taking less extreme measures, opting to freeze or cut public employee salaries instead.[2] Nebraska cities cannot avail themselves of this second, less extreme option however, because the Nebraska Legislature has adopted a unique method of establishing public employee salaries that essentially precludes[3] such flexible action – the Commission of Industrial Relations.

The Commission of Industrial Relations, or "CIR" as it is commonly known, is a state administrative agency comprised of five commissioners appointed by the Governor with the advice and consent of the Legislature.[4] The Legislature created the CIR to ensure the "continuous, uninterrupted and proper functioning and operation of [city] governmental service[s]."[5] To achieve this laudable public purpose, the Legislature did two things:

it banned city employees[6] from striking over salary disputes[7], and it established the CIR as the *sole* governmental body responsible for resolving city salary disputes in the state.[8] In order to peaceably resolve these disputes, the Legislature empowered the CIR to establish new salaries for Nebraska city employees that are "comparable" to the salaries of public employees in other cities.[9] In order to implement this broad mandate, the CIR developed a two-step process.[10] First, the CIR chooses an array of cities that are "comparable" to the Nebraska city in question.[11] Second, the CIR establishes new salaries that are "comparable" to the prevalent salaries of similar public employees residing in the "comparable" array cities.[12] After the CIR establishes, or sets, these new salaries, the city governments are required to pay.[13] If a given city refuses, it may be held in contempt of court; however, the city may appeal the CIR's salaries to the Nebraska Court of Appeals and, if that fails, to the Nebraska Supreme Court.[14]

Although the CIR's "comparable" system sounds straightforward and fair, it suffers from a number of significant problems. Chief among them is the Legislature's failure to require the CIR to consider a city's *ability to pay* before setting the new, and generally higher, "comparable" salaries.[15] Other problems include the Legislature's failure to require the CIR to consider Nebraska cities *first* when choosing "comparable" cities,[16] as well as the Legislature's failure to regulate the CIR through meaningful legislative oversight and appellate review.[17] These legislative failures are significant problems because, over the years, they have wreaked havoc on city budgets and city governance, and have forced city governments to make increasingly tougher decisions in increasingly tougher times.

Take Lincoln, for instance. In 1998, a dispute arose between the City of Lincoln and the Lincoln Firefighters Association Local 644 over the salaries of Lincoln firefighters.[18] In resolving the dispute, the CIR followed the two-step process described above. It first chose an array of "comparable" cities that included Cedar Rapids, Davenport, Des Moines, Minneapolis, Peoria, Sioux Falls, and Topeka.[19] It then established new pay lines for Lincoln firefighters based on the prevalent pay lines for firefighters residing in the array cities.[20] In so doing, the CIR doubled the starting salary for new firefighters from $18,000 to $36,000 per year, and raised the top salary for veteran firefighters to $51,030 per year.[21] Yet the CIR never considered the City of Lincoln's *ability to pay* before setting the "comparable" salaries, and the CIR never considered other Nebraska cities before choosing the "comparable" array, which, as already mentioned, included Minneapolis – *a metropolitan area ten times the size of Lincoln*.[22] When the City of Lincoln appealed the drastically higher salaries to the

Nebraska Supreme Court, the Court refused to reverse the CIR's decision because "there was no evidence presented to support the contention that a city's presence in a larger metropolitan area directly affected wages or work, skills and working conditions."[23] As a result, the city was stuck with the bill.

Ten years later, Lincoln's bill has grown. Spending on city employee salaries has increased 42 percent (from $76 million to $108 million), while average city salaries have increased 39 percent (from $33,463 to $46,546); spending on employee benefits have increased twofold (from $7,573 to $14,189), while city payrolls continue to grow – all because of the CIR.[24] With a budget shortfall in the millions of dollars, in a time when economic uncertainty is the only certainty, the City of Lincoln must now choose between the least of three evils to make ends meet: it can either raise city taxes, cut city services, or lay-off city employees.[25] Sadly, Lincoln is not alone; a number of cities across the state have had similar unsustainable salaries imposed upon them by the CIR – with similar results. Because this result is contrary to the original purpose of the CIR – to ensure the continuous, uninterrupted and proper functioning and operation of city governmental services – and antithetical to the virtue of good governance in bad times, the CIR system, as it presently stands, must be altered if city governments are to survive the worst economic crisis since the Great Depression. This is the focus of this report.

