

1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD
4

5 MATHEW C. BURKE,
6 Complainant,

7 vs.

8 CLARK COUNTY,
9 Respondent.

} ITEM NO. 654A
} CASE NO. A1-045900

10 For Complainant: Frank J. Cremen, Esq.
11 John R. Martin, Esq.

12 For Respondent: Yolanda T. Givens, Esq.
13 Clark County District Attorney's Office

14 **FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER**

15 On January 26, 2007, Mathew C. Burke ("Burke") filed a complaint with the Local
16 Government Employee-Management Relations Board ("Board") against Clark County
17 ("County"). Burke's allegations against the County were that he filed a grievance against the
18 County, and it denied the grievance solely on the basis that the recognized employee
19 organization did not present the grievance. The Service Employees International Union, Local
20 1107 ("SEIU") represents the bargaining unit applicable to Burke.

21 The County filed a motion to dismiss this matter, which was denied by the Board,
22 thereafter, an answer was filed by the County. The hearing in this matter was conducted on
23 December 17, 2007.

24 **Discussion of Testimony & Evidence Presented**

25 Burke was the first witness; and he testified he is a senior construction management
26 inspector for the County Public Works Department. Transcript of Hearing ("Tr."), p. 27. Burke
27 testified that he sent a grievance to Denis Cederburg (Hearing Exhibit ("Ex.") 1), indicating that
he "felt that [he] was working out of [his] classification because of some duties that division

1 manager had assigned" to him. Tr. p. 28. Cederburg denied the grievance (Ex. 2) claiming that
2 "[g]rievances can only be filed by the union when there is a dispute with the interpretation and/or
3 application of the Collective Bargaining Agreement." Because of the late response by
4 Cederburg, Burke had already filed his appeals (Ex. 3 and 4). Ray Visconti, Director of Human
5 Resources for the County, denied the appeals (Ex. 5) claiming the "claim was not grievable," that
6 the appeal was untimely, and that the Union must file any appeal. On December 25, 2006, Burke
7 sent additional correspondence to the County (Ex. 8), in which he claims that his "grievance is
8 NOT an issue of 'Contract Interpretation.' . . . My grievance has always been a simply matter of,
9 'the work I am being asked to perform is clearly outside the scope of my employment.'" (Emphasis in original.) He testified he is not an attorney and did not have the assistance of
10 counsel in drafting this letter. Tr. p. 37.

12 Burke stated he is not a member of the incumbent Union, i.e., SEIU; and indicated from
13 past experience that the "union is ineffective and would not properly represent" him. Tr. p. 55-6.
14 In response to a question from the Board, he described his complaint as follows:

15 The concern became whether they [the County] had the right at all to just
16 arbitrarily place duties on me which were clearly outside of my scope of
17 employment and what the extent of those were. . . . I felt they were exploiting me
as an individual. Tr. p. 57-8.

18 He further indicated to the Board that his supervisor indicated he was being insubordinate and
19 described the following about the impact on his job:

20 I don't know the exact date, but last month they completely reassigned my
21 duties, still quote/unquote within my current job title, senior construction
22 management inspector, but now I'm to be an office engineer, and I had to pull
23 tooth and nail to get a list of what was going to be required of me in that facet.
(Tr. p. 59.) . . . but it seriously puts into question whether my position with the
County is in jeopardy or not. (Tr. p. 60.)

24 Burke also indicated to the Board that he did not seek job reclassification as he felt he
25 would be demoted, i.e., "I would have gone backwards in pay. I was more skilled as an inspector
26 than as a computer programmer." Tr. p. 68.

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1 Upon cross-examination, Burke agreed that the Clark County Merit Personnel System has
2 a resolution process should an employee believe he is working outside the scope of his
3 employment. Tr. p. 47.

