STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Complainant, -vs- CITY OF ELKO, NEVADA, a political subdivision of the State of Nevada, Respondent.	**ITEM NO. 295** CASE NO. A1-045505 **DECISION**

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

For the Respondent: Richard G. Barrows, Esq.
WILSON & BARROWS, LTD.

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

STATEMENT OF THE CASE

In a pre-hearing telephone conference held on April 14, 1992, the Complainant, STATIONARY ENGINEERS, LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO ("Union"), and Respondent, CITY OF ELKO, NEVADA ("City"), narrowed the issues to the following:

> 1. Whether prior to October 22, 1991, Mike Magnani, a business representative of Local 39, responsible for collective bargaining with the City, and David L. Cohen, a representative of the City and responsible for collective bargaining with the Union mutually agreed that on October 22, 1991, they would strike names for selection of a factfinder who would conduct factfinding for the parties with respect to current negotiations.

/ / /

2. Whether during a conversation between Mr. Magnani and Mr. Cohen on October 22, 1991, the parties agreed that on October 29, 1991 they would strike the names of the panel members who would determine if the factfinding would be binding.

3. Whether the Union has impermissibly delayed in providing the City with relevant information as set forth in paragraph 13 of the City's Answer.

4. Whether or not the parties are precluded from proceeding to factfinding if they fail to schedule the dates and times for factfinding by October 20, as required by NRS 288.200(4).

5. Whether the Union is precluded from proceeding to factfinding because the Union failed to schedule, or even attempt to schedule the dates and times for the factfinding hearing before October 21 as required by NRS 288.200(4), i.e., whether the deadline is mandatory as opposed to directory.

6. Whether the Board is authorized by NRS Chapter 288 to extend beyond October 21 the date to schedule the dates and times for the fact-finding hearing.

7. Whether the City's refusal to continue to factfinding as a result of the failure to schedule dates and times for the factfinding hearing before October 21 constitutes a refusal to bargain collectively in good faith as required by NRS 288.270(1)(e).

8. Whether the City is entitled to its attorneys' fees and other reasonable costs incurred in this matter pursuant to NRS 288.110(6).

9. Whether the Union is entitled to its attorneys' fees and other reasonable costs incurred in this matter pursuant to NRS 288.110(6).

Additionally, the Union presented the following issues which were <u>not</u> stipulated to by the City:

1. Whether on October 29, 1991 in a negotiation session between the City and the Union, the City advised the Union that the parties had no right to go forward into <u>binding</u>

295-2

factfinding because NRS 288.200(4) requires that a schedule of dates and times for the factfinding hearing be established before October 20, 1991.

2. Whether the Board has the authority, pursuant to NRS 288.110(2), to extend the time in which the parties may participate in factfinding or the formation of a panel to determine if factfinding shall be binding upon the parties, and if so, is the Union entitled to such an order.

Also, the City presented the following issue which was not stipulated to by the Union:

1. Whether the Union's delay in providing the City with relevant information as set forth in paragraph 13 of the City's Answer constitutes a refusal to bargain in good faith.

On June 3, 1992, 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 the Complaint is meritorious.

I.

THE CITY'S REFUSAL TO PROCEED TO FACTFINDING CONSTITUTED A FAILURE TO BARGAIN IN GOOD FAITH. (Stipulated Issue No. 7 and Union Issue No. 1)

By the actions and representations of Mr. David L. Cohen (the City negotiator) the Union was clearly led to believe that the City would be willing to proceed to factfinding,

without imposition of any conditions as to whether or not said factfinding would be final and binding and notwithstanding t October 21 deadline for scheduling the dates and times for the factfinding hearing, as set forth in NRS 288.200(4). In fact, on October 22, 1991, after the October 21 deadline for scheduling factfinding had elapsed, Mr. Cohen wrote the Federal Mediation and Conciliation Service, advising that the parties had selected a factfinder and requesting that the factfinder provide the parties with available dates for a hearing. It was not until a negotiating session on October 29, 1991, that Mr. Cohen belatedly notified the Union of the City's position that the Union was precluded from proceeding to factfinding due to the failure to schedule the factfinding hearing by October 21, pursuant to NRS 288.200(4).

