STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Complainant, -vs- COUNTY OF LYON, a political subdivision of the State of Nevada, Respondent.	ITEM NO. 241 CASE NO. A1-045457 **DECISION**

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

For the Respondent: Jim V. Fisher
AMERICAN LABOR MANAGEMENT ASSOCIATES

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

STATEMENT OF THE CASE

On September 12, 1989, Complainant International Union of Operating Engineers, Stationary Engineers, Local No. 39, AFL-CIO ("Union"), brought this complaint against the County of Lyon ("County") alleging a prohibited practice for refusing to participate in mediation.

Specifically, the Union alleges that on June 30, 1989, Union representative, John Kidwell, contacted the County representative, Zane Miles, by telephone and that they confirmed an agreement to use the Federal Mediation and Conciliation Service ("FMCS") for mediation and that on July 1, 1989, the Union requested mediation from FMCS in writing.

The Union further alleges that on July 6, 1989, Mr. Kidwell and Mr. Miles again talked by telephone and agreed to extend the mediation deadline for sixty (60) to ninety (90) days.

On August 24, 1989, Jim Fisher, the new representative for the County, repudiated the alleged agreements between Mr. Kidwell and Mr. Miles and advised Mr. Kidwell that the Union had no right to mediation.

The County defends its action by alleging the County did not agree to use FMCS and therefore the Union was required to request mediators through the Nevada Labor Commissioner. The County argues that because the Union failed to send its request to the proper agency, it waived its statutory right to mediation.

The County further claims:

1. That the Union walked out of negotiations on August 24, 1989;

2. That the Union's bargaining team was co-mingled with members from the supervisory and the non-supervisory bargaining units;

3. That the Union refused to provide properly requested information; and

4. That the Union has failed to adopt and provide a proper pledge not to strike.

Notwithstanding the above claims, the County seeks continued bargaining with the Union.

The Union in answer to the Counter-Complaint contends

that its bargaining team walked out of the August 24, 1989 negotiations in response to the County's "take it or leave it attitude" and the County's refusal to extend the mediation time lines.

The issues for determination before the Local Government Employee-Management Relations Board ("Board") were:

1. Whether the County engaged in a prohibited practice when it refused to participate in mediation.

2. Whether the Union engaged in a prohibited practice when it "walked out" of the August 24, 1989 negotiations meeting.

3. Whether the Union engaged in a prohibited practice by "co-mingling" its bargaining team.

4. Whether the Union engaged in a prohibited practice by refusing to provide certain information to the County.

5. Whether the Union had provided the County a valid no-strike pledge.

On February 9, 1990, the Board held a hearing on the matter 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. The Board also accepted and reviewed post-hearing briefs. From all of the above, the Board has concluded, based on due deliberation, that the County has committed a prohibited practice in violation of NRS 288.270(1)(e).

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DISCUSSION

I

THE COUNTY'S REFUSAL TO PARTICIPATE IN THE MEDIATION PROCESS WAS A VIOLATION OF ITS DUTY TO BARGAIN IN GOOD FAITH.

NRS 288.270(1)(e) states:

> It is a prohibited practice for a local government employer or its designated representative willfully to:
>
> (e) Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and factfinding, provided for in this chapter. (Emphasis added.)

NRS 288.190(1) states in pertinent part:

> Anytime before July 1, the dispute may be submitted to a mediator, if both parties agree. On or after July 1 but before July 5, either party involved in negotiations may request a mediator. If the parties do not agree upon a mediator, the labor commissioner shall submit to the parties, a list of seven potential mediators. (Emphasis added.)

There is no dispute that the Union made a timely request for mediation during the July 1 to July 5 window period. The County's defense for refusing to participate in mediation is that the Union's request was sent to the wrong third party, the Federal Mediation and Conciliation Service. The Union does not dispute that it sent the request to the FMCS nor does the Union dispute that it would require an agreement in order to send the request to that agency rather than to the Labor Commissioner. The County simply claims that there was no agreement to use the FMCS.