* * * * *

This report will begin by discussing the main problem of the CIR system: the absence of an *ability to pay* requirement. This report will continue by discussing the other problems of the CIR system: the lack of "comparability" constraints and the threat of unbridled CIR power. This report will then conclude with practical solutions to the CIR problems, in the form of practical amendments to the CIR statutes.

Section 2 - Main Problem of the CIR System: Ability to Pay

The Legislature laid out the broad powers of the CIR in section 48-818 of the Industrial Relations Act.[26] Section 48-818 mandates that the CIR establish new salaries for Nebraska city employees "which are comparable to the prevalent [salaries] for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions."[27] Section 48-818 fails to mandate, however, that the CIR consider a city's *ability to pay* before setting the new "comparable" salaries.[28] The answer may seem obvious to most, but why is this such a problem? Why is ability to pay so important?

In the private sector, when an employer looks to hire a new employee, or give a raise to an existing employee, the employer's primary considerations are: a) the value of the employee's knowledge, experience, and abilities in relation to the position in question, and b) the employer's ability to pay for this value. The former consideration – the employee's salary – is determined by the local labor market[29] and the employer's business judgment.[30] The latter consideration – the employer's ability to pay – is determined by a number of factors particular to the employer, including, but not limited to, the employer's level of debt, margin of profits, potential for growth, and general economic outlook.

Under the CIR system, however, a city employee's salary is set by a central governmental authority, not the local labor market or city government (more on this later), while a city's ability to pay for the new – and generally higher – salary goes completely ignored.[31] This one-side approach has wreaked havoc on city budgets and city governance, because as the CIR sets higher and higher salaries (which on average already account for 70% of a city's budget)[32], the percentage of a city's non-salary budget drops lower and lower, forcing city governments to either raise city taxes[33], cut city services[34], or lay-off city employees[35] – just to make ends meet.[36] This result is contrary to the Legislature's own public purpose – to ensure the continuous, uninterrupted and proper functioning and operation of city governmental services – and antithetical to the virtue of good governance in bad times. Therefore, the CIR, as it presently stands, must

be transformed into a *balanced* system that takes into consideration not only the value of an employee's services but also the *ability of a city to pay for those services*.

But how can *ability to pay* be easily incorporated into the present CIR system? In answering this question, the Legislature needs to look no further than our next-door neighbor. Under Iowa's public employee dispute resolution system, arbitrators "shall consider, in addition to any other relevant factors, the following factors: a) Past collective bargaining contracts between the parties[,] including the bargaining that led up to such contracts; b) Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved; c) The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services; and d) The power of the public employer to levy taxes and appropriate funds for the conduct of its operations."[37] Factors C and D provide an excellent example of how *ability to pay* can be easily incorporated into the present CIR system in order to protect the economic vitality of city governments across the state.[38] Therefore, it is recommended that the Legislature amend section 48-818 of the Industrial Relations Act to include Factors C and D from the Iowa Act.[39]

Section 3 - Other Problems of the CIR System: Comparability and Unbridled Power

Although *ability to pay* is the main problem of the CIR's "comparable" system, there are two other problems that are worth addressing. The first is the unbounded scope of "comparability" under section 48-818, which provides no "Nebraska First" requirement.[40] The second is the unbridled power of the CIR under the Industrial Relations Act as a whole, which provides no meaningful legislative oversight or appellate review of CIR decisions.[41] These two issues are problematic because without meaningful "comparability" constraints, legislative oversight, or appellate review, the CIR lacks the necessary checks and balances on the exercise of its power. This is contrary to our constitutional system of checks and balances, which ensures that no department of the government – even an administrative agency such as the CIR – becomes too powerful. Therefore, in addition to *ability to pay*, the Industrial Relations Act should be amended to include a "Nebraska First" requirement as well as legislative and judicial safeguards.

