STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

MINERAL COUNTY PUBLIC SAFETY DISPATCHERS ASSOCIATION, Complainant, -vs- BOARD OF COUNTY COMMISSIONERS OF MINERAL COUNTY AND MINERAL COUNTY, NEVADA, Respondent.	ITEM NO. 265 CASE NO. A1-045482 **DECISION**

For the Complainant: Walter R. Tarantino, Esq.
AITCHISON & HOAG

For the Respondent: Craig Jorgenson, Esq.
MINERAL COUNTY DISTRICT ATTORNEY

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

STATEMENT OF THE CASE

On October 30, 1990, the Mineral County Public Safety Dispatchers Association ("Association") brought the following Complaint against the Board of County Commissioners of Mineral County and Mineral County, Nevada ("Employer") before the Local Government Employee-Management Relations Board ("Board"):

> 1. Respondent, BOARD OF COUNTY COMMISSIONERS OF MINERAL COUNTY AND MINERAL COUNTY, NEVADA (hereinafter referred to as "Employer" or "Respondent) are local government employers within the terms defined by NRS 288.060.
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> 2. Complainant, MINERAL COUNTY PUBLIC SAFETY DISPATCHERS ASSOCIATION, (hereinafter referred to as "Association") is a recognized employee organization within the terms defined by NRS 288.040.

3. The Association is the exclusive bargaining representative for a bargaining unit of Public Safety Dispatchers employed by the Respondent.

4. The Local Government Employee-Management Relations Board has original jurisdiction over the parties and the subject matter of this Complaint pursuant to the provisions of NRS Chapter 288.

5. On or about October 5, 1989, the Board of Mineral County Commissioners, meeting in official session, recognized and approved a separate bargaining unit for the Mineral County Public Safety Dispatchers.

6. On or about January 31, 1990, the Association, by letter and through its designated agent, the Operating Engineers Local Union No. 3, notified the Employer of its intent to enter into collective bargaining negotiations for an initial agreement pursuant to the provisions of NRS 288.180. (copy attached)

7. On or about March 22, 1990, the parties met for the first negotiation session at which time the Association presented its initial contract proposals to the Employer.

8. Present at the meeting referred to in paragraph 7, above, and representing the Employer as agents were District Attorney Larry G. Bettis and Deputy District Attorney Evan Beaver. The Association was represented by Richard Gleed of the Operating Engineers Local Union No. 3 and Mineral County Public Safety Dispatchers Jeri Bunch and Tina Carlson.

9. At the meeting referred to in paragraph 7, above, the Association and the Employer accepted and signed formal ground rules governing the negotiations for an initial agreement between the parties. (copy attached)

10. In or about May, 1990, the parties, by telephone, scheduled a second negotiation session for May 24, 1990.

11. In or about May, 1990 and before May 24, 1990, the Employer, through its agent, Evan Beaver, notified the Association, through its agent, Richard Gleed, by telephone, that the May 24, 1990 meeting was canceled and that the Board of County Commissioners had rejected the Association's initial contract proposals.

12. On or about May 30, 1990, the Association presented a second set of contract proposals to the Employer in the form of a counter proposal to the Board' earlier rejection of its initial set of proposals as referred to in paragraph 11, above. (copy attached)

13. By letter dated July 2, 1990, the

Employer notified the Association, for the first time, that the Board of County Commissioners did not intend to negotiate an initial collective bargaining agreement with the Association. The Employer further notified the Association that, in the future, the Employer would be represented by Mineral County District Attorney, Craig Jorgenson, regarding the matter. (copy attached)

14. After numerous telephone communications and requests to return to the bargaining table by the Association, the Employer, by letter dated September 13, 1990, reaffirmed its intent not to return to the bargaining table and negotiate an initial agreement with the Association. (copy attached)

15. On August 13, 1990, the Association made a formal and final demand to return to the bargaining table for the purpose of negotiating an initial agreement between the parties. (copy attached)

16. The formal demand referred to in paragraph 15, above, has gone unanswered by the Employer.

17. As of the date of this Complaint, the Employer has refused to return to the bargaining table and negotiate the terms of an initial agreement with the Association.

