STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

ESMERALDA COUNTY CLASSROOM TEACHERS ASSOCIATION, Complainant, -vs- ESMERALDA COUNTY SCHOOL DISTRICT, THE ESMERALDA COUNTY BOARD OF SCHOOL TRUSTEES, and HAROLD TOKERUD, Respondents.	ITEM NO. 273 CASE NO. A1-045497 **DECISION**

For the Complainant: Michael W. Dyer, Esq.
DYER AND MCDONALD

For the Respondents: C. Robert Cox, Esq.
WALTHER, KEY, MAUPIN, OATS,
COX, LEE & KLAICH

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

STATEMENT OF THE CASE

In a pre-hearing conference held August 7, 1991, the Complainant, ESMERALDA COUNTY CLASSROOM TEACHERS ASSOCIATION ("Association"), and Respondents, ESMERALDA COUNTY SCHOOL DISTRICT, THE ESMERALDA COUNTY BOARD OF SCHOOL TRUSTEES, and HAROLD TOKERUD (collectively referred to as "District"), narrowed the issues to the following:

> 1. Whether or not the filing of a grievance under the labor agreement in effect between the parties precludes the Board from "going forward with action" (considering the Complaint on its merits) pending resolution of the grievance through prescribed procedures for binding arbitration;

2. Whether or not Respondents' decision to consider Ms. Mary Jane Fulgham's failure to return a signed contract within ten (10) days as a rejection of the contract, pursuant to NRS 391.3196, was due to Mrs. Fulgham's union activities; and

3. If so, whether or not Respondents' decision constitutes a prohibited practice under NRS 288.270(1)(a), (c), (d) and (f).

Also, during the aforementioned pre-hearing conference, the parties stipulated to the following facts:

1. Complainant, ESMERALDA COUNTY CLASSROOM TEACHERS ASSOCIATION ("Association") is an employee organization as defined by NRS 288.040 and pursuant to NRS 288.160 is a duly recognized employee organization for the licensed employees of the ESMERALDA COUNTY SCHOOL DISTRICT.

2. Respondent, ESMERALDA COUNTY SCHOOL DISTRICT and the ESMERALDA COUNTY BOARD OF SCHOOL TRUSTEES ("District") is a local government employer as defined by NRS 288.060.

3. Respondent, HAROLD TOKERUD, is employed by the District in the capacity of Superintendent of the ESMERALDA COUNTY SCHOOL DISTRICT.

4. Ms. Mary Jane Fulgham, is a teacher employed by the District at Dyer Elementary School in Dyer, Nevada.

5. In the Fall of 1990, Ms. Fulgham testified at an arbitration hearing on a grievance filed by Ms. Rusty Johnson against the District.

6. The Association began its first collective bargaining negotiations with the District in 1988 and entered into an agreement in June, 1988. A second negotiated agreement was entered into on August 23, 1989 to be effective through June 30, 1991. In January, 1991, the Association gave notice to the District of its intent to bargain a contract to be effective for the 1991-1992 school year. This is the third year the parties have bargained. A bargaining team

was selected and Ms. Fulgham was nominated chairman of the bargaining team. The first negotiation session occurred on March 11, 1991. The parties have not reached an agreement for the 1991-92 school year and negotiations are continuing.

7. On or about May 1, 1991, the District issued a Contract Between Employee and Trustees to Ms. Fulgham. The contract was executed by Brad Mettam and Leila Shrider respectively, the President and Clerk of the Esmeralda County Board of School Trustees and was given to Ms. Fulgham for her signature. Ms. Fulgham signed the contract and returned the contract to the District on Monday, May 13, 1991.

8. On Monday, May 13, 1991, Respondent HAROLD TOKERUD informed Ms. Fulgham that in his view by failing to turn in the contract by May 10, pursuant to NRS 391.3196, she had declined employment with the District. Ms. Fulgham immediately wrote to Respondent TOKERUD and the President of the Board of School Trustees that it was not her intent to resign.

9. On June 11, 1991, the Board of School Trustees voted that Ms. Fulgham's failure to return her contract by May 10 was a rejection of their offer of employment. On June 11, 1991, Ms. Fulgham filed a grievance against the District as a result of the District's termination of Ms. Fulgham's employment without just cause.

On August 23, 1991, the LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD ("EMRB" and "Board") conducted a hearing on the instant Complaint. The Board's Discussion, Conclusions of Law, Decision and Order are set forth below.

DISCUSSION

The parties have stipulated to the fact that a grievance (Respondent's Exhibit "4") has been filed under the grievance procedures of their labor agreement regarding the same subject or cause of action which forms the basis of the instant

Complaint.

