BEFORE THE LOCAL GOVERNMENT
EMPLOYEE-MANAGEMENT RELATIONS BOARD

THE COUNTY OF LYON, a political subdivision of the State of Nevada, Plaintiff-Petitioner, -vs- INTERNATIONAL UNION OF OPERATING ENGINEERS STATIONARY LOCAL NO. 39, Defendant-Respondent.	ITEM NO. 229 CASE NO. A1-045449 DECISION

For the Petitioner: Zane Miles, Esq., Deputy District Attorney
LYON COUNTY DISTRICT ATTORNEY'S OFFICE

For the Respondent: Larry D. Lessly, Esq.
MOSCHETTI & LESSLY

For the EMRB: Salvatore C. Gugino, Chairman
Tamara Barengo, Vice Chairman
Howard Ecker, Board Member

STATEMENT OF THE CASE

This matter came before the Local Government Employee-Management Relations Board ("Board") upon the filing of a Complaint and Petition For Declaratory Judgment and Related Relief, or in the Alternative, Appeal From Award of Factfinder ("Complaint") by the County of Lyon ("County") seeking a determination that certain binding awards of a factfinder in a bargaining dispute with the International Union of Operating Engineers Stationary Local No. 39 ("Union") are unlawful, void, and of no effect.

In the summer of 1988, during the course of negotiating a first time collective bargaining agreement for County employees in the white and blue collar bargaining units, the County asserted that many of the articles proposed by the Union were illegal and that it would not negotiate them. After further negotiations and mediation in accordance with statutory provisions, the parties reached impasse on certain proposed articles.

The Union then sought and were granted final and binding factfinding on the remaining issues which were mandatory subjects of bargaining through a panel convened according to statutory provisions by the Commissioner of the Board.

During October of 1988, the County filed a Petition in District Court seeking a determination that certain issues that were awarded binding factfinding are unlawful, enjoining further actions by the Union seeking the proposals at issue. However, the Court granted the Union's Motion to Dismiss this Complaint on the grounds that the County had not stated a cause of action in either of its causes of action and had not exhausted its administrative remedies.

Factfinding hearings were held, and on April 24, 1989, the factfinder entered binding awards on the issues before him including those presently in dispute before this Board.

Subsequent to the factfinder's awards, the County again filed a Complaint in District Court. As of this date, that Complaint is still pending.

The Petitioner thereafter submitted some of the issues presently in dispute to the Board for its determination.

In their Prehearing Statements, the parties have submitted the following issues for the Board's determination:

a. Does the Local Government Employee-Management Relations Board have jurisdiction to interpret any statutes other than NRS Chapter 288?

b. Does the factfinder's binding award of a contract provision granting to Union "exclusive use" of a portion of County's bulletin board violate NRS 288.270(1)(b) prohibiting County from assisting in the "administration" of Union?

c. Does the factfinder's binding award for a contract provision granting to Union "exclusive use" of a portion of County's bulletin boards

violate NRS 288.270(1)(c) prohibiting County from discrimination which would encourage or discourage membership in Union?

d. Does the factfinder's binding award of a contract provision granting paid release time totaling 390 hours per year for Union members who are County employees to conduct Union business violate NRS 288.170(1)(c) prohibiting County from discriminating in any term or condition of employment to encourage or discourage membership in Union?

e. Does the factfinder's binding award of a contract provision requiring County to credit authorized Union leave for County's merit pay purposes violate NRS 288.270(1)(b) prohibiting County from assisting in the administration of any employee organization?

f. Does the factfinder's binding award of a contract provision requiring County to credit authorized Union leave for County's merit pay purposes violate NRS 288.270(1)(b) prohibiting County from discriminating to encourage or discourage membership in an employee organization?

g. Does the factfinder's binding award of a contract provision that the contract "shall continue from year to year" unless modified by agreement of the parties constitute an unlawful contract in perpetuity which the factfinder is not authorized to impose pursuant to NRS Chapter 288?

h. Does the factfinder's binding award of a contract provision exempting informal negotiations from statutory notice requirements constitute imposition of an unlawful term outside the authority of a factfinder to order pursuant to NRS Chapter 288?

i. Is the factfinder's binding award of the "merit pay" article in fact and law actually a binding award limiting County to granting "merit pay" adjustments solely on the basis of seniority violative of NRS 281.270(1) which requires County to base all personnel actions solely on merit and fitness.

