STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

CLARK COUNTY CLASSROOM TEACHERS ASSOCIATION, Complainant, -vs- TIMOTHY SANDS, Respondent.	ITEM NO. 320 CASE NO. A1-045539 DECISION

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

For the Respondent: Dan R. Waite, Esq.
EDWARDS & KOLESAR, CHTD.

For the EMRB: Tamara Bargeno, Chairman
Susan L. Johnson, Vice Chairman
Salvatore C. Gugino, Member

STATEMENT OF THE CASE

The instant Complaint arose out of a letter dated February 1, 1993, from Attorney Dan R. Waite, representing Principal Timothy Sands, to Jose Sandoval, Chairperson of the Teacher Advisory Council (TAC) at Harvey Dondero Elementary School. The letter states, in pertinent part, as follows:

> Please be advised that this law firm represents Mr. Timothy J. Sands, principal of Harvey Dondero Year-Round School.
>
> According to Article 10 of the Agreement between the Clark County School District and the Clark County Classroom Teacher's Association, 1991-1993, the purposes and duties of TAC are as follows:
>
> 1. Improve the morale of the professional staff;

. . .

2. Apprise the principal of actual or potential problems;

3. Secure the maximum productive and constructive involvement of members of the professional staff in the prime goal of the school, i.e., the education of students enrolled therein;

4. Improve communications between the principal and members of the professional staff; and

5. Provide input on the school's budget.

I am informed that TAC has failed to accomplish any of the above listed duties on a consistent basis. Furthermore, TAC has continued to pit teacher against teacher in a manner which is highly unprofessional and unproductive. Your own fellow TAC members have frequently complained to the administration that they do not understand or appreciate your intentions and actions. In short, my client is very dissatisfied with the performance of the TAC, generally, and your conduct, specifically.

Finally, Mr. Sands is informed and believes that you intend to discuss in public meetings matters which are both false and derogatory of Mr. Sands and his staff. Such a course of conduct by you could result in Mr. Sands' reassignment to another school. Mr. Sands does not want to transfer schools and will resist any efforts to force him to do so. To that end, please be advised that should you make any defamatory comments, Mr. Sands fully intends to take whatever legal action is necessary to protect his rights and to rehabilitate any damage you may cause to his esteemed reputation. Govern yourself accordingly.

Please feel free to give me a call if you wish to discuss this matter further or if you have any questions or comments.

The Complainant (hereafter referred to as "Association") contends that this letter was an attempt to coerce and intimidate Mr. Sandoval, and interfere with the exercise of his employee rights under the collective bargaining agreement. The Association specifically contends that Principal Sands' aforementioned conduct is a prohibited practice under NRS 288.270 (1) (a) and (c), quoted below:

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1. It is 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) . . .

(c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.

The Association also cites EMRB Case No. A1-045435 (Item No. 237) wherein the Board found that Principal Sands had attempted to intimidate and discourage TAC participation at another school, and asks the Board to consider said case in determining appropriate penalties in the instant case.

Principal Sands contends he had reason to believe that Mr. Sandoval planned to falsely accuse him of immoral conduct at a public meeting of the Clark County School Board. He claims it was this concern, and not anti-union animus, which motivated him to retain an attorney to write a letter to Mr. Sandoval.

Principal Sands also contends (1) that the TAC, of which Mr. Sandoval is Chairman, is not an "employee organization" as is defined by NRS Chapter 288; (2) that his conduct is protected free speech under the Constitutions of the United States and the State of Nevada; (3) that the letter does not violate either NRS 288.270 (1) (a) or (c) because the letter cannot reasonably be interpreted as interfering, coercing or restraining any employee rights, nor does it discourage employee participation through discrimination of employee Sandoval; and (4) that his conduct toward Mr. Sandoval was not a "willful" violation of NRS 288.270 (1).