The Board has held that it has exclusive jurisdict concerning unfair labor practices and/or the resolution of charges alleging prohibited practices, and the requirement that it interpret contractual provisions in order to determine whether or not a prohibited practice was involved in a particular case does not deprive the Board of jurisdiction over such matters. See Nevada Classified School Employees Association, Chapter 1, Clark County vs. Clark County School District, EMRB Item No. 105, Case No. A1-045336 (November 21, 1980). In so holding, the Board has adopted a "limited deferral doctrine" with regard to disputes arising under labor agreements. I.A.F.F. #731 vs. City of Reno, EMRB Item No. 257, Case No. A1-045466 (February 15, 1991). Under said limited deferral doctrine in order for the Board to consider complaint involving an alleged contractual violation, the Complainant must establish, at least prima facie, that the alleged contractual violation constituted a prohibited practice (or failure to bargain in good faith) under NRS Chapter 288. In the instant case, the Board finds that the Association has met its requisite burden of proof.

The testimony and evidence of record is sufficient to find that protected activity was a motivating factor in the District's decision to consider Ms. Fulgham's failure to return the contract within ten (10) days as a rejection of said contract.

The Board is concerned with the chilling effect which

the District's decision may have had on rights of the employees which are guaranteed under NRS Chapter 288. 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.

This Board outlined the legal standards governing an employer's discriminatory conduct in Valdemar Arredondo, et. al. v. Clark County School District, et. al., Item No. 102, Case No. A1-045337 (April 22, 1981) citing the U.S. Supreme Court decision National Labor Relations Board v. Great Dane Trailers, 388 U.S. 26, 34; 87 S.Ct. 1792, 1798, 18 Lawyers Edition 2nd 1027, 1032 (1967):

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight" antiunion motivation must be proved to sustain the charge IF the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to SOME extent, the

burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."
(italics in original)

In a more recent decision of Transportation Management Corp., the U.S. Supreme Court supported the framework for allocating burden of proof established in the Wright Line case. Under Wright Line, the union must establish that protected employee conduct was a motivating factor in the decision to terminate; the burden then shifts to the employer to prove it would have taken the same action regardless of the employee's protected activity. NLRB v. Transportation Management Corp., 462 U.S. 393, 113 LRRM 2857 (1983); NLRB v. Wright Line, 662 F.2d 899, 108 LRRM 2513 (CA 1981) cert denied, 455 U.S. 989, 109 LRRM 2779 (1982).

The Board believes that in the instant case the evidence is sufficient to establish that Ms. Fulgham's involvement in various protected activities was a motivating factor in the District's decision to consider her contract as rejected.

The testimony developed that Ms. Fulgham was involved in contentious negotiations on a new labor agreement at the time of the District's decision. The Board believes that the District's aforementioned decision was driven, in large part, by Ms. Fulgham's above-described protected activities. Also, it is clear that said decision could not help but be inherently destructive to the employees' right to freely organize and bargain collectively, and most certainly had a chilling effect on the other employees.

It is further apparent that the decision of the Distric

to deny Ms. Fulgham's application for re-employment was also based upon a personal animus by Superintendent Harold Tokerud against Ms. Fulgham. At the hearing, Mr. Tokerud's dislike for Ms. Fulgham was apparent in his statements about her to the Board and it was clear from said statements that he was attempting to take advantage of a perceived "technicality" to eliminate a post-probationary teacher from the staff whom he did not approve of and who was obviously viewed by him as a troublemaker. Such an action is a prohibited practice pursuant to NRS 288.270(1)(f).

The testimony also developed that:

1. Ms. Fulgham had been given good work performance evaluations during her tenure with the District;

2. Based on her work performance evaluations above, Ms. Fulgham was considered a good teacher;

3. Ms. Fulgham had filed a grievance against the wishes of Superintendent Harold Tokerud, which upset Mr. Tokerud; and

4. Ms. Fulgham immediately applied for re-employment following the District's aforementioned decision; and

5. Subsequent to the District's aforementioned decision and after Ms. Fulgham's application for re-employment, the District not only told her she didn't have to interview for the job, but it also attempted to hire two individuals

unknown to the District to replace Ms. Fulgham; the first individual was passing through town when hired by the District for said vacancy and subsequently resigned.

The Board believes these facts further evidence that the motivation for the District's decision was related to Ms. Fulgham's protected activity. Retaliation for such protected activity is an unfair labor practice. NLRB vs. Ford Motor Co., 683 F.2d 156, 110 LRRM 3202 (CA 6 1982); American Steel Works, 263 NLRB 826, 111 LRRM 1136 (1982), and Teamsters, Chauffeurs, Warehousemen & Helpers, and Professional, Clerical, Public and Miscellaneous Employees, Local Union No. 533 vs. Humboldt General Hospital, EMRB Item No. 246, Case Nos. A1-045459 and A1-045460 (June 11, 1990).