Mr. Cohen testified to the effect it is his positio that the City could have waived the deadline for factfinding on <u>other than a final and binding basis</u>, if the Union had so requested. However, his testimony indicated that in his discussions regarding factfinding with the Union, he never alluded to a particular type of factfinding, nor did he advise the Union <u>at any time prior to the hearing</u> of his willingness to proceed to <u>non-binding</u> factfinding; also, during the Pre-Hearing Conference the parties stipulated (Issue No. 4) that the issue was "whether or not the parties are precluded from proceeding to <u>factfinding</u> . . ." (Emphasis added.) The Union, therefore, had no reason to assume that the City's position in the premise applied only to <u>final and bindi</u>

factfinding.

During cross-examination Mr. Cohen testified that the reason he did not advance the position that the Union was precluded from proceeding to binding factfinding until October 29, 1991, was that he "hadn't had a chance to really sit down and look over the statute and confer with my client (the City)." He testified that he didn't intend to mislead the Union. However, the totality of Mr. Cohen's actions and representations throughout the negotiating process belie his testimony in this regard and indicated a willingness prior to October 29, 1991, to proceed to factfinding notwithstanding the statutory deadline for scheduling same. It appears that he either deliberately misled the Union or that the position he belatedly advanced on October 29, 1991 (that the Union was precluded from proceeding to factfinding) was an afterthought and was pretextual in nature. In either event, the Board finds that by virtue of Mr. Cohen's actions and representations throughout the negotiating process (and even beyond the statutory deadline), the City waived any right it may have had to refuse to proceed to factfinding. Mineral County Public Safety Dispatchers Association vs. Board of County Commissioners of Mineral County and Mineral County, Nevada, EMRB Item No. 265, Case No. A1-045482 (May 30, 1991). Accordingly, under the particular facts and circumstances involved in the instant case, the City's refusal to proceed to factfinding - with the issue of whether or not to make the factfinder's findings and recommendations final and binding to

be determined by a panel created pursuant to NRS 288.200(b) constituted a failure to bargain in good faith as required by NRS 288.270(1)(e).

II.

THE BOARD HAS THE AUTHORITY TO EXTEND THE TIME IN WHICH THE PARTIES MAY SCHEDULE AND PARTICIPATE IN FACTFINDING, AS WELL AS THE TIME FOR FORMATION OF A PANEL TO DETERMINE IF FACTFINDING SHALL BE BINDING.
(Stipulated Issues No. 4, 5 and 6 and Union Issue No. 2)

As concerns specifically the issue of whether or not the Board has the authority, pursuant to NRS 288.110(1) and (2), to extend the time in which the parties may schedule and participate in factfinding as well as the time for formation of a panel to determine if factfinding shall be binding up the parties, the Board finds that it indeed does have such authority, and it has exercised same whenever the parties have waived statutory deadlines to facilitate constructive negotiations. Reno Police Protective Association vs. City of Reno, EMRB Item No. 175, Case No. A1-045390 (January 30, 1985) and White Pine Association of Classroom Teachers vs. White Pine County Board of School Trustees, EMRB Item No. 36, Case No. A1-045288 (May 30, 1975).

At this point it is important to note that, from the testimony and other evidence of record, it is clear that the City was primarily responsible for the delay in selecting a factfinder (the delay in striking names); therefore, the City must bear most (if not all) of the responsibility for th

resulting failure of the parties to schedule factfinding on or before October 21, 1991.