The Union acknowledges the lack of a written agreement

on the matter was a mistake (Transcript at 41), but that a verbal agreement made on the phone by Mr. Kidwell and Mr. Miles was sufficient to make the request of the FMCS. Mr. Miles testified on cross-examination that he and Mr. Kidwell had a discussion about utilization of the FMCS, but he did not know whether it was June 30th or some other time. (Transcript at 66 and 69) He further testified that his telephone response to Mr. Kidwell's proposal to use FMCS was basically, "You do whatever you have to do." (Transcript at 65 and 70) The Board took special note of Mr. Miles demeanor during his testimony. (Transcript at 64) Mr. Miles paused at length with the questioning, exhibiting uncertainty with his testimony. (See in this regard: Rains v. Rains, 17 N.J. Misc. 310, 8 A.2d 715, 717.)

Mr. Kidwell on the other hand, answered directly in a forthright manner more convincingly to this Board. Mr. Kidwell was more precise in his recollection of the call. He testified that the conversation was short because he and Mr. Miles had discussed using FMCS as the mediator previously and this was simply to confirm the discussion. He recalled Mr. Miles response to be: "Yes, that's fine." (Transcript at 13 and 40) Mike Magnani, an associate of Mr. Kidwell's, testified that he was asked by Mr. Kidwell to listen in on the phone conversation and that Mr. Kidwell advised Mr. Miles that Mr. Magnani was listening in. His testimony corroborated Mr. Kidwell's testimony that the conversation did take place, it was very short and that an agreement was made. (Transcript at

73-77)

The Union's Exhibit "16", page 1, a Nevada Bell long distance phone bill from Mr. Kidwell's office, shows a phone call of one minute to the Lyon County offices at 10:52 a.m. on June 30th. The County argues at length in its Post-Hearing Brief the one minute was insufficient time for the Lyon County switchboard operator to answer the phone, transfer the call to Mr. Miles' office and for Mr. Kidwell and Mr. Miles to confirm the use of the FMCS. The Board finds no evidence supporting that argument.

The Union's Exhibit "16", page 2, and testimony (Transcript at 15, 68, 74) are sufficient to reasonably conclude that a second phone call between Mr. Kidwell and Mr. Miles took place on July 6th in which the parties agreed to extend the mediation deadlines by sixty (60) to ninety (90) days. Further, Mr. Miles did not take the opportunity during the July 6th conversation to repudiate Mr. Kidwell's letter of request for mediation to the FMCS. The County's claim that the Union never sent the letter is contradicted by the fact that the EMRB received its copy on July 7, 1989.

The Board believes that the preponderance of the evidence supports the Union's claim that Mr. Kidwell did have verbal agreement with Mr. Miles to use the services of the FMCS for mediation and that the parties later agreed to extend the mediation deadlines. The County's refusal to participate in mediation thereafter was a prohibited practice. See: Reno Police Protective Association v. City of Reno, Case No.

A1-045390, Item No. 175 (January, 1985).

II

IN VIEW OF THE TOTALITY OF CIRCUMSTANCES, THE COUNTY REFUSED TO BARGAIN IN GOOD FAITH.

The Board believes the County's conduct led to the breakdown of face to face negotiations. The County claims the Union bargaining team engaged in a prohibited practice when it walked out of negotiations on August 24, 1989. The Union says it walked out and went into caucus because of the County's insistence that negotiations were conditioned on the lack of mediation prospects and that the factfinder's awarded contract was void and because of Mr. Fisher's "take it or leave it" attitude. The Union further contends that upon returning to the bargaining table later in the day, Mr. Fisher insisted bargaining was finished and told the Union team it had to return to work.

Regardless of which party initiated the halt to the process, the Board believes that the Union was convinced there were irreconcilable differences which could not be resolved without outside assistance and that the County was convinced the Union had ceased to bargain. Negotiations had reached an impasse.