"Comparability"

"Comparability" has a connotation of fairness; however, as with all things in life, it depends on what is being compared: apples to apples, or apples to oranges.[42] The problem with CIR "comparability" is that it has trended towards comparing the latter (apples to oranges) because section 48-818 of the Industrial Relations Act lacks any "Nebraska First" requirement. In other words, when the CIR conducts its "comparability" analysis, it does so without any statutory obligation to compare the Nebraska city in question to other Nebraska cities first (apples to apples).[43] Instead, the CIR applies an informal "half-to-twice-as-big" rule, whereby the CIR chooses an array of "comparable" cities – *located anywhere in the United States* – that are half-to-twice-as-big as the Nebraska city in question.[44] Casting aside for a moment the irrationality and inequity of such a rule, the CIR is under no obligation to even follow this rule – a rule of its

own making – because, as the Nebraska Supreme Court has said, the rule is *merely a guideline, not a statutory requirement*: "We must not lose sight that the 'guidelines' used by the [CIR] are not statutory requirements, and the failure of the evidence to strictly comply with the guidelines does not require us to find that the action of the [CIR]…was arbitrary and capricious [and thus reversible]. Guidelines are nothing more than…a framework."[45] As a result, the CIR has abandoned the "half-to-twice-as-big" rule at its leisure, the most egregious example of which occurred, as discussed in the introduction, in 1998, when the CIR compared the city of Lincoln to the metropolis of Minneapolis, *a city ten times as a large.*[46] The point is, an orange is still an orange, even if the CIR paints it red. Therefore, the CIR should be *statutorily required* to compare apples to apples, not freely allowed to compare apples to oranges, as under the present system. As such, section 48-818 should be amended to include a "Nebraska First" requirement.[47]

But how can section 48-818 be easily amended to include a "Nebraska First" requirement? Coincidentally enough, section 48-818 had such a requirement prior to 1969. Until that time, section 48-818 expressly required the CIR to establish new salaries comparable to other salaries "in the same labor market area and, if none, in adjoining labor market areas within the state and which in addition bear a generally comparable relationship to [salaries] maintained by all other employers in the same labor market area."[48] But without explanation, this "same labor market" rule, a.k.a. "Nebraska First" requirement, was removed from section 48-818 in 1969.[49] Since then, the consequences of CIR "comparability" have been clear: as the CIR has looked to larger and larger cities farther and farther away, inflation of Nebraska city employee salaries has accelerated at a rapid – and unsustainable – pace.[50] But all is not lost. The Legislature can easily circumscribe the presently unbounded "comparability," and return to a common sense apples-to-apples approach, by re-inserting the above-quoted "Nebraska First" language in section 48-818 of the Industrial Relations Act.[51]

Unbridled Power

Another problem of the CIR's "comparable" system is the unbridled power the CIR exercises as the central, salary-setting authority in the state. This unbridled power is the direct result of the lack of any meaningful legislative or judicial safeguards in the Industrial Relations Act.[52]

No Legislative Oversight

Contrary to popular opinion, the CIR is not a "labor court";[53] it is "an administrative agency acting within a legislative capacity" (a legal term of art).[54] In order for "an administrative agency acting within a legislative capacity" to be constitutional under the Separation of Powers' Non-Delegation Doctrine,[55] the legislature must provide proper oversight by expressly delineating the agency's procedural requirements and substantive powers in statutory form.[56] The federal Congress has accomplished this legislative oversight by enacting two types of administrative statutes: 1) the Administrative Procedure Act, or "APA," which governs the procedural requirements of all federal administrative agencies,[57] and 2) individual enabling acts, like the National Labor Relations Act[58], which govern the substantive powers of individual federal agencies, like the National Labor Relations Board.[59]

The Nebraska Legislature has enacted an administrative procedure act similar to the federal APA, the Nebraska Administrative Procedure Act[60]; however, the Legislature exempted the CIR from the procedural requirements of the Nebraska Administrative Procedure Act in 1974.[61] The Legislature has also enacted an individual enabling act for the CIR, the Industrial Relations Act; however, as discussed in the previous sections, the Legislature has failed to provide any meaningful constraints on the CIR's substantive powers in section 48-818. As a result, the CIR lacks any procedural protections against or substantive limitations on the exercise of its power. In other words, when the CIR sets salaries, it does so without any meaningful legislative oversight. This problem can be easily remedied, however, by bringing the CIR under the auspices of the Nebraska Administrative Procedure Act again and by changing section 48-818 of the Industrial Relations Act in accordance with the principles discussed above.[62]