The list of factfinders provided by FMCS was received by the City (Mr. Cohen) and the Union's business representative (Mr. Magnani) on or about September 30, 1991. Mr. Magnani testified that he contacted Mr. Cohen on or about October 1, 1991, and Mr. Cohen indicated that he was not prepared to strike names at that time. During a subsequent telephone conversation Mr. Cohen indicated he would be ready to strike names when they met for negotiations on October 7, 1991. They did not strike names on October 7, 1991; Mr. Cohen indicated he had a plane to catch, but he would call Mr. Magnani on the following day. Subsequently, Mr. Magnani called Mr. Cohen on two occasions regarding striking names, to no avail. Mr. Cohen was not prepared to strike names at a negotiating session on October 17th, but indicated he would call Mr. Magnani for that purpose on October 21st. A factfinder was finally selected on October 22, 1991. This sequence of events clearly places most (if not all) of the responsibility for the delay upon the City and, as testified by Mr. Cohen, it was not possible to schedule a factfinding date by the statutory deadline (even if a factfinder had been selected on October 17, 1991); therefore, the failure to meet the statutory deadline was a direct result of the refusal of Mr. Cohen to strike names on a timely basis.

Following receipt of the Union's request for a panel to determine whether or not the findings and recommendations of

the factfinder will be final and binding, the EMRB's Commissioner wrote the parties on September 30, 1991, in pertinent part as follows:

> The EMRB has received your request for a panel hearing pursuant to NRS 288.200(6) and NRS 288.201. The date for the determination by the panel on whether or not to make the findings and recommendations of the factfinder final and binding in your negotiations may be extended upon your request pursuant to NRS 288.200(6).
>
> If no extension is requested, we will schedule the panel hearing on your case as soon as you have notified us of the names of the attorney and the accountant which the parties have chosen.
>
> Please inform me of the date(s) for your factfinding hearing as soon as possible. Pursuant to NRS 288.200(4), this <u>scheduling</u> must be complete before October 20, a date which cannot be extended.

Concurrently, the Union wrote the State Board of Nevada and the Nevada State Board of Accountancy, requesting a list of members who would serve on the panel. On October 17, 1991, upon the instruction of the EMRB Commissioner, EMRB's Secretary wrote the parties in pertinent part as follows:

> This letter is to confirm telephone conversations had with a representative for I.U.O.E. Local 39 and David Cohen, representative for the City of Elko, wherein the parties were instructed by the EMRB Board Secretary not to strike names from the list of attorneys recently provided by the Nevada State Bar.
>
> The lists provided to the parties by the Nevada State Bar were incorrect lists containing names of Southern Nevada attorneys rather than Northern Nevada attorneys. Due to the location of the parties involved, the parties should have been provided with lists of Northern Nevada attorneys in which to strike names from.
>
> The Nevada State Bar was contacted by the EMRB Board Secretary on October 17, 1991, and informed of the mix-up in lists. Linda, from the

> Nevada State Bar, indicated that she would send out the correct lists to the parties immediately. Upon receipt of the correct lists, the parties will have eight (8) days in which to strike names.
>
> As for the October 20th deadline, or in this case October 21st due to the 20th falling on a Sunday, the parties should have established a schedule of dates and times for the factfinding hearing. As for a determination being made by the factfinding panel not later than October 20th, this date will have to be extended by the Commissioner due to the mix-up in lists delaying the date in which a panel could possibly be formed.
>
> Please contact the EMRB immediately following the striking of names from both lists and provide the EMRB with the names of the attorney and accountant who will sit on the factfinding panel, along with the date scheduled for the factfinding hearing.

As evidenced by the above, it is quite likely that the delay in selecting the panel, which resulted from the Nevada State Bar sending out the incorrect list of attorneys, contributed to the failure of the parties to schedule the factfinding hearing by October 21st, as required by NRS 288.200(4). (The panel must be convened prior to the factfinding hearing, to determine which, if any, of the factfinder's findings or recommendations will be final and binding; therefore, the selection of the panel and arranging a meeting date/place for the panel could have been a determinative factor in scheduling the factfinding hearing.) It is clear, however, that the overriding reason for the failure of the parties to schedule factfinding on or before October 21, 1991, was the fact that the Union had been convinced by the actions and representations of Mr. Cohen that the City would be willing to proceed to factfinding, even if

same were to be scheduled after the statutory deadline. (Prior to October 29, 1991, Mr. Cohen certainly had not given the Union any reason to suspect that he would refuse to proceed to factfinding if same were not scheduled on or before October 21st.) Under the circumstances, therefore, it is entirely proper and appropriate for the Board to exercise the authority with which it is vested and extend the time limit for scheduling factfinding and formation of a panel to determine if factfinding shall be binding upon the parties.

