in good standing in the profession of being a commissioner. This interpretation would mean that incumbents already holding the office were subject to an eligibility requirement that did not apply to persons seeking the office for the first time. If the Legislature had intended to distinguish between incumbents seeking reelection and persons seeking election for the first time, it would have set out separate requirements. But it did not.

Instead, subsection (1) is more sensibly read to set out the requirements for any person seeking the office of commissioner. When interpreted in this manner, the Legislature obviously meant that a commissioner must be in good standing in any profession of which he or she is a member or practitioner—outside of the duties imposed upon a commissioner while holding office.

CONCLUSION

[6] Because the Legislature did not intend service on the PSC to be read as a profession for which one must be "in good standing according to the established standards of" that profession, we conclude that the district court was correct in dismissing the Rosbergs' challenges.

AFFIRMED.

STEPHAN, J., participating on briefs.

DOUGLAS COUNTY HEALTH CENTER SECURITY UNION, APPELLEE, v. DOUGLAS COUNTY, NEBRASKA, APPELLANT.

817 N.W.2d 250

Filed July 13, 2012. No. S-11-778.

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: Labor and Labor Relations.** Under Nebraska's Industrial Relations Act, the Commission of Industrial Relations has

the authority to decide industrial disputes and to determine whether any party to an agreement has committed a prohibited practice.

3. **Labor and Labor Relations.** It is a prohibited practice for any employer, employee, employee organization, or collective bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
4. **Commission of Industrial Relations.** Neb. Rev. Stat. § 48-818 (Reissue 2010) sets out mandatory topics of bargaining: The Commission of Industrial Relations may issue orders that establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same.
5. **Labor and Labor Relations: Waiver.** Under the clear and unmistakable waiver standard utilized by the National Labor Relations Board, equivocal, ambiguous language in a bargaining agreement is insufficient to establish waiver of bargaining rights under a collective bargaining agreement.
6. ____: ____. Under the clear and unmistakable waiver standard, the parties to a collective bargaining agreement must unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term.
7. **Labor and Labor Relations: Contracts.** Under the contract coverage rule, if the issue was covered by the collective bargaining agreement, then the parties have no further obligation to bargain the issue.
8. **Labor and Labor Relations: Federal Acts.** While decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, such decisions are not binding on the Nebraska Supreme Court.
9. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
10. **Commission of Industrial Relations: Breach of Contract.** The Commission of Industrial Relations does not have the authority to hear cases involving an alleged breach of a contract.
11. **Contracts: Claims: Courts.** The proper forum to pursue claims involving contract interpretation is the district court.

Appeal from the Commission of Industrial Relations. Reversed and remanded with directions.

Donald W. Kleine, Douglas County Attorney, and Diane M. Carlson for appellant.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The Douglas County Health Center Security Union (Union) filed a petition before the Commission of Industrial Relations (CIR) alleging that its employer, Douglas County, Nebraska (County), had engaged in certain prohibited practices. The CIR found the County had engaged in a prohibited practice when it failed to negotiate its intention to contract out bargaining unit work to a private security company. The CIR ordered the parties to recommence negotiation and awarded the Union attorney fees and costs. The County appeals. We reverse, and remand the decision of the CIR, with directions to vacate its order and dismiss the Union's petition.

FACTUAL BACKGROUND

The Douglas County Health Center (DCHC) is an agency of the County. The Union is the recognized bargaining unit for all full- and part-time DCHC security guards and represents approximately eight guards. The parties entered into a collective bargaining agreement (CBA) effective from January 1, 2007, to December 31, 2009. The CBA contained the following language, which is relevant to the issues presented by this case:

> **ARTICLE 16**
> **MANAGEMENT RIGHT OF CONTRACTING AND SUB-CONTRACTING**
>
> **Section 1.** The Union recognizes that the right of contracting and sub-contracting is vested in the County. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any employees.
>
> **Section 2.** If the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs, the County agrees to notify the Union as early as possible in advance of the same in order to provide the Union with an opportunity to discuss with the County the necessity and effect on bargaining unit employees.

As noted above, this CBA expired on December 31, 2009. But the record contains uncontested evidence that the parties have continued to operate as if it were still in effect. We will likewise treat the CBA as being in effect.