Once impasse is reached, a party is not required to engage in continued fruitless discussions. National Labor Relations Board v. American Nat. Ins. Co., 343 U.S. 395 (1952). NRS 288.190 contemplates mediation as the initial means of resolving impasse. The Union's insistence on securing mediation in the face of the County's intransigent

conduct was not improper. The Board fails to find that the Union engaged in a prohibited practice by its halt to negotiations on August 24, 1989.

This Board in Clark County Classroom Teachers Association v. Clark County School District, Case No. A1-045302, Item No. 62 (December 10, 1976), set forth the rule that it is necessary to review the totality of the collective bargaining between the parties in order to make a determination that a party refuses to bargain collectively in good faith citing NLRB v. Reed and Prince Manufacturing Company, 205 F.2d 131 (1st Cir. 1953) cert. denied 346 U.S. 887.

The evidence presented in the instant case shows that during negotiations the County has insisted that the existing labor agreement was no longer in affect; that the factfinder's awarded contract language was reputiated by the County; and that the County's conduct at the bargaining table was, at times, intransigent. In view of the totality of circumstances, the Board believes that the County, by refusing to participate in mediation when impasse was reached, simply engaged in another means to frustrate the bargaining process.

III

THE PARTIES SHARE RESPONSIBILITY FOR AN IMPROPERLY CO-MINGLED BARGAINING TEAM.

The Board concurs with the County that co-mingling of the Union bargaining team with members from separate bargaining units is a prohibited practice. In Water Employees Association v. Las Vegas Valley Water District, Case No.

A1-045418, Item No. 204 (March, 1988), the Board declared:

> 1. Local Government Employee Associations, When Representing Two Bargaining Units One of Which Is Comprised of Supervisors And The Other Which Is Not, Must Represent Those Two Units in Negotiations with a Local Government Employer with Separate Bargaining Teams, Neither of Which are Permitted to Include Members of the Other Bargaining Unit.
>
> NRS 288.170 provides that a supervisor "shall not be a member of the same bargaining unit as the employees under his direction." There is no question that the purpose and intent of that statute is to protect both the supervisors and employees from conflicts of interest inherent in having both of them in the same bargaining unit. We concur with the reasoning of the New Hampshire Supreme Court in City of Concord v. Public Employee Labor Relations Board, 407 A.2d 363 (N.H. 1979) which found, in construing a statute similar to ours, that the members must not [be] only in separate bargaining units but also, as a logical consequence, that they must not be allowed to co-mingle on each other's negotiating teams. In our view, to hold otherwise, would permit the existence of the very conflicts of interest the legislature intended to prohibit.

In the instant case, the County condoned the practice of co-mingling the bargaining team for over a year and only to raise the issue after this Complaint was filed. (Transcript at 34) As late as August 15, 1989, the County negotiated ground rules with the Union bargaining team agreeing to paid release from duties for negotiation for the five-member Union team which consisted of two representatives of the white collar unit, two from the blue collar unit and one from supervisory. No objection to the team composition was raised by the County at that or at subsequent bargaining meetings. (Union's Exhibit "2", page 1-3)

Further, during the previous year's negotiations, the Union offered in a letter of June 14, 1988 to Mr. Miles to

separate the bargaining team (Union's Exhibit "1", page 3):

> . . ., in an effort to facilitate and expedite the finalization of a contract for all Lyon County employees represented by Local 39, Local 39 will be pleased to conduct separate negotiations with Lyon County with respect to the contract for the supervisory unit.

The County did not accept the Union proposal. The County cannot now charge the Union with an unfair labor practice. The County is estopped by its own actions and encouragement of co-mingling from making such a claim.

This ruling is not a reversal of Item 204, supra. The Board does not condone the practice of co-mingling bargaining teams and directs the Union to structure its bargaining teams accordingly in future negotiations.

