

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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SUBJECT:           Constitutionality Of Legislative Enactments  
                    For Collective Bargaining With State Employees  
                    And Legislative Authority To Determine Employee  
                    Compensation.

REQUESTED BY:    Senator Jerome Warner,  
                    Chairman, Appropriations Committee.

WRITTEN BY:       Robert M. Spire, Attorney General,  
                    Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion concerning constitutionality of legislation providing for statewide collective bargaining units and legislative authority to determine employee compensation.

First, you have inquired as to the constitutionality of a legislative enactment which would provide for the inclusion of state employees of different agencies, boards and commissions in statewide occupational bargaining units. Generally, there are no constitutional prohibitions which would restrict legislative enactments of this nature. In arriving at this conclusion, it is necessary to qualify the definition of state employees so as not to include constitutional and executive officers and members of independent boards and commissions whose compensation and term of office are otherwise set by the Constitution or by statute.

The recognition and creation of bargaining units within executive departments are not prohibited by the Constitution. The Legislature possesses the authority to grant the power of recognition of bargaining units to the court of industrial relations. American Fed. of S.C. & M. Empl. v. State, 200 Neb. 171, 263 N.W.2d 643 (1978). In this case, the Nebraska Supreme

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Court declined to distinguish between employees of the executive branch.

Under current law, the formation of labor organizations and the recognition of bargaining units is governed by Chapter 48, Article 8 of the Nebraska statutes. Under these statutes, state employees are similarly treated for purposes of collective bargaining concerning terms, tenure and conditions of employment. The Nebraska Commission of Industrial Relations has the jurisdiction to determine questions of representation of state employees in employment matters. A review of court decisions involving standards and composition of bargaining units furnishes guidelines concerning whether statewide occupational bargaining units may include: (1) employees of an agency headed by a constitutional officer or officers with employees of another agency headed by a constitutional officer or officers; (2) employees of an agency headed by a constitutional officer or officers; or (3) employees of an agency not headed by a constitutional officer with employees of another agency not headed by a constitutional officer.

One general standard concerning bargaining units is the prohibition against "undue fragmentation". In Sheldon Station Employees Assn. v. N.P.P.D., 202 Neb. 391, 275 N.W.2d 816 (1979), it was held that bargaining units of employees of less than departmental size are not appropriate in cases of governmental subdivisions such as municipalities, counties, power districts, or utility districts with no prior history of collective bargaining. The Nebraska Supreme Court, in House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N.W.2d 258 (1977), provided the reasoning for the prohibition of undue fragmentation of bargaining units. It (undue fragmentation) fosters proliferation of personnel to bargain and administer contracts on both sides resulting in public institutions not being able to develop, administer and maintain any semblance or uniformity or coordination in their employment policies and practices.

A second standard which has been upheld by the courts is a prohibition against supervisory or managerial personnel entering into a bargaining unit with rank and file employees. Intl. Brotherhood of Elect. Workers v. Lincoln Elect. System, 222 Neb. 550, 385 N.W.2d 433 (1986), Neb. Assn. of Public Empl. v. Nebraska Game and Parks Commission, 197 Neb. 178, 247 N.W.2d 449 (1976).

Another general guideline or standard is the "community of interest" of the employees involved in the bargaining unit. The Nebraska Supreme Court, in American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N.W.2d 1 (1977), defined the issue as whether a community of interest

exists among the employees which is sufficiently strong to warrant their inclusion in a single unit. In this case the Court held that established policies of the employer in establishing bargaining units of employees is not exclusive and that establishing a bargaining unit which included faculty at one campus and not faculty of a second campus was proper. The Court further held that the College of Law and College of Dentistry was entitled to bargaining units separate from a unit for other faculty of the university campus and that department chairmen were properly included in bargaining units consisting of faculty members of the university. The Court pronounced that relevant factors in determining the composition of bargaining units include prior bargaining history, centralization of management (particularly in relation to labor relations), extent of employees interchange, degree of interdependence or autonomy of the facilities, differences or similarities in skills in relationship to each other, and the possibility of over fragmentation of bargaining units.

Accordingly, you are advised that the standards and guidelines articulated by the Nebraska Supreme Court serve to define the restrictions placed on state employee composition of statewide collective bargaining units.

