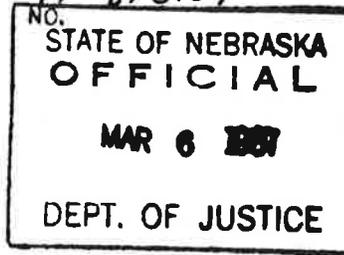


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

# 87029



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DATE: March 4, 1987

SUBJECT: Constitutionality of Those Portions of LB 661 and LB 71 Dealing With Arbitration

REQUESTED BY: Senator Jerome Warner  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
Dale A. Comer, Assistant Attorney General

You have posed several questions concerning arbitration in Nebraska and the constitutionality of portions of LB 661 and LB 71 dealing with arbitration. We have completed our analysis of the issues which you raised, and our views as to your questions concerning arbitration are set out in detail below. We will deal with your questions in the order in which you presented them.

LB 661 is the State Employees Collective Bargaining Act. The Act would establish various procedures for collective bargaining between state agencies and their employees. Among other things, the Act provides for the appointment of a special master as a fact-finder in certain types of labor negotiations. The act also provides for binding arbitration of certain types of employee grievances.

LB 71 is the Uniform Arbitration Act. LB 71 provides that an agreement to submit an existing controversy to arbitration or a contractual provision providing for arbitration of future disputes is valid and enforceable. The Uniform Act would establish procedures for arbitration including standards for the judicial review of decisions by arbitrators. The standards for judicial review of decisions by arbitrators in LB 71 are identical to the standards for judicial review of arbitration involving employee grievances set out in LB 661.

Your first question involves the special master procedures included in LB 661. That bill provides that a special master shall decide all unresolved negotiable issues at impasse between management and state employees. While the special master's decision is binding, LB 661 does provide for a limited appeal to

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the Commission of Industrial Relations (hereinafter CIR) and, subsequently, to the Nebraska Supreme Court. You ask, if this decision by the special master is considered a form of arbitration, is it constitutional under our Nebraska Constitution?

In a series of cases beginning in 1889, our Supreme Court has consistently held that binding arbitration agreements, entered into before a dispute arises, are contrary to public policy and not enforceable. City of Lincoln v. Soukup, 215 Neb. 732, 340 N.W.2d 420 (1983); Heisner v. Jones, 184 Neb. 602, 169 N.W.2d 606 (1969); Wilson & Company, Inc. v. Fremont Cake & Meal Company, 153 Neb. 160, 43 N.W.2d 657 (1950); German-American Insurance Company v. Etherton, 25 Neb. 505, 41 N.W. 406 (1889). The most recent pronouncement of this rule came in Overland Constructors v. Millard School District, 220 Neb. 220, 224, 369 N.W.2d 69, 73 (1985) where the court stated:

While this court is supportive of parties resolving their differences through arbitration, if possible, we have consistently held that an arbitration agreement entered into before a dispute arises, denying to the parties their right to seek the assistance of the courts, is contrary to public policy and is not enforceable.

As a part of this rule, our Supreme Court has also stated on several occasions that exhaustion of contractual arbitration procedures is not required prior to submission of disputes to the District Court. Poppert v. Brotherhood of Railroad Train Men, 187 Neb. 297, 189 N.W.2d 469 (1971); Rentschler v. Missouri Pacific Railroad Company, 126 Neb. 493, 253 N.W. 694 (1934). This rule which prohibits arbitration agreements that are binding without significant recourse to the courts appears to be based upon the notion that our courts may not be ousted of their jurisdiction. Such an ouster would violate Article I, Section 13 of our state constitution which requires the availability of open courts.

However, the Nebraska Rule against arbitration does not appear to be a blanket prohibition against all forms of that remedy. For example, an agreement to arbitrate an existing dispute is permissible. Overland Constructors v. Millard School District, supra. Likewise, an arbitration agreement which would allow a full review of the arbitrator's decision on the merits by the District Court would seem acceptable. Therefore, the special master procedure set out in LB 661 which is the subject of your first question is not unconstitutional simply because it may involve arbitration.

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The constitutionality of the special master provisions contained in LB 661 actually turns on the adequacy of the standards given the special master to resolve disputed issues at impasse. Setting the compensation of governmental employees and determining the conditions of their employment involve legislative powers and functions. Orleans Education Association v. the School District of Orleans, 193 Neb. 675, 229 N.W.2d 172 (1975). As a result, the CIR, which heretofore has reviewed these matters and which would hear appeals from the special master under LB 661, is an administrative agency performing a legislative function. Transport Workers of America Local 223 v. Transit Authority of the City of Omaha, 205 Neb. 26, 286 N.W.2d 102 (1979); Orleans Education Association v. School District of Orleans, supra. In a similar fashion, a special master deciding a dispute involving state employees under LB 661 would also perform a legislative function. When the Legislature delegates authority to perform a legislative function, that authority must be limited to the expressed purpose and administered under sufficient basic standards prescribed in the legislative act. Orleans Education Association v. School District of Orleans, supra. Consequently, LB 661 is constitutional if it gives the special master sufficient statutory standards to complete the arbitration process.