No Appellate Review

As previously mentioned, if a city is unhappy with a CIR salary, the city may appeal the salary to the Nebraska Court of Appeals and, if that fails, to the Nebraska Supreme Court.[63] In reality, however, such an appeal is generally a losing proposition. As an "administrative agency acting within a legislative capacity," the CIR is presumed to innately have – and prudently exercise – a high level of expertise in the field of public salary dispute resolution.[64] As a result of this presumed expertise, the Nebraska Supreme Court awards a high level of deference to CIR salary decisions by applying the "arbitrary and capricious standard of review" (a legal term of art) to CIR salary appeals.[65] The Nebraska Supreme Court has described this highly deferential standard of review as follows:

"We have recognized that… 'determining comparables [i.e. cities and salaries] requires the granting of some discretion to the [CIR], and unless there is no substantial evidence upon which the [CIR] could have concluded that the factors it used resulted in an appropriate array, we may not as a matter of law disallow the [CIR's] determination.'"[66] As applied to the CIR, this highly deferential standard of review is really no standard of review at all. In the Lincoln-Minneapolis example discussed above, the Supreme Court refused to reverse the patently unfair comparison based on the "arbitrary and capricious standard of review" alone.[67] As a result, when the CIR sets salaries, it does so without any meaningful appellate review. This problem can be easily remedied, however, by providing the Nebraska Court of Appeals and the Nebraska Supreme Court with a less deferential standard of review, such as the "de novo on the record standard of review" (a legal term of art), which would allow the appellate courts to substitute their judgment for the judgment of the CIR.[68]

Section 4 - Practical Amendments to the Industrial Relations Act

The result of the Legislature's failure to codify ability to pay, circumscribe "comparability," and rein in CIR power is a system that is both inequitable and inflexible; a system that is contrary to both public policy and common sense; a system that must be changed if Nebraska city governments are to survive the worst economic crisis since the Great Depression. It is therefore proposed that the following practical amendments to the Nebraska Industrial Relations Act are enacted.[69] Proposed amendments appear in ***bold italics*** or ~~strikeouts~~.

Neb. Rev. Stat. § 48-818

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 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 the same labor market area and, if none, in adjoining labor market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area***. In establishing wage rates, the commission shall take into consideration: ***(1)*** 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; ***(2) past collective bargaining contracts between the parties, including the bargaining that led up to such contracts; and (3) the public employer's ability to pay, having regard not only to the interests and welfare of the public, the ability of the public employer to finance economic adjustments, and the effect of such adjustments on the normal standard of services, but also the power of the public employer to levy taxes and***

appropriate funds for the conduct of its operations. 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. ***Appeals arising out of this section shall be subject to the de novo on the record standard of review***.

Neb. Rev. Stat. § 48-804

(4) The commission shall ~~not~~ be subject to the Administrative Procedure Act.

Neb. Rev. Stat. § 84-901

For purposes of the Administrative Procedure Act:

(1) Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations, except the Adjutant General's office as provided in Chapter 55, the courts including the Nebraska Workers' Compensation Court, ~~the Commission of Industrial Relations~~, the Legislature, and the Secretary of State with respect to the duties imposed by the act[.]

Section 5 - Conclusion

These amendments would restore the Legislature's – and the People's – public policy of ensuring the continuous, uninterrupted and proper functioning and operation of city governmental services. Moreover, these amendments would fairly balance the countervailing financial interests of city governments, city employees, and city taxpayers. Finally, these amendments would revitalize the virtue of good governance in bad times, a virtue long eschewed by the Federal Government, but long cherished by Nebraskans. It is recommended that the Legislature adopt these amendments with all speed.

Nebraska, like the rest of the country, is at an economic crossroads. We can be either proactive in addressing our problems or inactive and hope for the best. As Dickens said, we can either save ourselves or condemn ourselves. The choice is ours.

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About the Author

Nebraska native John Joseph Heieck II is an accomplished writer and licensed attorney who graduated *magna cum laude* from the University of Notre Dame and *cum laude* from the Creighton University School of Law. In the spring of 2010, Mr. Heieck will obtain an LL.M. in Public International Law from the prestigious Leiden University, located at The Hague, The Netherlands. Mr. Heieck currently resides with his wife Julie Borchers Heieck, a Captain in the United States Army Judge Advocate General's (JAG) Corps, in Heidelberg, Germany. Mr. Heieck currently works at the United States Army Europe (USAREUR) Tax Center.