On approximately March 1, 2011, the DCHC received notice from the budget committee of the county board that it, along with most other of the County's agencies, would be required to reduce by 4 percent its 2011-12 budget. This reduction amounted to about $1.6 million.

The record shows that after receiving this directive, James Tourville, the DCHC administrator, considered different options by which to reduce the DCHC budget. In connection with this process, Tourville contacted a private security firm to determine whether any cost savings would be had by outsourcing that work. According to evidence in the record, a cost savings of between $140,000 and $160,000 could be achieved by privatizing the security work.

At this time, Tourville contacted a deputy county administrator whose job responsibilities included negotiation with labor unions on behalf of the County. The administrator apparently indicated that there were no CBA-related issues with outsourcing the security work. In early April 2011, Tourville approached the county board and was told to "proceed with contracting out the service," which apparently included notifying the Union and beginning the competitive bid process.

On April 25, 2011, Tourville and the deputy county administrator met with Union representatives to inform them that the security work would be outsourced. The County acknowledges that it did not negotiate with the Union, but, rather, informed the Union of the decision. The Union was asked to offer any cost savings it might have to avoid the outsourcing. At some point subsequent to this meeting, the Union offered to reduce the uniform allowance paid to its workers, amounting to a cost savings of between $8,000 and $10,000. At the meeting, the Union was also informed that the Union's members would be allowed to apply for jobs with the new vendor.

On May 24, 2011, the Union filed a petition with the CIR alleging, restated, that the County committed several instances of prohibited practices, including (1) discouraging union

membership and denying the rights afforded to the Union, in violation of Neb. Rev. Stat. § 48-824(2)(a), (c) and (f) (Reissue 2010); (2) failing to negotiate with the Union in advance of outsourcing the security work, in violation of § 48-824(2)(b), (c), and (e); and (3) informing Union representatives that the Union was too expensive, that outsourcing the work would be cheaper, and that the Union's members could probably be hired by the private vendor, in violation of § 48-824(2)(a), (b), and (c).

It appears that following the filing of this petition, the County submitted a request for proposals, placing out for bid DCHC's security work. In response, on June 10, 2011, the CIR entered a status quo order, ordering the County to not alter the employment status, wages, or terms and conditions of the Union's employees.

A hearing was held before the CIR on August 8, 2011. On August 18, the CIR issued an order finding that the County had engaged in a prohibited practice when it failed to negotiate with the Union prior to outsourcing the security work. In particular, the CIR found that the County had undermined the Union when it outsourced all security jobs, thus leaving no members left in the bargaining unit. The CIR ordered the parties to recommence negotiations over outsourcing work within 30 days. The CIR further ordered the County to pay attorney fees and costs, which amounted to $6,029.02.

ASSIGNMENTS OF ERROR

On appeal, the County assigns, restated and consolidated, that the CIR erred in (1) finding that the County committed a prohibited practice by failing to negotiate with the Union over the County's decision to outsource bargaining unit work, (2) finding that the County's motivation was to undermine the Union or discriminate against its members, (3) not properly interpreting article 16 of the CBA, and (4) awarding attorney fees.

STANDARD OF REVIEW

[1] 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 CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[1]

ANALYSIS

On appeal, the County's primary argument is that the CIR was incorrect in ordering it to bargain over the issue of outsourcing the security jobs at the DCHC, because, according to the County, "the CIR failed to recognize that the parties had already negotiated the topic and that the result of that negotiation is clearly set forth in Article 16 of the CBA."[2] The resolution of this case requires this court to examine issues of contract coverage and waiver in collective bargaining agreements.

Contract Coverage and Waiver.

[2-4] The general principles are familiar ones. Under Nebraska's Industrial Relations Act, the CIR has the authority to decide industrial disputes[3] and to determine whether any party to an agreement has committed a prohibited practice.[4] Under § 48-824(1), it is a prohibited practice for any employer, employee, employee organization, or collective bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining. Neb. Rev. Stat. § 48-818 (Reissue 2010) sets out mandatory topics of bargaining: The CIR may issue orders that "establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." And in this case, the parties agree that the topic at hand—the outsourcing of bargaining unit jobs—is a mandatory topic of bargaining.