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The Board's Discussion, Findings of Fact, Conclusions of Law, Decision and Order are set forth below:

DISCUSSION

The Board found that the letter which forms the basis of this Complaint is comprised of two separate subject matters. The first is Principal Sands' general dissatisfaction with the performance of the TAC at his school and with Mr. Sandoval's performance as Chairman, specifically. The second is a warning to Mr. Sandoval against making defamatory comments about Principal Sands in any public meetings. We address these issues in reverse order.

I.

PRINCIPAL SANDS' WARNING OF LEGAL ACTION AGAINST MR. SANDOVAL IF HE MADE ANY DEFAMATORY COMMENTS AT A PUBLIC MEETING CONSTITUTED FREE SPEECH WHICH IS NOT RESTRICTED BY NRS CHAPTER 288

This was clearly a situation of a school staff in conflict over divided loyalties to the principal. Three witnesses (Principal Sands and teachers Christina White and Laura Henley) testified that widespread rumors had circulated among the staff about alleged affairs between Principal Sands and certain staff members. Mr. Sandoval's testimony that he was not aware of such rumors was simply not credible given the climate of the school and Mr. Sandoval's position as Chairman of the TAC.

Further, any apprehension about Mr. Sandoval's intended comments before the School Board are the direct result of his own refusal to be forthright and honest with other TAC members. When asked by them if he was planning to speak to the School Board an if so, about what subjects, he would only say that he "could"

speak if he wanted to and that he would tell "all the facts." Even in his testimony before this Board, Mr. Sandoval was vague and elusive as to these "facts." We find that Principal Sands had a reasonable basis to believe that, given the conflict between them and the rumors running rampant at the school, Mr. Sandoval's coyness could be interpreted as a veiled threat to bring these rumors to a public forum.

It is also clear that Principal Sand's fear that the mere accusation of immoral conduct could result in his demotion or transfer was well founded. Subsequent to the filing of this Complaint against him, Principal Sands was demoted with a pay loss of nearly $16,000 per year. This action by the School District appears to have been based solely on the allegations contained in this Complaint, and prior to any determination by this Board as to the merits of the charges against Sands.

Additionally, Article 27-5-3 of the Agreement between the Clark County School District and the Clark County Association of School Administrators, 1991-1993, provides that the mere accusation of immorality is considered an "incident of a serious nature" and subject to immediate discipline. We therefore find that Principal Sands had a legitimate interest in preventing any defamatory remarks concerning his alleged immoral conduct from being aired at a public School Board meeting.

That portion of the letter drafted by Principal Sands' attorney for this purpose is clear and unambiguous. The letter warns against comments which are "both false and derogatory," "defamatory," and made in "public meetings." These terms have

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clear legal definitions and are generally accepted as referring to unprotected, tortious speech.

We do not credit the Association's contention that Mr. Sandoval's exercise of his employee rights was in any way restrained or threatened by virtue of an attorney warning him against tortious conduct, especially where such conduct appeared imminent. While this Board continues to reject any activity which has a chilling effect upon public employees' free exercise of their rights under NRS Chapter 288, no provision of Chapter 288 can reasonably be construed to offer protection to tortious conduct between an employer and employee. Similarly, no provision of Chapter 288 restricts either party's free speech rights to warn the other against engaging in such tortious conduct.

For the reasons stated above, the Board finds that the portion of the February 1, 1993, letter which warned Mr. Sandoval against making defamatory remarks about Principal Sands in a public meeting did not violate NRS 288.270(1)(a) or (c).

II.

THE ACTION OF PRINCIPAL SANDS IN EXPRESSING HIS DISSATISFACTION WITH TAC THROUGH A LETTER FROM HIS ATTORNEY TO THE TAC CHAIRMAN WAS NOT A "WILLFUL" VIOLATION OF NRS 288.270(1)(a) or (c)

The first section of the February 1, 1993 letter which is the subject of this Complaint addresses Principal Sands' displeasure with the productiveness and administration of the TAC at Harvey Dondero Elementary School. These are topics of legitimate discussion between the Principal and his TAC Chairman. What this Board finds unfortunate is that the dissatisfaction was

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relayed not by the Principal directly, but rather by the Principal's attorney.