Footnotes

1 Marisol Bello, *Cities Cut Back, Expecting Shortfalls: Salaries, Jobs, Services Face the Chopping Block*, USA Today, December 1, 2008, *available at* http://www.usatoday.com/printedition/news/20081201/1acities_st.art.htm

2 *Id.*

3 Technically speaking, Neb. Rev. Stat. § 48-818 provides that "[a]ny 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." (Emphasis added). However, the "change in conditions" to which the statute refers is limited to the criteria provided under the "comparability" system for determining public employee wages. Because this system lacks *ability to pay* and "Nebraska First" requirements, as well as legislative and judicial safeguards (discussed in Sections 2 and 3 of the report), the "change in conditions" provision of the statute is essentially meaningless. Thus, the statement that the CIR system essentially precludes flexible action by city governments in dire economic times, such as freezing or cutting employee salaries, is factually correct.

4 The CIR is comprised of five commissioners who are appointed by the Governor, with the advice and consent of the Business and Labor Committee, for staggering six-year terms. There are no specific requirements to becoming a commissioner; commissioners must only be "representative of the public." But generally speaking, appointees to the CIR are attorneys who are familiar with public labor issues.

5 Neb. Rev. Stat. § 48-802. This report will focus on the CIR as it relates to employees of city governments; however, the problems discussed in relation thereto are equally applicable to employees of school districts, county governments, and, ultimately, the state government. Therefore, the proposed solutions in this report, although couched in terms of employees of city governments, apply to all public employees in Nebraska.

6 Such as firefighters, police officers, and other municipal employees.

7 Neb. Rev. Stat. § 48-802.

8 Neb. Rev. Stat. § 48-803.

9 Neb. Rev. Stat. § 48-818.

10 *See* John M. Gradwohl, *Historical Explanation of the Nebraska Public School District Bargaining Impasse Resolution Mechanism*, 79 Neb. L. Rev. 1011, 1041-1043 (2000).

11 *Id. See also* Neb. Rev. Stat. § 48-818.

12 *Id. See also* Neb. Rev. Stat. § 48-818.

13 Neb. Rev. Stat. § 48-819.

14 Neb. Rev. Stat. §§ 48-819; 48-812.

15 Neb. Rev. Stat. § 48-818.
See generally 79 Neb. L. Rev. *at passim*.

16 Neb. Rev. Stat. § 48-818.

17 Neb. Rev. Stat. § 48-801 *et seq*.

18 *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 838, 572 N.W.2d 369 (1998).

19 *Lincoln Firefighters*, 253 Neb. at 840.

20 *Lincoln Firefighters*, 253 Neb. at 850.

21 Deena Winter, *City Personnel Costs Gradually Climbing*, Lincoln Journal Star, March 12, 2006, *available at* http://www.journalstar.com/articles/2006/03/12/top_story/doc4413c02e55ec7973015686.txt.

22 *Lincoln Firefighters*, 253 Neb. at 841.

23 *Lincoln Firefighters*, 253 Neb. at 842, 843.

24 Deena Winter, *City Personnel Costs Gradually Climbing*, Lincoln Journal Star, March 12, 2006, *available at* http://www.journalstar.com/articles/2006/03/12/top_story/doc4413c02e55ec7973015686.txt.

25 *See* Deena Winter, *City Personnel Costs Gradually Climbing*, Lincoln Journal Star, March 12, 2006, *available at* http://www.journalstar.com/articles/2006/03/12/top_story/doc4413c02e55ec7973015686.txt; Martha Stoddard, *Union Wins Fight for Bigger Pay Hikes*, Omaha World-Herald, August 18, 2007, *available at* http://www.omaha.com/index.php?u_page=2798&u_sid=10110233; Adrian Sanchez, *Bahr Says Pay Raises Excessive*, Columbus Telegram, September 9, 2008, *available at* http://www.columbustelegram.com/articles/2008/09/03/news/local/topnews/doc48beb92a13c4c551964020.txt; Adrian Sanchez, *Influence of CIR Being Felt By City*, Columbus Telegram, September 14, 2008, *available at* http://www.columbustelegram.com/articles/2008/09/14/news/local/doc48cc9ed49ae06154060753.txt; Deena Winter, *Omaha, Lincoln Officials Commiserate Over Salaries*, Lincoln Journal Star, October 23, 2008, *available at* http://journalstar.com/articles/2008/10/23/news/local/doc49010def80e0e881972729.txt.

