STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

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| INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL NO. 39, AFL-CIO,<br><br>Complainant,<br><br>-vs-<br><br>COUNTY OF LYON, a political subdivision of the STATE OF NEVADA and KEN HARVEY, in his capacity as the County Commissioner of LYON COUNTY,<br><br>Respondents. | **ITEM NO. 240**<br><br>CASE NO. A1-045451<br><br>**DECISION** |

For the Complainant: LARRY LESSLY, ESQ.
MOSCHETTI & LESSLY

For the Respondent COUNTY OF LYON: WILLIAM G. ROGERS, ESQ.
ZANE MILES, ESQ.

For the EMRB: SALVATORE C. GUGINO, Chairman
TAMARA BARENGO, Vice Chairman
HOWARD ECKER, Board Member

**STATEMENT OF THE CASE**

On June 28, 1989, Complainant INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL NO. 39, AFL-CIO, ("UNION"), brought its complaint against the COUNTY OF LYON ("COUNTY") and KEN HARVEY in his capacity as a County Commissioner, for certain acts and statements of Mr. HARVEY which the UNION has alleged amount to a prohibited practice.

Specifically, the UNION alleges that on May 15, 1989, Mr. HARVEY approached County employees Kathy Hall, Diana Lanier, Ida Faber, and Sandra Kuhl, and informed them that at the next Thursday meeting of the COUNTY Commissioners, the

employees should come to the meeting with their collective bargaining team in order to inform the COUNTY that they no longer wished to be represented by the UNION. The UNION further contended that in exchange, Mr. HARVEY promised the employees that they would receive the same monetary raise in salary as were to be given to the COUNTY's other unclassified employees and that, when the employees declined Mr. HARVEY's request, that he then threatened to lay off COUNTY employees, particularly Kathy Hall, as a means of reimbursing the COUNTY for its expenses incurred during the negotiations process.

The COUNTY, for its part, contends that if the alleged statements were made, that they would indeed constitute an unfair labor practice and a violation of law by the COUNTY. However, the COUNTY asserts that any such statements were uttered by Mr. HARVEY in his individual capacity and status as one of the five Commissioners, and that Mr. HARVEY was not authorized to speak for the bargaining team.

Like the COUNTY, Mr. HARVEY admitted in his Response that the conduct and statements alleged by the UNION, if true, would constitute a prohibited practice under NRS Chapter 288, but denied that the conversations and actions occurred as described. It should be noted that Mr. HARVEY purportedly filed his response "in propria personna" (in proper person).

On November 6, 1989, the LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD ("BOARD") conducted a hearing in Reno, Nevada, in which the BOARD reviewed the papers and pleadings on file, took the testimony of witnesses for the

parties, examined evidence and heard arguments by the parties and their counsel. From all of the above, the BOARD has concluded, based upon due deliberation, that the Respondents have each committed prohibited practices in violation of NRS 288.270(1)(a) and (b).

## DISCUSSION

### I

### THERE IS OVERWHELMING EVIDENCE THAT RESPONDENT HARVEY MADE THE STATEMENTS ALLEGED IN THE COMPLAINT.

With regard to the statements attributed to Respondent HARVEY on May 15, 1989, the BOARD heard testimony from COUNTY employees Sandra Kuhl and Kathy Hall, both of whom asserted that Respondent HARVEY had asked them to leave the UNION whereupon they would be treated "right" by the Board of County Commissioners, but that, if they didn't, he would recoup COUNTY expenses incurred as a result of the negotiation process by laying off employees, in particular Ms. Kathy Hall (See Transcript at 18, 19, 20, and 47). According to Ms. Kuhl, "He had indicated that the board would do what he wanted them to do because they apparently had discussed it, treating us right, as they put it." (Transcript at 21, 22.)

The statements were made in the presence of other COUNTY employees, Diana Lanier and Ida Faber, both of whom were prepared to testify on behalf of the UNION (Transcript at 22, 54). Their testimony was clear and concise. In contrast, the testimony of Respondent HARVEY as to his version of the facts was simply not credible. See Reno Police Protective Association v. The City of Reno, EMRB Item No. 175, Case No.

A1-045390, citing Innes v. Beauchene, 370 P.2d 174 (Alaska, 1962). Moreover, the testimony of COUNTY Commissioner Kathy Jensen revealed that, within a day or two of the alleged incident, she had been contacted by COUNTY employee Kathy Hall who repeated the incident to her and asked for her advice (Transcript at 104, 105). COUNTY Commissioner Marianne Hamer stated that she was personally aware of incidents in which Respondent HARVEY went to COUNTY employees seeking concessions and taking inappropriate actions (Transcript at 74).