III.

PRIOR TO OCTOBER 22, 1991, UNION'S BUSINESS REPRESENTATIVE AND CITY'S REPRESENTATIVE (MR. COHEN) AGREED TO STRIKE NAMES FOR SELECTION OF A FACTFINDER ON OCTOBER 22, 1991. (Issue No. 1)

Based on the totality of the testimony elicited during the hearing, as well as other evidence of record, the Board finds that the question posed by Issue No. 1 must be answered in the affirmative.

IV.

DURING CONVERSATION BETWEEN UNION'S BUSINESS REPRESENTATIVE AND CITY'S REPRESENTATIVE (MR. COHEN) ON OCTOBER 22, 1991, THE PARTIES AGREED THAT ON OCTOBER 29, 1991, THEY WOULD STRIKE THE NAMES OF THE PANEL MEMBERS WHO WOULD DETERMINE WHETHER OR NOT FACTFINDING WOULD BE FINAL AND BINDING. (Issue No. 2)

Based on the totality of the testimony elicited during the hearing, as well as other evidence of record, the Board finds that the question posed by Issue No. 2 must be answered in the affirmative.

V.

WHETHER UNION DID OR DID NOT IMPERMISSIBLY DELAY PROVIDING THE CITY WITH RELEVANT INFORMATION IT HAD REQUESTED IS NOT RELEVANT. (Issue No. 3 of stipulated issues and Issue No. 1 of City's issue(s))

As an initial observation regarding the City's allegation in the premise, the Board notes that an "impermissible delay in providing . . . relevant information" in the context of collective bargaining could be considered as constituting a failure to bargain in good faith, a prohibited practice under NRS 288.270(1)(e). In the instant case, the Board received no counterclaim or complaint from the City, alleging that the Union failed to bargain in good faith. For this reason, the Board is inclined to view the City's position regarding the Union's alleged "impermissible delay in providing . . . relevant information" as a pretextual defense for its own delay in striking names for selection of a factfinder. The Board finds no reason to conclude from the testimony and other evidence of record that the Union's alleged delay in providing information requested by the City was causative, either directly or indirectly, of the failure of the parties to schedule factfinding by the statutory deadline. Accordingly, the question(s) posed by Issue No. 3 of the stipulated issues and Issue No. 1 of the City's issues is not deemed relevant to deciding the case at bar.

/ / /

/ / /

/ / /

VI.

THE UNION IS ENTITLED TO ATTORNEY'S FEES.
(Stipulated Issues No. 8 and 9)

In view of the City's failure to bargain in good faith (which resulted in the Union being required to incur attorney's fees and related costs in order to restore integrity to the collective bargaining process), the Board finds that the Union is entitled to attorney's fees as set forth in the Board's Decision and Order which follows:

FINDINGS OF FACT

1. That the Complainant, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, is a local government employee organization.

2. That the Respondent, City of Elko, Nevada, is local government employer.

3. That on September 13, 1991, the Union requested factfinding and on or about September 30, 1991, the parties received a list of factfinders from the Federal Mediation and Conciliation Service, from which they were to select a factfinder.

4. That on or about October 1, 1991, the Union's business representative (Mr. Magnani) placed a telephone call to the City' negotiator (Mr. Cohen) wherein Mr. Cohen indicated he was not prepared to strike names at that time.

5. That during a subsequent telephone conversation the parties agreed to select a factfinder when they met for negotiations on October 7, 1991.

6. That on October 7, 1991, following completion of the parties negotiation session, Mr. Magnani asked Mr. Cohen if he was ready to strike names and Mr. Cohen indicated that he had a plane to catch and he would call Mr. Magnani on the following day.

7. That subsequent to October 7, 1991, Mr. Magnani called Mr. Cohen regarding the striking of names and again was told that he was not prepared to strike names for a factfinder; also, that the parties should strike names for the factfinding panel (from the lists provided by the State Bar and the State Board of Accountancy) at the same time as they struck names for the factfinder.