j. Whether the award of the factfinder providing that the County shall provide space on existing bulletin boards for exclusive use by the Union in each location where members of the bargaining unit work, violates NRS 288.270(1)(b) since provision of exclusive space would "assist in the . . . administration" of the Union. The County's First Cause of Action goes on to allege that provision of exclusive space to the Union would have the effect of encouraging membership in the Union, and the exclusivity provision would discriminate against non-members of the Union.

k. Whether the factfinder's binding decision providing for release time with no loss of pay for the purpose of employees participating in the formal steps of a grievance procedure or negotiating with the County on matters subject to collective bargaining, when those negotiations occur during regular working hours, violates the provisions of NRS 288.270(1)(b) by constituting assistance in the administration of the employee organization. The Second Cause of Action alleges further the issue that the payment by the County of 390 hours of release time per year for such purposes would discriminate in a term or condition of employment to encourage membership in an employee organization, in violation of NRS 288.270(1)(c).

l. Whether the binding finding of the factfinder providing that the contract should continue from year to year after the first termination date, unless the County and Union agree to change, amend, modify or terminate the agreement pursuant to the provisions of Chapter 288 of NRS, or the Union ceases to be the exclusive representative of the County employees, is an unlawful contract in perpetuity, ambiguous and uncertain, unenforceable at law, and overrules Nevada statute law.

m. Whether crediting of "authorized union leave" for an employee to qualify for a merit salary step advancement, as required by the binding decision of the factfinder, violates NRS 288.270(1)(b), as it constitutes

assisting in the administration of an employee organization. The Fourth Cause of Action goes on to allege that crediting of such "authorized union leave" violates NRS 288.270(1)(c), in that it discriminates in a term or condition of employment to encourage membership in an employee organization.

Both parties contending that there are no substantial facts in controversy and neither party requesting a hearing pursuant to NAC 288.400, the Board determined to decide the matter without the necessity of a hearing, based on all pleadings and papers on file.

DISCUSSION

I

EXCLUSIVE USE OF BULLETIN BOARDS LAWFUL PURSUANT TO NRS CHAPTER 288.

The Board is not convinced by the County's arguments that the factfinder's award with respect to the use of bulletin boards violates the provision of NRS 288.270(b) and (c).

The language of the award reads as follows:

> "The County shall provide space on existing bulletin boards for exclusive use by the Union, in each location where members of the bargaining unit work."

Exclusive rights of the bargaining agent are discussed in Item 2 of the Boards past decisions. In that decision a case is cited, NLRB v. Janes & Laughlin Steel Corp., 301 U.S. 1, 44, (1937) which establishes that an employer can grant to the bargaining agent certain exclusive contract rights and that the employer has an obligation to treat this representative exclusively and has a negative duty with respect to others.

A Memorandum Opinion and Order of the U.S. District Court filed June 3, 1970 for the District of Colorado (Civil Action C-1393) states the following concerning the exclusive contract rights in a school district:

> "It provides the duly elected representative ready means of communicating with all teachers, not just the DCTA membership.

> This is essential, since the DCTA represents all teachers, not just its membership. It eliminates inter-union competition for membership within the public schools except at time of representation elections."

A similar argument would be appropriate in the instant case. The Board agrees with the Binding Factfinder's analysis that:

> " . . . there is not merit to the County's contention that providing bulletin board space for the exclusive use of the union represents prohibited discrimination against employees for their "nonmembership" in a union. The statute requires employers to recognize and bargain with employee unions while preserving the rights of employees not to join the union if they choose. It would be an odd construction of the statute to assert that it simultaneously recognizes an exclusive representative and disables the employer from providing that exclusive representative access to its members so that it can fulfill its negotiating and grievance-handling responsibilities." (See Complaint, Exhibit "A" - Factfinding Report, pp. 18-19.)

II

PROVISION PROVIDING RELEASE TIME TO CONDUCT UNION BUSINESS LAWFUL PURSUANT TO NRS CHAPTER 288.

The provisions set forth in NRS 288.270(1)(b) and (c), prohibiting against assisting in the administration of an employee organization refers to actual interference in the administration of an employee organization or assisting in the formation of such an organization and participating in the active control of such an organization. Release time with no loss of pay or benefits for the express purpose of negotiating and handling grievance procedures does not assist the administration of the employee organization, it merely provides a vehicle by which both parties can carry out their statutorily mandated requirement to negotiate and to handle grievances. In light of the County's current labor problems and the difficulties involved in negotiating this first contract, it is ludicrous to think that this award will encourage Union membership. The fact that the County has granted similar language in the past to another bargaining unit would make this Board believe that the County doesn't really believe this argument either.