Had the totality of the facts of this case been different, this Board might be constrained to find a violation of NRS 288.270(1)(a) by virtue of the chilling influence of an attorney relaying criticism from the principal about a purely operational matter. However, before a violation can be found, we must determine that it was "willful" under the terms of the statute. This determination requires a closer analysis of the facts.

As previously referenced, Principal Sands was the subject of a prohibited practice complaint in 1989, which arose out of his dealings with a TAC at another school. This experience, coupled with his immediate concern about the possible pending defamation of his character and its effect upon his career, caused him to proceed cautiously. He sought legal counsel to determine how to appropriately deal with the issues confronting him and the TAC Chairman.

Unfortunately for Principal Sands, his counsel apparently did not recognize the danger of inserting himself into a critique of TAC operations. This entire portion of the letter was gratuitous and unrelated to the immediate legal concern at hand: the alleged defamation. We are of the opinion that counsel should have limited his written "warning" to only the defamation issue and advised Principal Sands to deal directly with Mr. Sandoval about the operational problems with the TAC. Not having done so, however, we must decide whether Principal Sands can be found to have "willfully" violated NRS 288.270(1)(a) or (c) as a result of the actions and advice of counsel whom he employed.

The nature of an attorney-client relationship is one of trust and dependence. The client trusts the attorney to represent him appropriately and is dependent upon his attorney's knowledge and familiarity with the legal subject matter. We would generally applaud any employer or employee who, recognizing a potential problem, seeks legal advice before taking action which could be interpreted as a prohibited labor practice under NRS Chapter 288.

We recognize that in matters of civil and criminal litigation, a client is generally bound by the actions of his attorney and cannot readily avoid the consequences of his attorney's actions. Cahn v. Fisher, 805 P.2nd 1040, 167 Ariz. 219, rev.den. (Ariz.App.1990); Alt v. Krueger, 663 P.2nd 1078, 4 Haw.App. 201 (1983). However, it is equally clear that where fundamental rights of the client are involved, the actions of the attorney will not be imputed to the client. Raquepaw v. State, 108 Nev.Adv.Op.159 (1992); Jones v. Barnes, 463 U.S. 745, 751 (1983).

In this case, the Board must conclusively determine whether the client willfully violated a state statute, which requires a fundamental determination of guilt. Under the specific circumstances of this case, we cannot impute to Principal Sands the ill-advised actions of his attorney for the purpose of making such a finding. We are reluctant to conclude that he has "willfully" committed a prohibited practice by taking reasonable steps to consult with and rely upon counsel in an effort to avoid just the sort of labor dispute which ultimately resulted in this case.

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For the reasons discussed above, we find that although the portion of the attorney's letter criticizing the TAC may have proven intimidating to Mr. Sandoval, Principal Sands did not act in such a manner as to "willfully" cause such a result.

Lastly, we note that despite the letter in issue and the apparent tension between the two men, Principal Sands nonetheless gave Mr. Sandoval a "satisfactory" performance evaluation one month after the incident in question. No other evidence was presented to support a finding that Mr. Sandoval was in any way discriminated against in his employment and we therefore find no violation of NRS 288.170 (1)(c).

III.

MEMBERS OF A TEACHERS ADVISORY COUNCIL (TAC) ARE ENTITLED TO THE PROTECTIONS OF NRS CHAPTER 288

This issue was raised in these proceedings and must be addressed, although it was not dispositive of the instant case.

Principal Sands has asserted that the TAC is not an "employee organization" under Chapter 288 and therefore is not endowed with any rights which could be subject to violation. We disagree.

Article 10 of the Collective Bargaining Agreement between the Clark County Classroom Teachers Association and the Clark County School District provides for the formation of Teacher Advisory Councils as official representatives of faculty in dealing with concerns at each school. The primary purpose of these "TACs" is to liaison between the Principal and the staff on operational matters at the school. Principal Sands contends that because Chapter 288 does not specifically protect rights derived from a

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collective bargaining agreement, that his relationship with the TAC is not governed by Chapter 288.