8. That subsequent to the above-referenced conversation Mr. Magnani again called Mr. Cohen regarding the striking of names and again was told that he was not prepared to strike names, but that the parties could strike names at their next negotiating session on October 17, 1991.

9. That on October 17, 1991, Mr. Magnani asked Mr. Cohen if he was prepared to strike names and again he was told that he was not prepared to strike names; also, that the parties were waiting for another (correct) list from the State Bar to be utilized in connection with striking names for the factfinding panel. Mr. Cohen suggested that the parties could strike names when they received the new list from the State Bar, and that he would get in touch with Mr. Magnani.

10. That on October 18, 1991, the Union's secretary (Ms. Cloyd) telephoned Mr. Cohen and attempted to strike names for

factfinder. Mr. Cohen told Ms. Cloyd that he was not prepared to strike names, did not feel it was necessary and he would get back in touch with Mr. Magnani.

11. That on October 22, 1991, the parties struck names (selected a factfinder) and Mr. Cohen wrote the Federal Mediation and Conciliation Service, notifying said service of the selection and requesting that the factfinder selected provide the parties with available dates for a hearing.

12. That on October 29, 1991, Mr. Cohen advised Mr. Magnani it was his position (the City's position) that the Union does not have the legal right to proceed to (binding) factfinding because the factfinding hearing was not scheduled within the time required by NRS 288.200(6).

13. That on November 12, 1991, the Union brought the instant Complaint before the board, alleging that the City's refusal to proceed to factfinding constitutes a refusal to bargain in good faith and a violation of NRS 288.270(1)(e).

14. That on December 2, 1991, the City filed a Motion to Dismiss the instant Complaint on the premise that the Complaint failed to state a claim upon which relief can be granted based on the failure of the parties to schedule dates and times for the factfinding hearing by the statutory deadline.

15. That on January 9, 1992, the Board denied the City's Motion to Dismiss, in order to afford the Board an opportunity to consider the facts and any mitigating factors which may have been involved in the parties' failure to comply with the

statutory deadline.

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, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, is a recognized employee organization as defined by NRS 288.040.

3. That the Respondent, City of Elko, Nevada, is a recognized local government employer as defined by NRS 288.060.

4. That, under the facts and circumstances prevailing in the instant Complaint, the parties' failure to schedule the factfinding hearing by October 21, 1991 (the statutory deadline) does not preclude the parties from proceeding to factfinding, pursuant to NRS 288.200, with the issue of whether or not the factfinder's recommendations are to be final and binding to be determined by a panel selected pursuant to NRS 288.200, NRS 288.201 and NRS 288.202.

5. That, under the facts and circumstances prevailing in the instant Complaint, the Board has the authority, pursuant to NRS 288.110(1) and (2), to extend the time in which the parties may schedule and participate in factfinding, as well as the time for formation of a panel to determine whether or not factfinding is to be final and binding.

6. That, under the facts and circumstances prevailing

in the instant Complaint, the City's refusal to proceed to factfinding, with the issue of whether or not the factfinder's findings and/or recommendations are final and binding to be decided by a panel, constitutes a failure to bargain in good faith and a violation of NRS 288.270(1)(e).

DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Union's Complaint is upheld to the extent set forth in the Board's Conclusions of Law, and the factfinding hearing shall be scheduled immediately, with the issue of whether or not the factfinder's findings and/or recommendations to be decided by a panel, selected from the lists previously furnished the parties by the Nevada State Board of Accountancy and State Bar of Nevada, pursuant to NRS 288.202; and

2. That the Respondent, City of Elko, Nevada, shall pay Complainant, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, $1,000.00 for costs and attorney's fees incurred in connection with this proceeding.

DATED this 18th day of August, 1992.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By Salvatore C. Gugino
SALVATORE C. GUGINO, Chairman

By Tamara Barengo
TAMARA BARENGO, Vice Chairman

By Howard Ecker
HOWARD ECKER, Member