FINDINGS OF FACT

After hearing the testimony, considering the evidence and due deliberation, the Board finds the facts are as follows:

1. That Ms. Fulgham was a licensed employee of the District.

2. That Ms. Fulgham was member of a recognized employee organization.

3. That negotiations had commenced between the Association and the District.

4. That, on April 30, 1991, the District provided Ms. Fulgham with a form entitled "CONTRACT BETWEEN EMPLOYEE AND TRUSTEES" (Petitioner's Exhibit "B").

5. That the aforementioned form was in error from the standpoint that the salary shown was incorrect and it was in the form of a final, binding contract.

6. That, at the time the aforementioned form was given to Ms. Fulgham, she advised the Superintendent, Harold Tokerud, that the salary shown was erroneous and expressed her concern with respect to said error.

7. That there was conflicting testimony as to whether or not Superintendent Harold Tokerud refused to correct the salary.

8. That Ms. Fulgham did not sign the form on April 30, 1991, due to the aforementioned error in the salary shown thereon.

9. That Ms. Fulgham subsequently talked to her union representative and he instructed her as to how to deal with the erroneous salary, i.e., make a notation on the form and initial same.

10. That Ms. Fulgham then became involved in other activities and did not return the form within ten (10) days.

11. That Ms. Fulgham had no intention to resign and never communicated a rejection of the aforementioned "CONTRACT BETWEEN EMPLOYEE AND TRUSTEES".

12. That, at the time Ms. Fulgham was given the contract she orally indicated her intention and desire to continue her employment with the District.

13. That, on May 13, 1991, less than one business day after the aforementioned 10-day period had expired,

Superintendent Harold Tokerud learned of Ms. Fulgham's failure to return the contract approximately one (1) hour before returned the signed contract.

14. That Ms. Fulgham communicated her intent and desire to accept the aforementioned "CONTRACT BETWEEN EMPLOYEE AND TRUSTEES", and she signed and returned this document to Superintendent Harold Tokerud on May 13, 1991.

15. That, on May 13, 1991, Ms. Fulgham wrote Superintendent Harold Tokerud and Mr. Brad Mettam, President of the Board of Trustees for the District, confirming her discussion with Superintendent Harold Tokerud and reiterating that it was not her intention to resign.

16. That Ms. Fulgham was involved in union activities; i.e., she was in contentious negotiations with the District regarding a new labor agreement.

17. That Ms. Fulgham had filed a grievance against Superintendent Harold Tokerud's wishes regarding a letter of reprimand which he had issued her.

18. That the testimony of Superintendent Harold Tokerud evidenced personal animus toward Ms. Fulgham because of her union activities.

CONCLUSIONS OF LAW

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

2. That the Complainant, ESMERALDA COUNTY CLASSROOM TEACHERS ASSOCIATION, is a recognized employee organization as

defined by NRS 288.040.

3. That Respondent, ESMERALDA COUNTY SCHOOL DISTRICT, is a local government employer as defined by NRS 288.060.

4. That Respondents, ESMERALDA COUNTY BOARD OF SCHOOL TRUSTEES and HAROLD TOKERUD, were acting in their official capacity as agents for the ESMERALDA COUNTY SCHOOL DISTRICT.

5. That the District committed an unfair labor practice under NRS 288.270(1) by discriminating against Ms. Mary Jane Fulgham for personal reasons and because of her union affiliation.

6. That due to Ms. Fulgham's union activities and the personal animus against her, and considering the totality of the circumstances, the return of Ms. Fulgham's signed contract in an untimely fashion was wrongfully deemed to be a rejection of her contract, in violation of NRS 288.270(1).

7. That the filing of a grievance under the labor agreement in effect between the parties does not preclude this Board from going forward with this action, as contemplated by NRS 288.110(2), pending resolution of the grievance through binding arbitration.

DECISION AND ORDER

Upon decision rendered by this Board at its meeting on August 23, 1991, it is hereby,

ORDERED, ADJUDGED AND DECREED as follows:

1. That Ms. Fulgham be reinstated to her position within the District forthwith; and

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2. That each party is to bear its own attorney's fees and costs.

DATED this 23rd day of September, 1991.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
HOWARD ECKER, Chairman

By _____
SALVATORE GUGINO, Vice Chairman

By Tamara Barengo
TAMARA BARENGO, Member