IV

THE UNION ENGAGED IN A PROHIBITED PRACTICE WHEN IT REFUSED TO FURNISH AN AUDIO TAPE OF A NEGOTIATIONS SESSION.

The County alleges that the Union refused to furnish reasonable information relevant to negotiations.

There is sufficient evidence (Transcript at 35) for the Board to conclude that the Union refused to supply the County with an audio tape of a June 16, 1988 negotiations meeting between the parties.

NRS 288.180(2) provides:

> Following the notification provided for in subsection 1, the employee organization or the local government employer may request reasonable information concerning any subject matter included in the scope of mandatory bargaining which it deems necessary for and relevant to the negotiations. The information requested must be furnished without unnecessary delay. The information must be accurate, and must be

> presented in a form responsive to the request and in the format in which the records containing it are ordinarily kept.

The Union argues that the tape was not the type of information contemplated by NRS 288.180(2). The Board rejects that argument. The law is not so narrow as to exclude tapes of negotiation sessions between the parties. In the instant case, the County's new representative hired in July had a legitimate interest in the discussion of the June 28th meeting and the tape was the only record of that discussion.

Further, the Board rejects the argument that the Union was not compelled to furnish the tape because it was "unintelligible". The Union is not given the authority to determine the quality or the value of the tape. The tape must be furnished to the County without delay.

V

THE UNION PROPERLY ADOPTED AND PROVIDED A PLEDGE NOT TO STRIKE.

The Board concurs with Lyon County District Judge Mario Recanzone where he states in his Order of February 14, 1990, on this matter:

> NRS 288.160(3)(a)-(d) allows a county to withdraw recognition from an employee organization when the organization
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> (a) Fails to present a copy of each change in its constitution and bylaws . . .
> (b) Disavows its pledge not to strike . . .
> (c) Ceases to be supported by a majority . . . of employees . . .
> (d) Fails to negotiate in good faith . . .
>
> However, before withdrawing recognition the county must first receive the written permission of the local government employee-management relations board. NRS 288.160(3); NAC 288.020. Prior to withdrawing recognition the county must request a

hearing before the board. NAC 288.145. There is no indication that the county has attempted to withdraw its recognition of the union under the parameters of the above cited statutes and regulations.

NRS 288.160(1) provides in pertinent part as follows:

> A local government employer shall not recognize as representative of its employees any employee organization which has not adopted, <u>in a manner valid under its own rules</u>, the pledge required by paragraph (c). (Emphasis added.)

The pledge referred to is a pledge in writing not to strike against the local government employer under any circumstances. NRS 288.160(1)(c).

The union points out that its own rules, and that of its international parent organization, allow the union to take only those actions, and utilize only those procedures, which are lawful. Since it would be unlawful for the union to call a strike against the county, cf. NRS 288.230 et seq., the union's own regulations impliedly prohibit the union from striking. The union further notes that the international's rules allow strikes to be called only if the union is vested with the power to call a strike. Since it would be illegal for the union to strike against the county, the local union is without power to call a strike.

The Court agrees with the defendant union that the county has not shown by any measure of evidence that the no strike pledge executed by the union and delivered to the county was not adopted in a manner valid under the union's own rules. Cf. NRS 288.160(1).

The Board also concludes such a claim by the County has no merit.

<u>FINDINGS OF FACT</u>

1. That the International Union of Operating Engineers, Stationary Engineers, Local No. 39, AFL-CIO, is a local government employee organization.

2. That the County of Lyon is a local government

employer.

3. That on June 30, 1989, John Kidwell for the Union and Zane Miles for the County, confirmed an agreement by telephone to use the services of the Federal Mediation and Conciliation Services for mediation.

4. That on July 1, 1989, the Union mailed its request for mediation services to the FMCS.

5. That the FMCS received the Union request dated July 1, 1989 and the EMRB received a copy of the request on July 7, 1989.