In light of the above, the BOARD unanimously concurred that Mr. HARVEY made the statements attributed to him.

II

**RESPONDENT HARVEY ACTED IN HIS CAPACITY AS A COUNTY COMMISSIONER WHEN HE MADE HIS STATEMENTS TO THE EMPLOYEES.**

At the time that Respondent HARVEY made his statements to the COUNTY employees, he was not only chairman of the Board of COUNTY Commissioners, but he was also chairman of their negotiating team (Transcript at 21, 58, 59). His political position was formidable in relation to these employees, and any statements or suggestions made by Respondent HARVEY could not be easily ignored by them. In effect, he statements and actions had a "chilling effect" upon their activities in association with the UNION. The BOARD takes note that the COUNTY was aware of the effect which such statements might have, and cites the statement of COUNTY Commissioner Kathy Jensen under cross-examination by Respondent HARVEY:

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> Q. Did you really think it was that big of a deal, that if what I was accused, that I did this, did you think it was a big deal?
>
> A. Yes, I did.
> I think that our position as commissioners, anything we say is a big deal. People take it personally.
> I think that whether you said it or you didn't say it -- If you did say it, that would be a big deal, yes, because those employees, they don't have any way to fight back. We're their employer and if we threaten them or lay down ground rules to them they have to take it.

(See Transcript at 107.)

Under the totality of the circumstances, it would be unreasonable for the employees to have assumed that Respondent HARVEY was acting in anything <u>other</u> than his capacity as a COUNTY Commissioner and chairman of the negotiating team.

The COUNTY, in its defense, has asserted that the employees should not have felt threatened by Respondent HARVEY's remarks, since it takes three (3) Commissioners to take an official action and that, therefore, HARVEY had no authority to make good on his statements. This completely misses the legal issue involved here. NRS 288.270(1)(a) makes it a prohibited practice for a local government employer <u>or its designated representative</u> to willfully ". . . interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter." Further, subsection (1)(b) of the statute prohibits a <u>designated representative</u> from statements and conduct which might willfully ". . . Dominate, interfere or assist in the formation or administration of any employee organization."

There is no question that the COUNTY appointed

Respondent HARVEY as its designated representative at th bargaining table. What specific authority he might have had at the time is of no matter. His ability to chill the union activities of COUNTY employees by the mere nature of his political position is sufficient.

The BOARD therefore concludes that Respondent HARVEY has committed prohibited practices pursuant to NRS 288.270(1)(a) and (b).

III

**UNDER THE CIRCUMSTANCES, THE COUNTY IS ALSO LIABLE FOR ITS COMMISSION OF PROHIBITED PRACTICES.**

The COUNTY contends that it should not be held in violation of the statute because it did not authorize Respondent HARVEY's actions nor did it ratify them. The fact appear otherwise. Testimony from the COUNTY Commissioners given at the hearing revealed that the Commissioners were well aware of Respondent HARVEY's "continuing litany" of actions or statements made by Mr. HARVEY to various employees from January of 1987 through July of 1989, and that he harbored certain hostilities for these employees. (Transcript at 82, 83, 93.) Yet, the COUNTY placed him on the negotiating team (Transcript at 83). He was, in fact, made chairman of that negotiating team for the COUNTY, and the COUNTY cannot now contend that they should not be held accountable for the prohibited acts which HARVEY subsequently committed in the course and scope of his position as COUNTY Commissioner and negotiations team chairman.

IV

**THE COUNTY DEMONSTRATED ITS RATIFICATION OF RESPONDENT HARVEY'S ACTIONS DURING THE COURSE OF THE HEARING.**

Aside from the prior knowledge of Respondent HARVEY's propensities, cited above, the COUNTY also demonstrated that it continued to support HARVEY "after the fact" by virtue of its unusual involvement in HARVEY's defense.

The BOARD concludes that the surreptitious involvement of the COUNTY in Respondent HARVEY's defense, as well as the totality of the circumstances, demonstrates a ratification of Respondent HARVEY's prohibited practices.

V

**THE COUNTY MUST BE HELD ACCOUNTABLE FOR THE ACTS AND REPRESENTATIONS OF ITS DISTRICT ATTORNEY AND DEPUTY DISTRICT ATTORNEY IN THIS MATTER.**

The BOARD feels compelled to comment upon the actions of District Attorney WILLIAM G. ROGERS and Deputy District Attorney ZANE STANLEY MILES in this matter. These attorneys came before the BOARD and actively represented that Respondent HARVEY was representing himself in proper person (Transcript at 6, lines 10-12). As the proceeding continued, the following facts were revealed:

1. That the District Attorney prepared HARVEY's answer for him (Transcript at 128);

2. That the District Attorney did so "Because it was in the best interest of the Lyon County taxpayers, because if he hadn't did that I (Respondent HARVEY) wouldn't have even showed up here today." (Transcript at 129, lines 1-3);

3. That, after the Complaint was filed, the Deputy District Attorney asked Mr. HARVEY to provide him a written description of "what happened". (Transcript at 129, lines 21-25; 130, lines 1-3);

4. That the District Attorney's Office also prepared Respondent HARVEY's prehearing statement for him (Transcript at 132, lines 13-15).