You also have inquired whether there are other provisions of the Nebraska Constitution which would prohibit statewide occupational bargaining groups from including employees of any of these or other such departments particularly described or created by the Nebraska Constitution. There are no constitutional prohibitions for the same reasons set forth above. However, the guidelines and standards articulated by the Nebraska Supreme Court again would need be applied when formulating the composition, by legislation or otherwise, of employee groups to be included in occupational bargaining groups.

Second, you have generally inquired whether the Legislature may determine, either in substantive law or in the appropriations bills, that each state employee not subject to collective bargaining shall receive a salary increase. You are advised that the Legislature may provide for salary increases either in substantive law or in the appropriations bill. You have appropriately qualified or conditioned this type of legislative enactment to allow "flexibility to the agency head for promotions, merit increases etc."

In general, the power and authority to fix terms and conditions including compensation for public employment resides with the Legislature subject to express constitutional limitations or delegation of this authority to an administrative agency or department. State ex rel. Beck v.

Young, 154 Neb. 588, 48 N.W.2d 677 (1951), State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756 (1933).

This authority extends over all state employees including employees of constitutional offices except where expressly limited by the Constitution or otherwise provided by law. You have appropriately recognized and listed certain express constitutional provisions relating to constitutional and other executive offices and for this reason, the provisions will not be repeated in this opinion.

You have raised the specific question whether the Legislature has the authority to direct salary increases for employees of constitutional offices or possibly for any nonlegislative departments. It is the opinion of this office that the Legislature does possess this authority subject to certain qualifications.

In responding to this question, it is important to recognize that there are inherent differences between offices created by statute and "constitutional offices" in that legislative control over constitutional offices is limited and the Legislature cannot abolish a constitutional office or change it except as expressly provided by the Constitution.

State ex rel. Grant v. Eaton, et al., 114 Montana 199, 133 P.2d 588 (1943). The Nebraska Legislature has recognized this inherent distinction in certain legislative enactments relating to compensation and classification of state employees. Neb.Rev.Stat. §81-1331 (Reissue 1981) states:

As used in sections 81-1330 to 81-1335, state employee shall mean any employee of the state or of any state agency, specifically including all administrative, professional, academic, and other personnel of the University of Nebraska, the four state colleges, the technical community colleges, and the State Department of Education, but excluding any employee or officer of the state whose salary is set by the Constitution or by statute.

(Emphasis added.)

Accordingly, any legislative enactment relating to employee compensation may not unduly influence or serve to control the operation of a constitutional office. If the Legislature mandated a specific salary increase which included employees of a constitutional office, the increase should be implemented unless the increase could not be reasonably implemented due to other fiscal constraints of the office or other factors. As you have recognized, sufficient fiscal

flexibility should be provided an agency head for promotions, merit increases, etc., in legislative enactments which provide for certain salary increases to state employees. To conclude otherwise would result in the Legislature unduly controlling the management and administration of the office through legislation relating to compensation. The same principles or restrictions generally apply establishing certain benefit levels for state employees.

The Nebraska Supreme Court has dealt with this question in State Code Agencies Ed. Assn. v. Dept. of Publ. Institutions., 219 Neb. 555, 364 N.W.2d 44 (1985). In this case, our Court held that the allocation of funds among employees as salaries or wages is a matter of discretion in administration of the department or agency. It is important that this holding be considered in light of the fact that the appropriation bills enacted did not specifically allocate sums as wages or salaries for particular jobs or positions of employment in those departments or agencies.

In conclusion, it is our opinion that legislative enactments for statewide occupational bargaining units would be valid if the standards and guidelines relative to the composition of bargaining units as enunciated by the courts are followed. The Legislature may determine by legislative enactment that eligible state employees shall receive specific salary increases if adequate discretion and flexibility is permitted an agency head to allocate other increases in administering those departments or agencies.

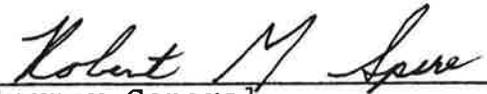
Very truly yours,

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cc: Patrick O'Donnell  
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APPROVED:

  
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