18. The Employer is obligated, pursuant to the provisions of NRS 288.150 and NRS 288.270 to bargain collectively in good faith with the Association, the exclusive representative of the recognized bargaining unit as referred to in paragraphs 2, 3 and 5, above.

19. By the Conduct [sic] alleged in paragraphs 13, 14, 16 and 17, above, the Respondent has failed to bargain in good faith by refusing to return to the bargaining table and negotiate in good faith with the exclusive representative of a recognized bargaining unit regarding the terms of an initial agreement, in violation of NRS 288.270(1)(e).

20. By the conduct alleged in paragraphs 13, 14, 16 and 17, above the Respondent has derivatively interfered, restrained and coerced employees of the bargaining unit in the exercise of protected activity in violation of NRS 288.270(1)(a).

In answer, the Employer stipulated to the accuracy of Allegations 1 through 18 of the Association's above-quoted Complaint, but denied Allegations 19 and 20 for reasons which

can be briefly stated by quoting the CONCLUSION set forth i the Employer's ANSWER TO COMPLAINT, i.e.:

> On October 5, 1989, the County Commissioners recognized the unique position of the dispatchers and agreed to treat them as a bargaining unit. In doing so they never envisioned, or suspected that they were nullifying and extracting the dispatchers out of their current contract. The County continues to afford the dispatchers all of the rights and privileges under the County contract, and clearly if the County started to treat the dispatchers tomorrow in a way in violation of the current County contract Complainant would be in front of you next week complaining about a violation of their contract. It is the position of the Respondent that the dispatchers remain under there [sic] current contract and that the Commissioners gave them permission to bargain as a unit effective the 1991 contract.

The Employer's aforementioned answer was not received by the Board until December 24, 1990, following which the Association filed a Motion to Dismiss Respondent's Answer and Motion For Judgment on the Pleadings, account the Employer did not file its answer within twenty (20) days as required by NAC 288.220.

On January 9, 1991, the Employer filed a Memorandum in Opposition to Complainant's Motion to Dismiss Respondent's Answer and Motion For Judgment on the Pleadings, alleging:

> (1) There is no provision in NAC 288.240 for dismissal of an answer filed within 20 days;
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> (2) The provisions of NAC 288.220(1) are not mandatory and do not preclude the respondent from filing an answer more than 20 days after service of the Complaint;
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> (3) The Nevada Administrative Code does not provide for Judgment on the Pleadings; and

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(4) The Complainant (Association) is not entitled to an order recognizing that all allegations in the Complaint are deemed to be admitted as true;

and asked the Board to deny the Complainant's (Association's) Motions.

At a meeting held on March 15, 1991, the Board heard argument from the parties on Complainant's Motion to Dismiss Respondent's Answer and Motion For Judgment on the Pleadings. At said meeting the parties went on record as to stipulating to the facts contained in the pleadings and further stipulated to the Board rendering a decision in the instant case based on the merits of the pleadings. Following said meeting the Board issued an Order denying the Complainant's Motion to Dismiss Respondent's Answer and Motion For Judgment on the Pleadings, in accordance with the aforementioned stipulations.

DISCUSSION

The parties, having stipulated to the accuracy of certain allegations contained in the Association's Complaint, supra, have thereby established the facts as set forth in Allegations 1 through 18 of said Complaint and the issues as set forth in Allegations 19 and 20 of said Complaint. The allegations set forth as 19 and 20 may be summarized as follows:

(1) Does the Employer's refusal to negotiate with this bargaining unit, which it has recognized, regarding the terms of an initial agreement constitute a prohibited practice in violation of NRS 288.270(1)(e)?

(2) Does the Employer's refusal to negotiate constitute interference, restraint and/or coercion of or against the employees of said bargaining unit, practices prohibited by NRS 288.270(1)(a)?

