ITEM NO. 197

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

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| ORMSBY COUNTY TEACHERS ASSOCIATION, Petitioner, -vs- CARSON CITY SCHOOL DISTRICT and the CARSON CITY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES, Respondents. | CASE NO. A1-045405 **DECISION** |

For the Petitioner: MICHAEL W. DYER, Esq.

For the Respondent: E. THOMAS ECK, III, Esq.

For the EMRB: SALVATORE C. GUGINO, Esq., Chairman
TAMARA BARENGO, Vice Chairman
JEFFREY L. ESKIN, Esq., Member

## STATEMENT OF THE CASE

On December 9, 1985, the ORMSBY COUNTY TEACHERS ASSOCIATION ("OCTA") filed its Complaint against the CARSON CITY SCHOOL DISTRICT and its Trustees ("CCSD") alleging that Respondents had engaged in certain unfair labor practices in the administrative selection process for the appointment of a new vice-principal at Eagle Valley Junior High School. Chief among Petitioner's concerns was the use by the CCSD of a written examination question submitted to the candidates which stated as follows:

> You are serving as assistant principal at Eagle Valley Junior High School. In your prior capacity as a classroom teacher you have developed a number of personal and professional associations with current staff members. You have been an active member of the teacher's association and have served on a number of committees for the association.
>
> It has come to your attention that a teacher with whom you have been associated on both a personal and professional basis, has committed

> an infraction which would make him/her subject to possible dismissal under the provisions of NRS 391.312 (copy attached) for unprofessional conduct (evident intoxication while on duty). The teacher was insubordinate to you when initially confronted with the problem.
>
> Please write a letter of admonition (NRS 391.313) reprimanding the individual for his/her conduct in this regard, giving instructions for remedial and corrective action, and indicating the steps which may be taken if the situation is not appropriately resolved. (Emphasis added).

There were seven (7) applicants for the position of vice-principal of which three (3) names were submitted to the school principal for her selection. The finalists, who were ranked according to their cumulative scores in written and oral examination, included, respectively, Royston Waltemyer (45.25), Nellana DeGraff (44.37), and Thomas Badillo (41.0). Regarding the above-cited question, the three candidates achieved the following scores out of twelve (12) possible points: Waltemyer (11), DeGraff (8), Badillo (7).

The principal of Eagle Valley Junior High School reviewed the above-named candidates and selected Mr. Badillo. It has been noted for the record that Mr. Waltemyer was a prior president of the OCTA and was an active member of the Association; and that Mr. Badillo had recently resigned from the OCTA. Although the OCTA does not question Mr. Badillo's qualifications for the position, it is the Association's belief that the above question, among other things, acts to discourage membership in the OCTA, particularly among individuals who may wish to apply for administrative positions. It is also their contention that such a question unfairly discriminates against Association members who do apply for such positions.

## D I S C U S S I O N

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### THE QUESTION, AS WRITTEN, CONSTITUTES A PROHIBITED

PRACTICE IN VIOLATION OF NRS 288.270(1)(a) AND (c)

The Board is concerned with any activity which may, in practice or on its face, have a chilling effect upon the right of public employees to associate as members of an employee organization. NRS 288.270 provides in part:

> "1. It is a prohibited practice for a local government employer or its designated representative willfully to:
>
> (a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.
>
> (b) Dominate, interfere or assist in the formation or administration of any employee organization.
>
> (c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization." (See NRS at 10541).

In analyzing the "drunken teacher Association member" question, the Board may draw inferences from and make conclusions on proven facts with regard to whether antiunion or animus existed. National Labor Relations Board v. Electric Steam Radiator Corp., 321 F.2d 733, 738 (6th Cir. 1963). NRS 288.270(1)(c) refers to "the employer willfully" discriminating to discourage membership. However, the requirement that the employer's actions must have been willful does not require that the Petitioner or Complainant carry the burden of showing specific intent on the employer's part.

The United States Supreme Court has expressly stated that although an employer's intent or motive to discriminate or to interfere with Union rights is a necessary element of an unfair labor practice, specific evidence of the employer's subjective intent is not required when the employer's conduct inherently encourages or discourages Union membership. Radio Officer's Union, etc. v. National Labor Relations Board, 347 U.S. 17, 44, 74 S.Ct. 323, 338 (1954).