Section 14 (3) of LB 661 provides:

The special master shall choose the most reasonable final offer on each issue in dispute. He or she may consider, but shall not limited to, evidence regarding comparable rates of pay and conditions of employment as described in §48-818. (Emphasis added).

The Nebraska Supreme Court has indicated that the standards provided for the CIR under Neb.Rev.Stat. §48-818 are constitutionally sufficient for that body, and we assume that those standards would also be sufficient for the special master. However, the portion of Section 14(3) of LB 661 emphasized above allows the special master to go considerably beyond the standards set out in Section 48-818 in the determination of disputes. Indeed, it is our view that the portion of Section 14(3) of LB 661 emphasized above, in effect, sets no standards for the special master at all. Therefore, we believe that LB 661, as it is presently drafted, establishes unconstitutional arbitration procedures involving the special master since there are insufficient standards for the delegation of legislative authority. That constitutional impediment can obviously be corrected by more detailed standards.

You next ask, are the arbitration procedures for grievances under LB 661 and the general arbitration procedures under LB 71 permitted by the Nebraska Constitution? Our answer must be "No".

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Section 18 of LB 661 provides that collective bargaining agreements involving state employees may include provisions for binding arbitration of employee grievances. A decision by an arbitrator involving such a grievance would be appealable to the District Court. Under Section 21 of LB 661, a district court could vacate the arbitration award only when:

(a) The award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any parties; (c) the arbitrators exceeded their powers; (d) the arbitrators refused to postpone an arbitration hearing upon sufficient cause being shown therefore, refused to hear evidence material to the controversy, or otherwise so conducted the hearing as to prejudice substantially the rights of a party; or (e) there was no arbitration agreement and the party did not participate in the arbitration hearing without raising the objection.

Section 12 of LB 71 establishes an identical standard for District Court review of an arbitrator's decision under the Uniform Arbitration Act.

As discussed above, arbitration which involves agreements made before a dispute arises and which denies parties their right to seek assistance of the courts is unconstitutional under Article I, Section 13 of our state constitution. Under the standards for judicial review set out above, a District Court reviewing an arbitration decision under LB 661 or under LB 71 could in no way consider the merits of the controversy, and would be limited, in great part, to questions concerning fraud or partiality. In our view, those standards are so narrow as to effectively deny parties to the arbitration the assistance of the courts. Therefore, we believe that the portion of LB 661 which provides for the arbitration of grievances together with the general arbitration provisions of LB 71 are unconstitutional. We would note, however, that LB 71 would be constitutional to the extent that it is applied to agreements for arbitration of existing controversies under Section 2 of that bill.

Your third question involves the statutory authority for a state agreement to use arbitration procedures. You ask whether the state could agree to binding arbitration procedures of any kind in a contract with an employee bargaining unit without specific statutory authority to do so.

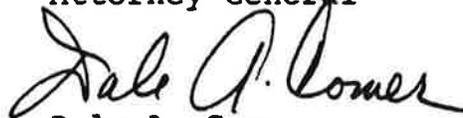
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In general, a state administrative body has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the plain purposes of the act. Nebraska Association of Public Employees, Game & Parks Chapter v. Game & Parks Commission, 220 Neb. 883, 374 N.W.2d 46 (1985). Absent specific statutory authority for the use of arbitration procedures, it is our view that state agencies could not agree to use binding arbitration procedures with an employee bargaining unit.

Finally, you inquire as to whether a grievance arbitration procedure in a labor contract would mean that the State Personnel Board would not hear grievances of employees covered under such a contract. It seems to us that the answer to that question would turn on the provisions of the labor contract involved and on the provisions of the statute which authorizes the arbitration. The State Personnel Board was created by the Legislature, and its duties and authority may be altered by that body. Therefore, the Legislature could provide that proper and constitutional forms of arbitration could take the place of grievance proceedings before the State Personnel Board.

Sincerely,

ROBERT M. SPIRE  
Attorney General



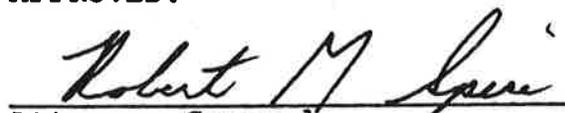
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cc: Patrick J. O'Donnell  
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APPROVED:

  
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