6. That on July 6, 1989, the Union and the County agreed by telephone to extend the mediation deadlines for sixty (60) to ninety (90) days.

7. That on August 24, 1989, the Union and the County ceased face to face negotiations and reached impasse.

8. Subsequent to August 24, 1989, the Union requested the County to participate in mediation and that the County refused.

9. That on June 14, 1988, the Union offered to separate its co-mingled bargaining team which included members of the supervisory and non-supervisory units and that the County failed to accept the offer.

10. That on August 15, 1989, the County and the Union agreed to ground rules providing for release time for bargaining for the co-mingled Union bargaining team.

11. That the County negotiated with the Union's co-mingled bargaining teams for over a year without objection.

12. That the County requested an audio tape of the June 16, 1989 negotiations meeting between the parties from the Union and that the Union refused to supply the tape.

13. That on February 29, 1988, the Union provided the County with a pledge in writing not to strike.

14. That the County never attempted to withdraw recognition of the Union.

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 Counter-Complaint, pursuant to the provisions of NRS Chapter 288.

2. That the Complainant, International Union of Operating Engineers, Stationary Engineers, Local No. 39, AFL-CIO, is a recognized employee organization within the terms defined by NRS 288.040.

3. That the Respondent, County of Lyon, is a local government employer within the terms defined by NRS 288.060.

4. That the June 30, 1989 agreement to use FMCS services between Mr. Kidwell and Mr. Miles by telephone was sufficient agreement upon a mediator pursuant to NRS 288.190(1).

5. That the July 1, 1989 Union request for mediation service to FMCS met the requirement of NRS 288.190(1) that "On or after July 1 but before July 5, either party involved in negotiations may request a mediator."

6. That the County's refusal to participate in mediation after August 24, 1989, constituted a prohibited practice within the meaning of NRS 288.270(1)(e).

7. That the Union's refusal to bargain further after impasse was reached on August 24, 1989 was not a prohibited practice within the meaning of NRS 288.270(2)(b).

8. That a bargaining team co-mingled with members representing different bargaining units is in violation of the purpose and intent of NRS 288.170.

9. That the County's encouragement of the Union co-mingling its bargaining team bars the County from raising the issue as prohibited practice.

10. That the County's request for an audio tape of the June 16, 1989 negotiations meeting between the parties was a request for reasonable information relevant to negotiations pursuant to NRS 288.180(2).

11. That the Union's refusal to furnish the requested tape was a violation of NRS 288.180(2) and a prohibited practice pursuant to NRS 288.270(2)(d).

12. That the Union's written pledge not to strike of February 29, 1988 met the requirements of NRS 288.160(1)(c).

DECISION AND ORDER

Upon decision rendered by the Board at its meeting on April 27, 1990, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Union Complaint is upheld;

2. That the County refrain from the action complained

of in this complaint and engage in good faith bargaining;

3. That the timelines in NRS 288.190 through NRS 288.203 be extended to allow the parties to participate in mediation, factfinding and, if necessary, a panel to determine if factfinding will be binding.

a. Request for a mediator through FMCS within twenty (20) days of the date of this order;

b. Submission to factfinding within fifty (50) days of the date of this order;

c. Factfinding hearing scheduled within seventy-five (75) days of the date of this order;

d. Request for a factfinding panel to determine final and binding issues, if necessary, within five (5) days of selection of a factfinder; and

e. All procedures outlined in NRS 288.190 through NRS 288.203 will apply with the exception of the deadlines ordered above.

4. That the Union establish its bargaining teams without including members of other bargaining units;

5. That the Union furnish the County a duplicate of the tape of the June 16, 1989 negotiations meeting; and

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

DATED this 11th day of June, 1990.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
SALVATORE C. GUGINO, Chairman

By _____
TAMARA BARENGO, Vice Chairman

By _____
HOWARD ECKER, Member