STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

CLARK COUNTY CLASSROOM TEACHERS ASSOCIATION, Complainant, -vs- CLARK COUNTY SCHOOL DISTRICT and SUE BERNHEISEL, Respondents.	**ITEM NO. 277** CASE NO. A1-045493 **DECISION**

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

For the Respondents: Don Haight, Esq.
CLARK COUNTY SCHOOL DISTRICT

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

STATEMENT OF THE CASE

In a pre-hearing conference held on August 23, 1991, the Complainant, CLARK COUNTY CLASSROOM TEACHERS ASSOCIATION ("Association"), and Respondents, CLARK COUNTY SCHOOL DISTRICT and SUE BERNHEISEL ("District"), narrowed the issues to the following:

> 1. Whether or not the subject of the instant Complaint is the subject of a pending grievance filed pursuant to the grievance and arbitration procedures of the labor agreement between the parties, and, if so, whether or not the Complaint should be dismissed for that reason.
>
> 2. Whether or not Sue Bernheisel made the statements she is alleged to have made, and, if so, whether or not said statements constitute interference, restraint or coercion of the employees in the exercise of rights guaranteed then under NRS Chapter 288, in violation of NRS

288.270.

3. Whether or not the actions of Sue Bernheisel were taken against Ms. Roy to harass her; discriminate against her; interfere with, restrain and/or coerce her, and, if so, whether said actions constitute violations of NRS 288.270(1)(a), (c), (d) and/or (f).

Additionally, the parties stipulated to the following facts:

1. The CLARK COUNTY CLASSROOM TEACHER'S ASSOCIATION (hereinafter "CCCTA") is the recognized employee organization, as defined in NRS 288.160, representing the licensed personnel employed by the CLARK COUNTY SCHOOL DISTRICT.

2. Respondent, CLARK COUNTY SCHOOL DISTRICT (hereinafter referred to as the "DISTRICT"), is a local government employer as defined by NRS 288.060. Respondent, SUE BERNHEISEL, is an administrative employee of the DISTRICT and is employed as the principal of Andrew Mitchell Elementary School.

3. On or about December 4, 1990, the Association on behalf of Phyllis Roy filed a grievance, denoted Grievance #90-91/X/020, concerning a CCF-21 Record of Personnel Notification Form signed by Vice Principal Jeff Lobel which had been given to Ms. Roy by Ms. Bernheisel. Ms. Roy is a teacher employed by the DISTRICT at Andrew Mitchell Elementary School and is a member of CCCTA. Ms. Roy had requested CCCTA to assist her in obtaining the removal of negative remarks in the CCF-21 which Ms. Roy believed to be untrue and unfair.

4. The grievance filed by CCCTA on behalf of Ms. Roy progressed to the second level of the grievance procedure. At the grievance hearing for the second level of the grievance process, CCCTA representative Ron Lopez extensively questioned and challenged Ms. Bernheisel while acting in his capacity as Ms. Roy's representative. On or about February 12, 1991, which was the Tuesday following the second level of the grievance hearing, Ms. Bernheisel gave Ms. Roy another CCF-21 Record of Personnel Notification Form.

5. Although no action was taken to file an unfair labor practice action following a February 19, 1991 meeting between Ms. Bernheisel and Ms. Roy, Grievance #90-91/X/020 progressed through the

normal grievance process and the DISTRICT was notified that the grievance would be taken to arbitration, although the time lines for choosing an arbitrator would be waived. On or about March 20, 1991, Ms. Bernheisel was informed by the DISTRICT that notification had been received that the grievance was being taken to arbitration.

6. On April 12, 1991, Ms. Bernheisel gave Ms. Roy her annual evaluation. The evaluation which was dated April 11, 1991 and signed on April 12, 1991 was rated unsatisfactory and contained numerous negative remarks concerning Ms. Roy.

On September 27, 1991, the Local Government Employee-Management Relations Board ("EMRB" and "Board") conducted a hearing on the instant Complaint. The Board's Discussion, Findings of Fact, Conclusions of Law, Decision and Order are set forth below.

DISCUSSION

From the facts stipulated to by the parties, the testimony of witnesses cross-examined at the Hearing and other evidence of record, the Board has determined that it has jurisdiction in the instant case, notwithstanding the pending grievance. The Complaint before the Board was filed prior to the filing of the grievance in question and the fact that said grievance arises from the same incident that produced the Complaint does not deprive the Board of jurisdiction over the matter. The Board has held that it has exclusive jurisdiction concerning unfair labor practices and/or the resolution of charges alleging prohibited practices. 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).

Under the "limited deferral doctrine" adopted by th Board (see I.A.F.F. #731 vs. City of Reno, EMRB Item No. 257, Case No. A1-045466, issued February 15, 1991) in order for the Board to consider a 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. Esmeralda County Classroom Teachers Association vs. Esmeralda County School District, The Esmeralda County of School Trustees and Harold Tokerud, EMRB Item No. 273, Case A1-045497 (September 23, 1991). In the instant case, the Board finds that the Association has met its requisite burden of proof.