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[1] *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 805 N.W.2d 320 (2011).

[2] Brief for appellant at 12.

[3] Neb. Rev. Stat. § 48-819.01 (Reissue 2010).

[4] § 48-824.

It is here that the parties' views diverge. The Union contends that the County had an obligation to bargain over the outsourcing of bargaining unit jobs because it did not clearly and unmistakably waive its right to bargaining in the CBA. The County, however, argues that it already bargained with the Union on this topic at the time the parties entered into the CBA, that the results of this bargaining are encompassed in article 16 of the parties' CBA, and that no further bargaining is required at this time.

[5,6] The "clear and unmistakable" waiver standard is utilized by the National Labor Relations Board. Under that standard, "[e]quivocal, ambiguous language in a bargaining agreement" is insufficient to establish waiver of bargaining rights under a CBA.[5] Rather, the parties must "'unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term.'"[6] For example, where a contractual provision allowed for benefits to be provided for "'ninety (90) days following termination,'" the language was not "a clear and unmistakable waiver with respect to the continuation of benefits beyond" that time period, because it did not specifically address that time period.[7] The Union contends that article 16 is not a clear and unmistakable waiver of its right to bargain over the elimination of all bargaining unit jobs.

[7] But several circuit courts of appeals have instead determined that the threshold question is whether the issue was "covered by" the CBA. Only if it was not "covered by" the CBA, do these courts consider whether the CBA contained a clear and unmistakable waiver. Those circuits have adopted the "contract coverage" rule, which treats the issue of whether there had been a failure to bargain as a simple matter of contract interpretation—if the issue was "covered by" the CBA, then the parties have no further obligation to bargain the issue.

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[5] *Local Joint Executive Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1079 (9th Cir. 2008).

[6] *Id.* at 1079-80.

[7] *Id.* at 1081. See *N.L.R.B. v. General Tire and Rubber Co.*, 795 F.2d 585 (6th Cir. 1986).

The difference between these theories has been explained by the District of Columbia Circuit:

> [T]he "covered by" and "waiver" inquiries . . . are analytically distinct. A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant. . . .
>
> "Where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant."[8]

In applying this standard, courts first inquire as to whether the subject at issue was "covered by" the CBA. If it was, it becomes a contract interpretation question. But if the subject was not "covered by" the contract, whether the subject was waived is examined.

In fact, the CIR has adopted this "covered by" language,[9] though it has not applied it consistently.[10] In *F.O.P., Lodge No. 21 v. City of Ralston, NE*,[11] the CIR cited to *Dept. of Navy, Marine Corps Logistics Base v. FLRA*[12] for its explanation of the distinction between contract coverage and waiver. The CIR went on to explain why it mattered: If the change in health insurance was "'contained in'" the CBA, the dispute was a

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[8] *Dept. of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

[9] See *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994). See, also, *Washington County Police Officers Association/F.O.P. Lodge 36 v. County of Washington, State of Nebraska*, No. 1247, 2011 WL 2286982 (C.I.R. May 31, 2011).

[10] Cf. *General Drivers & Helpers Union, Local No. 554 v. County of Douglas, Nebraska*, No. 1224, 2009 WL 5220888 (C.I.R. Nov. 24, 2009) (status quo order).

[11] *F.O.P., Lodge No. 21, supra* note 9.

[12] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8.

breach of contract claim outside of the scope of the CIR's authority.[13]

[8] While decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, such decisions are not binding on this court.[14] And in this case, we are persuaded, not by the National Labor Relations Board's view of waiver under the National Labor Relations Act, but by the circuit courts that have adopted the contract coverage rule. In particular, we find persuasive the reasoning of the District of Columbia Circuit:

> When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of . . . the National Labor Relations Board or the courts to interfere with the parties' choice. [Citation omitted.] On the other hand, when a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of wavier and have tended to construe waivers narrowly.[15]

We find the distinction between contract coverage and waiver to be both logically and analytically correct, and as such, we adopt it.

Was Subcontracting "Covered By" CBA?