It should be noted that Respondent HARVEY's Response requested attorneys fees and costs. It is obvious that Mr. HARVEY would not be entitled to such a recovery unless he was represented by counsel. The BOARD is therefore left with the inescapable conclusion that the District Attorney and his Deputy actually represented Mr. HARVEY in this matter as well as the COUNTY, yet actively misrepresented themselves to the BOARD on this issue at the time of hearing.

Deputy MILES displayed an incredible lack of legal ethics in this matter by first representing that Mr. HARVEY was appearing "in proper person" and then later excusing this sub-rosa activities on behalf of Mr. HARVEY as a "common practice" in the legal profession (Transcript at 151, lines 12-15). While it may be a "common practice" for attorneys to prepare "in proper person" pleadings for a party in a case, the BOARD believes that it is somewhat less than ethical for a co-respondent's counsel to encourage the filing of pleadings, to then prepare them, and then to expressly represent to the BOARD that the party on whose behalf such documents were prepared is there without counsel.

Rule 172 of the Supreme Court Rules provides in subsection (1)(a) that,

> 1. A lawyer shall not knowingly:
> (a) Make a false statement of material fact or law to a tribunal;

It should be noted that the evidence revealed the District Attorney's Office asked Mr. HARVEY for his statement of the facts after the Complaint was filed and then prepared a Response on behalf of HARVEY and an additional one on behalf of the COUNTY which alleged that HARVEY was acting in his individual capacity. This would appear on its face to be detrimental to Respondent HARVEY's defense.

Rule 158 of the Supreme Court Rules provides under subsection 2 that,

> 2. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

For the above reasons, the BOARD expresses its concern about the ethics of District Attorney ROGERS and Deputy MILES in their representations on this matter.

**FINDINGS OF FACT**

1. That on May 15, 1989, Respondent KEN HARVEY, in his capacity as a COUNTY Commissioner and chairman of the negotiations team for the COUNTY approached County employees Kathy Hall, Diana Lanier, Ida Faber and Sandra Kuhl, and informed them that at the next Thursday meeting of the COUNTY Commissioners, the employees should come to the meeting with their collective bargaining team in order to inform the COUNTY that they no longer wish to be represented by the UNION.

2. That, on May 15, 1989, Respondent KEN HARVEY also stated that, in exchange for relinquishing UNION representation, that the employees would receive the same monetary raises in salary as were to be given to other COUNTY employees.

3. That, on May 15, 1989, Respondent KEN HARVEY, when the employees declined to relinquish UNION representation thereupon threatened to lay off employees, particularly Kathy Hall, as a means of reimbursing the COUNTY for its expenses incurred during the negotiations process.

4. That the COUNTY's legal representatives, District Attorney WILLIAM G. ROGERS, ESQ., and ZANE STANLEY MILES, ESQ., interviewed co-Respondent KEN HARVEY, took statements from him, and prepared his Response as well as his Pre-Hearing Statement in this matter.

5. That the COUNTY Commissioners, at the time they voted Respondent KEN HARVEY chairman of the negotiating team, knew of his "continuing litany" of hostilities toward employees, yet placed him on the team in spite of said knowledge.

## CONCLUSIONS OF LAW

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

2. That the INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL NO. 39 AFL-CIO, is a local

government employee organization within the term as defined in NRS 288.040.

3. That the COUNTY OF LYON is a local government employer within the term as defined in NRS 288.060.

4. That Respondent KEN HARVEY, at all times relevant herein, was acting within the course and scope of his official capacity as a COUNTY Commissioner and chairman of the negotiating team for the COUNTY.

5. That the COUNTY ratified the acts and statements of Respondent KEN HARVEY.

6. That Respondents COUNTY and KEN HARVEY have committed prohibited practices in violation of NRS 288.270(1)(a) and (b).

**ORDER**

From the foregoing Discussion, Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Respondents COUNTY and KEN HARVEY shall cease and desist from the prohibited practices complained of herein; and

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2. That Complainant UNION shall be awarded attorneys fees and costs in the sum of $2,500.00.

DATED this 23RD day of February, 1990.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
SALVATORE C. GUGINO, Chairman

By _____
TAMARA BARENGO, Vice Chairman

By _____
HOWARD ECKER, Member