III

TERM OF AGREEMENT PROVISION LAWFUL PURSUANT TO NRS CHAPTER 288.

The language of NRS Chapter 288 is permissive regarding the term of a negotiated contract. NRS 288.155 states:

> "Agreements entered into between local government employers and employees' organizations pursuant to this chapter may extend beyond the term of office of any member or officer of the local government employer."

Further, NRS 288.150 mandates the bargaining of the duration of a collective bargaining agreement.

Based upon these provisions and the language included in the award that the contract would cease upon the Union's ceasing to be the exclusive representative of the County's employees, the Board finds that the award of the arbitrator does not violate NRS 288.270(1)(b) or (c).

The language in the term of agreement provision exempting informal discussions between the parties from the requirements of notice or time prescribed by statutes is also permissible under NRS Chapter 288. The language of the award expressly states that the "Article does not preclude informal discussion between the parties on any matter which is not subject to negotiation or contract." (Emphasis added.) If these matters are not subject to negotiation or contract, it is difficult to see how they are subject to the notice requirements of our public employee bargaining statute.

IV

CONTRACT LANGUAGE BASING MERIT PAY ON SENIORITY DOES NOT CONSTITUTE PROHIBITED PRACTICE.

The Board agrees with the factfinder's statement (see Factfinding Report, p. 11) that "length of service ('seniority') is highly correlated with fitness for the position in which one serves." Further, it appears to

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the Board that keeping more experienced employees when layoffs are necessary is in keeping with a policy of basing personnel actions on merit and fitness.

The Board is unconvinced by the County's argument that the provision of NRS 281.370(1) which the County contends conflicts with the use of seniority as a criterion in certain personnel matters, states:

> "All personnel actions taken by state, county or municipal departments, agencies boards or appointing officers thereof must be based solely on merit and fitness."

This statute, of which this section is a part, is designed, in the County's words, "to eliminate unlawful discrimination in public employment and public contracting." The section quoted is very general in nature and appears, to the Board, to support the usage of an objective criteria such as seniority as a basis for certain personnel actions. We do not see the conflict.

However, even if such a conflict does exist, a test for determining which of two conflicting statutes governs is set forth in Rownow v. City of Las Vegas, 57 Nev. 332, 365, 65 P.2d 133, 146 (1937):

> "Where one statute deals with a subject in general and comprehensive terms, and another deals with another part of the same subject in a more minute and definite way, the special statute, to the extent of any necessary repugnancy, will prevail over the general one."

NRS Chapter 288 is a specific and definite enactment, and our determination in this Complaint is necessarily based upon our review and construction of this special labor statute. Regardless, the County has provided no convincing arguments that seniority as a criteria for certain personnel actions, as awarded by the factfinder, constitutes a violation of Nevada law. The use of seniority in the instant case is clearly lawful pursuant to NRS Chapter 288.

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V

THE COUNTY'S OBSTRUCTIVE ACTIONS CONSTITUTE A PROHIBITED PRACTICE.

The Board is mindful of the Union's argument that the County is attempting through this complaint to delay and avoid finalization of this and future collective bargaining agreements. The Board observes that the factfinder's award would seem to be, in part, a result of the County's apparent attempt to avoid a final agreement with the Union rather than make a concerted effort to reach agreement or to come as close as possible on each of the issues pursuant to the spirit of NRS Chapter 288 before resorting to factfinding.

The County's arguments are so numerous, are so bizarre, and are so at odds with the normal construction of the alleged conflicting statutes that any further delays in complying with the binding awards of the arbitrator will undoubtedly be viewed by the Board as an intentional avoidance of the requirement to engage in collective bargaining under NRS Chapter 288, an act which constitutes a prohibited practice pursuant to NRS 288.270(1)(e).

FINDINGS OF FACT

1. That the Petitioner, the County of Lyon, is a local government employer.

2. That the Respondent, International Union of Operating Engineers, Stationary Local No. 39, is a local government employee organization.

3. That on April 27, 1988, a certified election was held in which the Union was chosen as the bargaining agent for three units of County employees.

4. That negotiations began on or about June 1, 1988.

5. That subsequently the County asserted that many of the articles proposed by the Union were illegal and that it would not negotiate about them.

6. That after further negotiations and mediation in accordance with statutory provisions, the parties reached impasse on certain proposed articles.

7. That on September 26, 1988, the Union requested that the Commissioner of the Board form a panel to determine whether the findings and recommendations of the factfinder on the issues submitted would be final and binding.