The Supreme Court has further noted that some conduct by its very nature

contains the implications of the required intent. In such cases the natural foreseeable consequences of an employer's action may justify the conclusion that discrimination was intended. Thus, the existence of discrimination may be inferred by the Board based upon its experience in the labor management relations area. National Labor Relations Board v. Erie Resistor Corp., 373 U.S. 221, 227, 83 S.Ct. 1139, 1144 (1963); Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 800, 65 S.Ct. 982, 986 (1945).

The language of the test question leaves the Board with the clear and unambiguous impression that it casts aspersions upon the OCTA and its members. By requiring that the candidate assume that he or she has been "an active member of the teacher's association" in the past, the CCSD is inferrentially instructing the candidate to "overcome" this background in dealing with the drunken teacher. Moreover, it is informing the applicant that membership in the employee association serves as a detriment to the person who is required to think like an administrator.

Placing the "drunken teacher association member" question on the promotional examination has a natural tendency to discourage Association membership. Stated differently, the discouragement of Association membership is a reasonably foreseeable result of utilizing questions on promotional examinations which display the teacher association members in an unfavorable light and express the employer's doubt that association members, especially ones who have been active in the organization, can become effective administrators.

Since the negative impact is reasonably foreseeable, the Respondents must be presumed to have intended the natural consequences of their action. See Radio Officer's Union, Erie Resistor Corp., Electric Steam Radiator Corp. cases cited supra. The Board also relied upon the comments of the designer of the test, Dr. Rowley, who admitted under oath that he assumed the applicants for the position would be members of the OCTA. See Transcript of Proceedings,

February 27, 1986 at 115, 143.

Thus, in light of the testimony at the hearing and the clear and obvious import of the language in the test question, the Board has concluded that the Respondents CCSD have committed a prohibited practice in violation of NRS 288.270(1), subsections (a) and (c), and that the OCTA has presented sufficient facts and evidence to prevail on the First Cause of Action in its Complaint on file herein.

II

DISMISSAL OF ALL OTHER CAUSES OF ACTION

The Board has reviewed the remaining Causes of Action, numbered Two through Seven, in Petitioner's Complaint, and has determined that they are cumulative in nature and duplicitous of the first two Causes of Action. Accordingly, and for that reason, they are hereby denied.

FINDINGS OF FACT.

1. That the ORMSBY COUNTY TEACHERS ASSOCIATION is a local government employee organization.

2. That the CARSON CITY SCHOOL DISTRICT and the CARSON CITY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES are a local government employer.

3. That during the course of 1985, an administrative position for vice-principal of Eagle Valley Junior High School was opened for competitive application.

4. That, as part of the written examination, applicants were required to answer a question in which they were to assume that they had been active members of the teacher's association, and which involved a "drunken teacher" with whom the applicants had been personally and professionally associated.

5. That the question was written with the assumption that the

applicants were all members of the ORMSBY COUNTY TEACHERS ASSOCIATION.

## CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board possesses original jurisdiction over the parties and subject matter of this Complaint and/or Petition pursuant to the provisions of NRS Chapter 288.

2. That the CARSON CITY SCHOOL DISTRICT and the CARSON CITY SCHOOL DISTRICT BOARD OF SCHOOL TRUSTEES are a local government employer within the term defined in NRS 288.060.

3. That the ORMSBY COUNTY TEACHERS ASSOCIATION is a local government employee organization within the term as defined in NRS 288.040.

4. That there is sufficient evidence, based upon the express language of the test question and the testimony of witnesses at hearing, as well as the arguments of counsel, for the Board to conclude and thereby hold tha the inclusion of the "drunken teacher association member" question by the Respondents in their written examination of applicants for the administrative position in question was a prohibited practice in violation of NRS 288.270(1) (a) and (c).

5. That the Petitioner/Complainant has sustained its Burden of Proof on its First Cause of Action.

6. That the Second through Seventh Causes of Action in Petitioner/Complainant's Complaint are cumulative, duplicitous, inclusive of the general allegations contained in the First Cause of Action and, for that reason, are hereby denied.

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7. That each party is to bear its own costs and fees in this action.

DATED this 21st day of September, 1987.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By _____
SALVATORE C. GUGINO, Esq.
Chairman

By _____
TAMARA BARENGO
Vice-Chairman

By _____
JEFFREY L. ESKIN, Esq.
Member of the Board

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