26 Neb. Rev. Stat. § 48-818.

27 *Id.*

28 *Id.*

29 Which establishes automatically, without government intervention, what a new employee should be paid based on what similar workers with similar skills and experience in similar positions in the same geographical area are actually paid.

30 Which considers what an existing employee should be paid based on the local labor market *and* the independent (and often intangible) value of the employee's *continued* employment with the employer.

31 Deena Winter, *City Personnel Costs Gradually Climbing*, Lincoln Journal Star, March 12, 2006, *available at* http://www.journalstar.com/articles/2006/03/12/top_story/doc4413c02e55ec7973015686.txt.

32 Deena Winter, *City Personnel Costs Gradually Climbing*, Lincoln Journal Star, March 12, 2006, *available at* http://www.journalstar.com/articles/2006/03/12/top_story/doc4413c02e55ec7973015686.txt.

33 Such as sales, property, occupational, and use taxes.

34 Vis-à-vis the types of historical services upon which city residents have come to rely.

35 Which hardly ever happens because of political reasons. For those with Due Process property interest concerns, see *Heinzman v. County of Hall*, 213 Neb. 268, 271-272, 328 N.W.2d 764 (1983), which notes the following: "With regard to [a] claim under the fourteenth amendment of the U.S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). The establishment of a property interest in employment requires a 'legitimate claim of entitlement to it' that stems 'from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' *Board of Regents, supra* at 577. Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973); Nevels v. State, 205 Neb. 642, 289 N.W.2d 511 (1980). In the absence of an employment contract for a fixed term, an employee is terminable at will. *Stewart v. North Side Produce Co.*, 197 Neb. 245, 248 N.W.2d 37 (1976)."

36 *See* fn 25.

37 Iowa Code Ann. § 20.22(9) (2008).

38 Factor A is intriguing in its own right, especially in light of an arguably unknown, yet undeniably nonsensical, side-effect of the CIR's "comparable" system – the lack of any requirement to consider past collective bargaining practices between the disputed parties. Neb. Rev. Stat. § 48-818. In a recent case, even though a city government and an employee labor union had agreed to a particular contract term in Year One, the city had to prove in a subsequent dispute in Year Two that the contract term was "prevalent" in other contracts in other cities in other states *before* the CIR would rule that the contract term in Year One was "proper" in Year Two. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist.*, 269 Neb 956 (2005) (Hyannis I) and *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist.*, 274 Neb. 103 (2007) (Hyannis II). Factor A would eliminate this counter-intuitive and counter-productive practice; therefore, along with Factors C and D, Factor A should be a part of any amendments to section 48-818 of the Industrial Relation Act. Factor B is also important because of the "local area" rule it incorporates into Iowa's "comparability" consideration. This idea is addressed in Section 3, however, so it will not be addressed here.

39 *See* Section 4 of this Report.

40 *See* Neb. Rev. Stat. § 48-818.

41 *See* Neb. Rev. Stat. § 48-801 et seq.

42 The former is presumptively fair, unless and until, upon closer inspection, the presumption is deemed unworthy because of latent defects in the compared-to apple. Should such an event occur, any attempted comparison becomes at best qualified, and at worst, invalid. The latter, on the other hand, is indelibly unfair, because the constituent parts of the apple are irreconcilably different from the constituent parts of the orange, thereby making the whole of the apple irreconcilably different from the whole of the orange. Simple personal experience supports this rather verbose supposition, as an apple neither looks nor feels nor tastes like an orange.

43 *See* Neb. Rev. Stat. § 48-818.

44 *See Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 842, 572 N.W.2d 369 (1998) (noting that the CIR "has long considered only array members with populations that are not less than half or more than twice the population of the compared-to [Nebraska city].").

45 *Lincoln Firefighters, supra*, at 843 (quoting *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 523 304 N.W.2d 368 (1981)).

46 *Lincoln Firefighters, supra*, at 843.

47 *See* Section 4 of this Report.

48 1947 Neb. Laws c. 178, § 18, 585, 592-593.

49 *See* 79 Neb. L. Rev. at 1023-1025.

50 *See* fn 25.

51 *See* Section 4 of this Report.

52 *See* Neb. Rev. Stat. § 48-801 et seq.

53 *See* Tom Shaw, *Firefighters, City Head to Labor Court*, Omaha World-Herald, September 27, 2008, *available at* http://bulletin.aarp.org/states/ne/articles/firefighters_city_head_to_labor_court.html.