The parties in the instant dispute are in disagreement as to whether, by recognizing the Association as the exclusive bargaining agent for the dispatchers, the Employer intended to negotiate a labor agreement with the new bargaining unit before 1991, to become effective on or subsequent to July 1, 1991. The Employer holds steadfastly to the position that, notwithstanding its recognition of the dispatchers as a separate bargaining unit, it intended that the dispatchers would remain bound to the terms and conditions of the three-year labor agreement between Mineral County and Local 39, to which the dispatchers were subject at the time the Employer recognized them as a separate bargaining unit. The Association, on the other hand, adamantly holds to the position that the parties contemplated negotiating a separate labor agreement for the new bargaining unit prior to 1991. The Association proffers the following as evidencing the intention of the parties to negotiate a new labor agreement in 1990:

> (1) Copy of letter dated October 9, 1989, from the Clerk for the Board of Mineral County Commissioners to the Mineral County Sheriff's Department Association confirming meeting of County Commissioners on October 5, 1989, during which a separate bargaining unit for Dispatchers was considered, following which the Board of Commissioners recognized and approved a separate bargaining unit for Sheriff Dispatchers.
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> (2) Copy of letter dated January 31, 1990, from the Business Representative of Operating Engineers Local No. 3 (who was assisting the Association) to the Mineral County Board of Commissioners, setting forth the Association's list of issues to be negotiated.

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(3) Copy of "Ground Rules" adopted by the parties on March 22, 1990 for conducting the negotiations.

(4) Copy of letter dated May 30, 1990, from the aforementioned Business Representative (representing the Association) to the Deputy District Attorney for Mineral County. This letter alludes to a negotiating session which apparently had been scheduled for May 24, 1990, but was postponed by the Employer, and indicated that the Dispatchers were willing to make substantial concessions in order to reach an agreement by July 1, 1990.

(5) Copy of letter dated July 2, 1990, from the Deputy District Attorney for Mineral County to the aforementioned Business Representative (representing the Association), confirming the position of the Employer (that the Dispatchers were still bound to the terms and conditions of the three-year labor contract negotiated by Local 39 when the Dispatchers were part of that bargaining unit), and alluding to the Business Manager's comment that the Employer had either expressly or by implication led the Dispatchers to believe they would be free to negotiate their own labor agreement at that time.

(6) Copy of letter dated September 13, 1990, from the District Attorney for Mineral County to the aforementioned Business Representative, indicating that he did not have authority from the Employer to enter into negotiations with the Dispatchers and again confirming that the Employer was opposed to bargaining with the Dispatchers until the new contract talks start for the upcoming 1991 contracts.

(7) Copy of letter dated August 13, 1990, from the aforementioned Business Representatives to the District Attorney from Mineral County, concerning the Association's desire to "restart" the stalled negotiations.

It would be unreasonable to conclude from the sequence of events occurring prior to the Complaint being filed, as evidenced by the documents attached to the Complaint, that the Employer initially refused to bargain with the Association. It is clear from the evidence of record that negotiations of a preliminary nature actually commenced; e.g., the Association

filed notice of desire to negotiate on January 31, 1990 pursuant to NRS 288.180; the parties adopted "Ground Rules" for conducting their negotiations and a negotiating session was scheduled for May 24, 1990. It is clear from the evidence of record that the Employer's belated refusal to continue with the negotiations, and its reason therefore, was an afterthought. It is pretextual in nature and evidences a complete reversal of its intentions toward the negotiations requested by the Association.

The National Labor Relations Board (NLRB) has established the "contract bar" doctrine which essentially provides that the existence of a current and valid labor agreement will ordinarily prevent the recognition (or the election thereof) of a new collective bargaining representative. Millbrook, Inc., 204 NLRB 1148, 83 LRRM 1482 (1973). In the instant case, however, the Employer in fact did recognize a new collective bargaining unit and a new collective bargaining representative for Sheriff's Dispatchers. Relying on traditional common-law principles the Employer contended (albeit belatedly) that said Sheriff's Dispatchers were bound by the terms of the labor agreement executed on their behalf by their agent prior to recognition of the new bargaining unit, and that a mere change in agents cannot abrogate the existing labor agreement.