Respondent Bernheisel testified to the effect that following Ms. Roy's filing of a grievance on or about December 4, 1990, she (Ms. Bernheisel) assumed the direct supervision of Ms. Roy. In a meeting called by Ms. Roy on or about February 13, 1991, Ms. Bernheisel advised Ms. Roy that due to the grievance being filed everything she was doing was being documented and written up. Either in this meeting or on February 19, 1991, Ms. Bernheisel told Ms. Roy that something needed to be done to develop a level of trust and get a working relationship going again. She told Ms. Roy that it would be in her best interest to write her own response to any CCF-21 (Record of Personnel Notification) which she might be issued, and that responses authored by the union, vis-a-vis personally authored responses, would be viewed negatively by

any supervisors or administrators who might see her file. Ms. Bernheisel testified to the effect that on or about March 20, 1991, when she received the notice that Ms. Roy's grievance had been appealed to arbitration (albeit put on hold), she was "shocked" and "upset"; even though she was familiar with the appellate procedures of the labor agreement and knew that the union had the right to appeal the grievance to arbitration. She immediately went to Ms. Roy's classroom and confronted her with the notice of appeal, referring to same as "blackmail", because she thought the grievance had been settled.

From the totality of the testimony and evidence of record in the instant case the Board is pursuaded that Principal Bernheisel did in fact advise Phyllis Roy that she would stop writing her up if she would "drop" her union assisted appeal of a grievance.

The Board recognizes that an employer is free to communicate to its employees regarding work, even to the extent of any general or specific views about unionism as long as such communication does not contain a threat of reprisal or a promise of benefit. See Ormsby County Teachers Association vs. Carson City School District, EMRB Item No. 114, Case No. A1-045339 (1981). Under Section 8(c) of the National Labor Relations Act, the expression of any view, argument, or opinion or dissemination thereof, whether in written, printed or graphic form, does not constitute evidence of an unfair labor practice if the expression contains no threat of reprisal or force or promise of benefit. See NLRB vs. Movie

Star, Inc., 361 F.2d 346 (5th Cir. 1966); Drummond Education Assoc. vs. Drummond Integrated School District, WERC Case No. 22183 MP-794 (Wis. 1973), Pub. Employee Bargaining Rep. (CCH) at section 41, 276. In the instant case, however, the statements attributed to Principal Bernheisel clearly contained a threat of reprisal and a promise of benefit; i.e., reprisal in the form of continued, unrelenting, super-intensive scrutiny and documentation of her job performance, and benefit in the form of relief from such intensive scrutiny and documentation. Said threat of reprisal and promise of benefit was clearly directed toward Ms. Roy because of her processing a grievance, an activity which is protected by NRS Chapter 288. NRS 288.270 provides in pertinent 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.
>
> . . .
>
> (c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.

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

The facts upon which these findings are based are as stipulated to by the parties (reproduced in the Board's Statement of the Case on pages 2 and 3 of this Decision) and as set forth below:

1. Respondent Bernheisel testified to the effect that following the filing of a grievance by Ms. Roy on or about December 4, 1990, she assumed direct supervision of Ms. Roy.

2. That on or about February 13, 1991, Ms. Bernheisel advised Ms. Roy that due to the grievance being filed everything she did would have to be documented and written up.

3. That either on February 13, 1991 or February 19, 1991, Ms. Bernheisel told Ms. Roy that something needed to be done to develop a level of trust and a working relationship. She suggested to Ms. Roy that it would be in her best interest to write her responses to any CCF-21s (Record of Personnel Notification) which she may be issued, inasmuch as responses authored by the union were looked upon negatively by supervisors and administrators who might see her file.

4. That Ms. Bernheisel testified to the effect that on or about March 20, 1991, when she received the notice that Ms. Roy's grievance had been appealed to arbitration (albeit put on hold), she was "shocked" and "upset"; even though she was familiar with the appellate procedures of the labor agreement and knew that the union had the right to appeal the grievance to arbitration. She immediately went to Ms. Roy's classroom

and confronted her with the notice of appeal, referring t same as "blackmail", because she thought the grievance had been settled.

CONCLUSIONS OF LAW

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

2. That the Complainant, Clark County Classroom Teachers Association, is a recognized employee organization as defined by NRS 288.040.

3. That the Respondent, Clark County School District, is a recognized local government employer as defined by NRS 288.060, and Principal Sue Bernheisel was acting as agent fo said local government employer.

4. That, although the Board under its deferral doctrine, will normally refuse to hear a pending grievance involving an unfair labor practice, the mere filing of a grievance between the parties will not preclude the Board from going forward with an action, as contemplated by NRS 288.110(2), particularly where the matter involves an unfair labor practice occurring after the filing of the grievance.

5. That the District and its agent, Principal Bernheisel, committed an unfair labor practice under NRS 288.270(1)(a) and (c) by interfering, restraining and coercing Ms. Roy in the exercise of protected rights.

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DECISION AND ORDER

Upon decision rendered by the Board at its meeting on November 5, 1991, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Association's Complaint be, and the same hereby is, upheld;

2. That the District and its agent, Sue Bernheisel, shall cease and desist, and in the future, refrain from engaging in the prohibited practice set forth in this Complaint; and

3. That each party shall bear its own costs and attorney fees in this matter.

DATED this 15th day of November, 1991.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By _____
HOWARD ECKER, Chairman

By _____
SALVATORE GUGINO, Vice Chairman

By Tamara Barengo
TAMARA BARENGO, Member

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