54 *Orleans Educ. Assn. v. School Dist. of Orleans*, 193 Neb. 675, 685, 229 N.W.2d 172 (1975) (holding that "[t]he function [the CIR] exercises is a legislative one; its quasi-judicial powers are purely incidental.").

55 "*Separation of powers* is a political doctrine under which the executive, legislative and judicial branches of government are kept distinct, to prevent abuse of power. This U.S. form of separation of powers is widely known as 'checks and balances'." *Separation powers under the United States Constitution, available at* http://en.wikipedia.org/wiki/Separation_of_powers_under_the_United_States_Constitution. "[T]he *nondelegation doctrine* is the principle that the Congress of the United States, being vested with 'all legislative powers' by Article One, Section 1 of the United States Constitution, cannot delegate that power to anyone else [including an administrative agency]. However, delegation of some authority is exercised as an implied power of Congress, and has been ruled constitutional by the Supreme Court, as long as Congress provides an "intelligible principle" to guide the executive branch. "'In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.' So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Nondelegation doctrine, available at* http://en.wikipedia.org/wiki/Non-delegation_doctrine.

56 *See generally* "Administrative Procedure Act," *available at* http://en.wikipedia.org/wiki/Administrative_Procedure_Act.

57 5 U.S.C. §§ 500-504; 551-559; 571-584; 701-706.

58 29 U.S.C. §§ 151-169.

59 According to the National Labor Relations Board's own website, *available at* http://www.nlrb.gov/: "The National Labor Relations Board is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union, or to refrain from all such activity."

60 Neb. Rev. Stat. § 84-901 *et seq.*

61 79 Neb. L. Rev. at 1017, fn. 31.

62 *See* Section 4 of this Report.

63 Neb. Rev. Stat. § 48-812.

64 *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist.*, 269 Neb. 956, 957 (2005) (noting that "[d]eterminations made by the [CIR] in accepting or rejecting claimed comparables for purposes of establishing an array are within the field of its expertise and should be given due deference.").

65 The "arbitrary and capricious standard of review" is a highly deferential standard of review generally applied to administrative agency decisions.

66 *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist.*, 269 Neb. 956, 970 (2005) (quoting *Lincoln Firefighters Assn. v. City of Lincoln*, 253 Neb. 837, 843 572 N.W.2d 369 (1998)). The Supreme Court in Hyannis purports to apply a new standard of review in the case by citing Neb. Rev. Stat. § 48-825(4), which provides: "Any 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: (a) If the [CIR] acts without or in excess of its powers; (b) If the order was procured by fraud or is contrary to law; (c) If the facts found by the [CIR] do not support the order; and (d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole." While this standard of review appears quite different, upon application by the Court, it is the same as the traditional "arbitrary and capricious" standard of review applied to administrative agency decisions. *See Lincoln Firefighters, supra*, at 839 (noting, in describing the traditional "arbitrary and capricious" standard of review, that "[the Supreme Court is] restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable."). Moreover, the "new" *Hyannis* standard of review is bad law. The standard of review promulgated in Neb. Rev. Stat. § 48-825(4) applies to appeals of CIR orders in § 48-824 proceedings. Section 48-824 proceedings refer to prohibited practices in labor negotiations. If one party feels the other party has committed a prohibited labor practice under § 48-824, the party may file a complaint with the CIR under § 48-825(1). After reviewing the complaint and deciding a prohibited practice has occurred, the CIR is empowered under § 48-825(2) to "order an appropriate remedy." The party against whom the order is made may then appeal the order to the Nebraska Court of Appeals under § 48-825(3). Section 48-825(4) then lays out the Court of Appeals' standard of review in § 48-825(3) appeals. Therefore, contrary to the Nebraska Supreme Court's rationale in *Hyannis*, § 48-825(4) does not apply to all appeals from the CIR; it applies only to § 48-825(3) appeals of § 48-825(2) orders regarding § 48-825(1) infractions occurring in § 48-824 proceedings. Thus, the "new" *Hyannis* standard of review, aside from not being new at all, is bad law.

67 *Lincoln Firefighters, supra*, at 843 (quoting *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 523 304 N.W.2d 368 (1981)).

68 *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007). *See* Section 4 of this Report.

69 Neb. Rev. Stat. § 48-801 *et seq.*