A waiver may result from either action or inaction. In the instant case, the Employer may be considered to have waived its alleged right to refuse to negotiate under the

contract bar doctrine by its initial failure to invoke said doctrine (waiver by inaction) when the Association requested negotiations on a new labor agreement. Likewise, the Employer may be considered to have waived said right when it commenced preliminary negotiations with the Association on a new labor agreement (waiver by action).

The NLRB generally has been reluctant to give broad effect to a waiver by inaction. Peerless Publications, Inc., 231 NLRB 244, 85 LRRM 1611 (1977). A waiver by action, however, may be given broad effect where the action manifests the clear and unmistakable intentions of the party (or parties) taking said action; e.g., a party may contractually waive its right to bargain, but where such an assertion is raised, the test applied has been whether the waiver is in "clear and unmistakable" language. Norris Indus., 231 NLRB 50, 96 LRRM 1078 (1977). Here, the analogy is the action of the Employer in commencing preliminary negotiations with the Association on a new labor agreement, evidencing the "clear and unmistakable" intention of the Employer to proceed with negotiating a new labor agreement, and to affirmatively waive any right it may have had to refuse same under the contract bar doctrine.

The Employer's pretextual defense for refusing to proceed with the negotiations; i.e., "the County Commissioners . . . never envisioned, or suspected that they were nullifying and extracting the dispatchers out of their current contract", is belied by its action in commencing preliminary negotiations

with the Association on a new labor agreement.

Generally, mid-term negotiations are considered statutorily barred by the provisions of NRS Chapter 288, pursuant to the last sentence of NRS 288.180(1) and as evidenced by the time lines set forth in NRS 288.190, NRS 288.200 and NRS 288.205, as well as by the contract bar doctrine, unless such mid-term negotiations are conducted by mutual consent.

In view of the Employer's action of commencing preliminary negotiations with the Association on a new labor agreement, ostensibly by mutual consent, the Board finds that it affirmatively waived any rights it may have had to contend that said negotiations were barred statutorily or otherwise.

Since the Employer has affirmatively waived any right(s) it may have had to contend that the negotiations requested were barred statutorily or otherwise, the Board considers it unnecessary and inappropriate to address the propriety of the Employer's refusal to negotiate in the context of the existence of either a contract or a statutory bar. The determinative factor in this dispute is that the Employer entered into preliminary negotiations with the Association on an initial labor agreement. By virtue of that action and that action only it was obligated to continue the negotiating process until the parties either reached agreement on all issues or until an impasse was reached. Its failure to fulfill this obligation, under the prevailing circumstances, must be considered as a refusal to bargain collectively and,

likewise, a prohibited practice as defined by NRS 288.270(1)(e).

In finding the Employer in the instant case responsible for a refusal to bargain collectively in violation of NRS 288.270(1)(e), as a result of its refusal to proceed with the negotiations it had commenced, the Board adopts the NLRB's interpretation of the analogous section of the National Labor Relations Act; i.e.

> . . . interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. American Freightway Company, 124 NLRB 146, 147, 44, LRRN 1302 (1959).

Clark County Classroom Teachers Assn. vs. Clark County School District, et. al., EMRB Item No. 237, Case No. A1-045435 (December 13, 1989).

FINDINGS OF FACT

1. That the Complainant, Mineral County Public Safety Dispatchers Association, is a local government employee organization.

2. That the Respondent, the Board of County Commissioners of Mineral County and Mineral County, Nevada, is a local government employer.

3. That the Board of Mineral County Commissioners, in a meeting held on October 5, 1989, recognized and approved a separate bargaining unit for the Sheriff's Dispatchers, who are represented before this Board by the Mineral Public Safety

Dispatchers Association.

4. That on January 31, 1990, the Mineral County Public Safety Dispatchers Association filed notice, pursuant to NRS 288.180, of its desire to negotiate an initial labor agreement with Mineral County and/or the Mineral County Board of Commissioners.