However, the members of each school's TAC are also members of the more encompassing Clark County Classroom Teachers Association, which is an "employee organization" under the statute. The service they provide as TAC members is in furtherance of their membership in the Association. It is the spirit and intent of NRS Chapter 288 to protect employees engaged in the business of their organization, and we reject a constrained statutory construction which would limit those protections.

IV.

PRINCIPAL SAND'S INVOLVEMENT IN A PREVIOUS EMRB PROCEEDING IS NOT RELEVANT TO THIS CASE

The Association's citation and reference to Clark County Classroom Teachers Association vs. Clark County School District and Timothy Sands, et al., EMRB Item No. 237, Case No. A1-045435 (December 1989) in support of its position in the instant case is misplaced. The facts of the previous case bear no practical similarity to the facts of this case and do not therefore justify an inference of a pattern of conduct by Principal Sands. We take notice of the previous case but give it no weight in our determination.

FINDINGS OF FACT

1. The Complainant, Clark County Classroom Teachers Association, is a local government employee organization.

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2. Timothy Sands is employed by, and is the designated representative of Clark County School District, a local government employer.

3. The Clark County Classroom Teachers Association is a party to a collective bargaining agreement with the Clark County School District.

4. On the date of the alleged violation, Timothy Sands was employed by the Clark County School District as Principal of Harvey Dondero Elementary School.

5. Article 10 of the 1991-1993 Collective Bargaining Agreement provides for a Teachers Advisory Council, which is a committee established to serve as the official representative of faculty in dealing with concerns at a school.

6. Mr. Jose Sandoval was the Chairman of the Teacher Advisory Council at Harvey Dondero Elementary School on the date of the alleged violation.

7. Principal Sands had received complaints from teachers about the poor performance of the TAC and the performance of Mr. Sandoval as Chairman of TAC.

8. Principal Sands had a reasonable basis to believe that Mr. Sandoval intended to discuss rumors of Principal Sands' alleged affairs with staff members at a pending meeting of the Clark County School Board.

9. Mr. Sandoval was elusive and intentionally vague about whether he intended to voice these rumors at the School Board meeting.

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10. Principal Sands had a reasonable basis to fear damage to his career if rumors of immoral conduct were discussed at a School Board meeting.

11. Principal Sands sought legal advice to protect his reputation; that legal advice resulted in the February 1, 1993, letter from his attorney.

12. On February 2, 1993, Principal Sands hand delivered a letter to Mr. Sandoval which had been written by Sands' attorney. The letter expressed dissatisfaction with the performance of the TAC and with Mr. Sandoval's conduct as Chairman; it also warned Mr. Sandoval against making any defamatory comments about Principal Sands in public meetings.

13. Principal Sands gave Mr. Sandoval a "satisfactory" performance evaluation one month after the incident which is the subject of this complaint.

CONCLUSIONS OF LAW

1. The Nevada 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. The portion of the February 1,1993, letter warning Mr. Sandoval against making defamatory comments about Principal Sands in a public meeting did not violate NRS.288.270 (1)(a) or (c) because tortious conduct is not protected under the statute.

3. Principal Sands had a free speech right under State and Federal Constitutions to advise Mr. Sandoval against defaming him.

4. The portion of the February 1, 1993, letter criticizing the performance of the TAC and the performance of the TAC Chairman

did not violate NRS 288.270(1)(a) because Principal Sands did not act willfully; it did not violate NRS 288.270(1)(c) because the Complainant made no prima facie showing that Mr. Sandoval was discriminated against in his employment because of his membership in the TAC.

5. The Teacher Advisory Councils (TAC's) are comprised of members of the Association performing activities in furtherance of Association interests and thus are entitled to the protections of Chapter 288.

DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Association's Complaint is denied, without prejudice, with each side to bear its own costs and attorney's fees.

DATED this 11th day of October, 1993.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: Tamara Barengo
TAMARA BARENGO, Chairman

By: Susan L. Johnson
SUSAN L. JOHNSON, Vice Chairman

By: Salvatore C. Gugino
SALVATORE C. GUGINO, Member