We therefore consider the threshold question of whether the subcontracting of bargaining unit jobs at DCHC was "covered by" the CBA. In conducting this inquiry, we examine whether the CBA "fully defines the parties' rights" as to this topic.

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[13] *F.O.P., Lodge No. 21, supra* note 9 at 63.

[14] See *Scottsbluff Police Off. Assn., supra* note 1.

[15] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8 at 57.

Whether a topic is "covered by" a CBA was at issue in *Dept. of Navy, Marine Corps Logistics Base*,[16] which involved two separate petitions filed by a union against its employer, the Marine Corps. The first petition dealt with the reassignment of personnel, also referred to as employee "details"; the second petition dealt with a change in performance evaluation factors. As relevant to the first petition, the CBA contained provisions defining when employee "details" would be implemented, how long the detail could last, and the effect of the detail on an employee's salary and liability for union dues. After certain employees were detailed, the union filed a petition with the Federal Labor Relations Authority (FLRA), arguing that bargaining was required. The FLRA agreed, applying what was essentially a waiver analysis, and concluded that individual details on the local level were not addressed in the CBA.

As to the issue of performance evaluations, the CBA established comprehensive procedures for the employer to follow when it modified performance criteria, including advance notice, an opportunity for employee participation, and a requirement that the standards be "'fair and reasonable.'"[17] After the standards were changed, the union objected. The FLRA again agreed that bargaining was not waived, because the CBA did not specifically address the "'full range of impact and implementation'" issues.[18]

The District of Columbia Circuit, applying its contract coverage standard, held that in both instances, the topics at issue were "covered by" the CBA. The court conceded that the FLRA was correct that the CBA did not "'specifically address . . . the full range of impact and implementation issues' that might conceivably arise," but noted that this standard was "both unrealistic and impermissible."[19] We similarly conclude that the dispute over the subcontracting of DCHC security work is "covered by" the parties' CBA in this case.

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[16] *Dept. of Navy, Marine Corps Logistics Base, supra* note 8.

[17] *Id.* at 61.

[18] *Id.* at 53.

[19] *Id.* at 62.

In this case, article 16, § 1, of the CBA provides that the "Union recognizes that the right of contracting and subcontracting is vested in the County. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union, nor to discriminate against any employees." Section 2 further notes that "[i]f the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs," the County will notify the Union and "provide the Union with an opportunity to discuss with the County the necessity and effect on bargaining unit employees."

We conclude that the subcontracting of bargaining unit jobs is clearly "covered by" article 16 of the CBA. That article specifically notes the steps that the County needs to follow when "the contracting out or subcontracting of bargaining unit work has the effect of eliminating bargaining unit jobs." And the elimination of bargaining unit jobs is at issue in this dispute.

We recognize that article 16 does not specifically mention the elimination of the entire bargaining unit, which would be the result of the County's action in this case. But we decline to read article 16 so strictly as to conclude that it would not cover the subcontracting dispute at issue in this case. To strictly read article 16 would essentially apply the "unrealistic and impermissible"[20] waiver standard in the first instance, and would be antithetical to the contract coverage principles we now adopt.

Result.

[9,10] The CIR is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the CIR.[21] Under Nebraska's Industrial Relations Act, the CIR has the authority to decide

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[20] *Id.*

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

industrial disputes[22] and to determine whether any party to an agreement has committed a prohibited practice.[23] But the CIR does not have the authority to hear cases involving the alleged breach of a contract.[24]

[11] We have concluded that the subcontracting issue presented by this case is "covered by" the parties' CBA. And determining whether the County's action was allowed by the CBA involves a question of the proper interpretation of that contract. This is something over which the CIR lacks authority.[25] The proper forum to pursue such claims is the district court.[26] As such, we reverse, and remand the decision of the CIR, with directions to the CIR to vacate its order and dismiss the Union's petition.

CONCLUSION

We conclude that the issue of the subcontracting of bargaining unit jobs resulting in the elimination of bargaining unit jobs is "covered by" the CBA and presents an issue of contract interpretation over which the CIR lacks jurisdiction. We accordingly reverse, and remand to the CIR, with directions to vacate its order and dismiss the Union's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

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[22] § 48-819.01.

[23] § 48-824.

[24] See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979).

[25] See *id.*

[26] See *id.*