8. That on October 3, 1988, the County filed a Complaint and Petition For Declaratory and Injunctive Relief in District Court against the Union setting forth two causes of action: (1) alleging that the Union's insistence that certain personnel actions be based on seniority would violate NRS 281.370(1), and (2) alleging that the Union's proposals provided privileges and benefits for Union members that would violate NRS 613.250.

9. That on December 6, 1988, the Court granted the Union's Motion to Dismiss on the grounds that the County had not stated a cause of action in either of its causes of action for declaratory relief and had not exhausted its administrative remedy.

10. That on January 30, 1989, the panel convened by the Commissioner of the Board pursuant to NRS 288.200(6), NRS 288.201, and NRS 288.202, met and determined "that the factfinder selected shall render a Final and Binding Award on the following items: (1) Recognition, (2) Employee Rights, (3) Release Time, (4) Dues Deduction, (5) Discipline/Discharge/Demotion, (6) Grievance/Arbitration, (7) Layoff/Recall, (8) Basic Work Week, (9) Placement of entry level positions on the salary schedule, (10) Overtime Pay, (11) Standby and Call-Back Pay, (12) Shift Differential, (13) Temporary Supervisors Pay, (14) Merit Salary Adjustment, (15) Holidays, (16) Vacation, (17) Sick Leave, (18) Retirement Contribution, (19) Group Insurance, (20) Longevity, and (21) Term of Agreement.

11. That the panel further determined, based on the evidence and testimony presented during the hearing, that "the County's refusal to negotiate deduction of dues for the recognized employee organization, a subject which is specifically delineated in NRS 288.150(2) as a mandatory subject of bargaining, constituted in our opinion, bad faith bargaining."

12. That pursuant to NRS 288.200, factfinding hearings were held on February 8 and 27, 1989.

13. That on April 24, 1989, the factfinder entered binding awards on articles including those presently in dispute before this Board.

14. That on May 16, 1989, the County filed a Complaint and Petition For Declaratory Judgment and Related Relief appealing the factfinder's binding award regarding certain articles which the County alleges are in violation of Nevada statutes.

CONCLUSIONS OF LAW

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

2. The Petitioner, International Union of Operating Engineers Stationary Local No. 39, is a recognized employee organization within the terms defined by NRS 288.040 and is the exclusive representative of three bargaining units of Lyon County Employees pursuant to NRS 288.160.

3. That the factfinder's binding award of a contract provision granting to Union "exclusive use" of a portion of County's bulletin board does not violate NRS 288.270(1)(b) prohibiting County from assisting in the "administration" of Union.

4. That the factfinder's binding award for a contract provision granting to Union "exclusive use" of a portion of County's bulletin boards does not violate NRS 288.170(1)(c) prohibiting County from discrimination

which would encourage or discourage membership in Union.

5. That the factfinder's binding award of a contract provision granting paid release time totaling 390 hours per year for Union members who are County employees to conduct Union business does not violate NRS 288.170(1)(c) prohibiting County from discriminating in any term or condition of employment to encourage or discourage membership in Union.

6. That the factfinder's binding award of a contract provision requiring County to credit authorized Union leave for County's merit pay purposes does not violate NRS 288.270(1)(b) prohibiting County from assisting in the administration of any employee organization.

7. That the factfinder's binding award of a contract provision requiring County to credit authorized Union leave for County's merit pay purposes does not violate NRS 288.270(1)(b) prohibiting County from discriminating to encourage or discourage membership in an employee organization.

8. That the factfinder's binding award of a contract provision "shall continue from year to year" unless modified by agreement of the parties constitutes a lawful contract pursuant to NRS Chapter 288.

9. That the factfinder's binding award of a contract provision exempting informal discussions on matters not subject to negotiations from statutory notice requirements constitute a lawful term within the authority of a factfinder to order pursuant to NRS Chapter 288.

10. That factfinder's binding award of the "merit pay" article is lawful and binding pursuant to NRS Chapter 288.

ORDER

Based upon the above findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

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1. That the Complaint and Petition for Declaratory Judgment by the County, or in the Alternative, Appeal From Award of Factfinder, is denied.

2. That the Contract between the County and the Union, including the articles in the award of the factfinder, shall be effective as of the date of the binding factfinding award.

3. That the County shall immediately implement the full Contract entered into between the parties, including the factfinder's awards.

4. That each party is to bear its own costs and fees in the above-entitled matter.

DATED this 4th day of October, 1989.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
SALVATORE C. GUGINO, Chairman

By Tamara Barengo
TAMARA BARENGO, Vice Chairman

By _____
HOWARD ECKER, Board Member

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