5. That on March 22, 1990, the parties adopted "Ground Rules" governing the negotiations for an initial labor agreement.

6. That a negotiating session between the parties scheduled for May 24, 1990 was postponed or cancelled by the Employer.

7. That Mineral County and/or the Mineral County Board of Commissioners subsequently refused to bargain with the Mineral County Public Safety Dispatchers Association regarding an initial labor agreement, as evidenced by the correspondence summarized below:

> A. Letter dated May 30, 1990, wherein Mineral County Public Safety Dispatchers Association submitted revised proposals to the Deputy District Attorney for Mineral County, in an alleged effort to reach agreement by July 1, 1990.
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> B. Letter dated July 2, 1990, wherein the Deputy District Attorney for Mineral County confirmed conversation(s) he had with Mr. Dick Gleed, Business Representative for Operating Engineers Local Union No. 3 (representing the Mineral County Public Safety Dispatchers Association), regarding the position of the Mineral County Board of Commissioners that the Dispatchers are still bound to the terms and conditions of the three-year labor contract negotiated by Local 39 when the Dispatchers were part of that union. (Also, confirming that a copy of the minutes of the Board's October 5, 1989, meeting had been mailed to Mr. Gleed because of

his comment that the Mineral County Board of Commissioners had either expressly or by implication led the Dispatchers to believe that they would be free to negotiate their own labor agreement at that time.)

C. Letter dated September 13, 1990, wherein the District Attorney for Mineral County wrote Mr. Gleed advising that he had no authority from the Mineral County Board of Commissioners to enter into negotiations and that the Board of Commissioners is opposed to bargaining with the Dispatchers until the new contract talks start for the upcoming 1991 contracts. (Also, that it is the opinion of the Board of County Commissioners that they have no obligation to renegotiate what they consider to be a perfectly valid contract, to which the Dispatchers are subject, as well as the rest of the county employees. Additionally, that the minutes of the October 5, 1989 meeting of the Board of Mineral County Commissioners are silent as to whether the Commissioners or Dispatchers assumed that the Dispatchers were no longer under contract and therefore needed to negotiate anew.)

D. Letter dated August 13, 1990, wherein Mr. Gleed wrote the District Attorney for Mineral County in an apparent attempt to "restart" the "stalled" negotiations.

CONCLUSIONS OF LAW

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

2. That the Complainant, Mineral County Public Safety Dispatchers Association, is a recognized employee organization as defined by NRS 288.040.

3. That the Board of County Commissioners of Mineral County and Mineral County, Nevada, is a recognized local government employer as defined by NRS 288.060.

4. That the Board of County Commissioners of Mineral

County and Mineral County, Nevada, pursuant to NRS 288.170(1) determined that the Sheriff's Dispatchers, represented by the Mineral County Public Safety Dispatchers Association, constituted an appropriate bargaining unit for negotiations.

5. That, upon receipt of request from the Mineral County Public Safety Dispatchers Association, to negotiate an initial labor agreement, the Board of County Commissioners of Mineral County commenced to negotiate in good faith, pursuant to NRS 288.150, but subsequently refused to continue said negotiations.

6. That the refusal of the Board of County Commissioners of Mineral County to continue bargaining pursuant to NRS 288.150, after it had commenced preliminary negotiations, was a prohibited practice as defined by NRS 288.270(1)(e).

DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Association's Complaint regarding the Employer's refusal to negotiate an initial labor agreement is upheld to the extent set forth in the Board's Conclusions of Law, and the Employer shall be required to continue negotiating an initial labor agreement pursuant to the Association's request of January 31, 1990, for the 1990-91 labor agreement term, which will be considered the initial labor agreement between the parties;

2. That the Employer and Association shall immediately resume negotiations on said initial labor agreement, if the

have not already done so; and

3. That Respondent will pay attorney's fees and costs to Complainant in the amount of $1,500.00.

DATED this 30th day of May, 1991.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By Tamara Barengo
TAMARA BARENGO, Chairman

By Howard Ecker
HOWARD ECKER, Vice Chairman

By Salvatore C. Gugino
SALVATORE C. GUGINO, Member