4 Ray Visconti was the second witness. He indicated he was the Deputy Director of
5 Human Resources for the County. Tr. p. 76. He testified that an employee may file a grievance
6 and not be a union member, but the grievance cannot pertain to an interpretation or application of
7 the parties' Collective Bargaining Agreement ("CBA"). Tr. p. 77. He claimed that Burke's
8 grievance "did not fall within the Collective Bargaining Agreement[*'s four corners*]." Tr. p. 82.
9 Visconti stated that the County is not concerned about employees not being union members. Tr.
10 p. 86. Visconti stated, pursuant to the CBA, Burke "could have written a letter to Mr. Cederburg
11 requesting a job audit if he thought he was working out of his current classification." Tr. p. 89.
12 Classification audits are described in the parties' CBA. Tr. p. 91.

13 Upon cross-examination, Visconti stated that should an employee feel the CBA is being
14 interpreted or applied incorrectly as to a specific employee, he would encourage that employee to
15 contact Mr. Hatcher of the Union. Tr. p. 93-4. He admitted that he did not advise Burke in the
16 December 13, 2006 correspondence to consider a classification audit pursuant to the Merit
17 Personnel System. Tr. p. 97.

18 A discussion ensued between Mr. Visconti and the Board concerning Article 11, Sec. 2,
19 of the parties' CBA, that the "Union, on behalf of an employee, who believes that the employee
20 has a grievance relating to the interpretation and application of the express terms of the
21 Agreement, OR issuance of discipline, shall reduce the grievance to writing and submit it to the
22 employee's department head within ten (10) working days of the employee's knowledge of the
23 contract violation." (Emphasis added.) Tr. p. 105-7. The Board also indicated that it was
24 "curious" as to why the County would only accept grievances from non-Union employees
25 pertaining to discipline, and discipline only, and whether that conflicted with NRS 288.140. Tr.
26 p. 108-9. As a matter of fact, Chairman Wilkerson indicated: "Because that's not what the statute
27 says. And the union cannot dictate to you or anyone else or to Mr. Burke . . . that unless it has to
do with discipline, you have no right to file a grievance because that's not what the statute says."

1 Tr. p. 109. Visconti informed the Board that no formal document exists that an employee would
2 not be demoted if a classification audit was performed. Tr. p. 112.

3 Denis Cederburg was the third witness. He is the Director of the County Public Works
4 Department. Tr. p. 124. He testified that upon receipt of Burke's grievance, he contacted Les
5 Henley and Richard Blut. Tr. p.126. As a matter of fact, Mr. Blut drafted the correspondence
6 identified as Ex. 2 for Cederburg's signature. Tr. p. 127. He stated that Burke should have
7 sought a classification audit (Tr. p. 128) and that Burke's job is not in jeopardy (Tr. p. 129). He
8 does not know, however, if Mr. Henley or Mr. Blut met personally with Burke. Tr. p. 130.

9 Barbara King was the next witness; and she is the County's Employee Relations
10 Manager. Tr. p. 131. Her duties include familiarity with the County's various CBAs and
11 indicated that complainants "don't necessarily have to be a union member, but the union must
12 represent them on a certain type of grievance." Tr. p. 132-33. Upon cross-examination, she
13 indicated similarly that an "employee must be represented by the union to file a Step 1 contract
14 interpretation grievance" but does not have to be so represented if the grievance pertains to
15 discipline. Tr. p. 149. She further elaborated that the Union owns a contract interpretation
16 grievance. Tr. p. 152.

17 The Board questioned Ms. King why did the County state the grievance was untimely if
18 the deemed the matter ungrieveable. She believed it was merely to set forth all possible defenses
19 for the County should the County need to defend its actions. Tr. p. 168-69. Upon direct
20 questioning by Chairman Wilkerson whether the CBA takes precedence over statute, Ms. King
21 could not provide a response. Tr. p. 173-75.

22 Marcus Hatcher was the last witness. He is SEIU's Director of Representation. Tr. p.
23 189. He testified that it is the Union's position that "individuals should not be able to pursue"
24 grievances pertaining to CBA interpretation and application. Tr. p. 191. He also indicated that
25 he had not heard of Burke until "today" (the day of the hearing). Tr. p. 199. He stated that he
26 did not see a difference in NRS 288.140 between discipline or CBA interpretation grievances,
27 but that the end result simply must not conflict with the terms of the CBA. Tr. p. 201.

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1 Upon cross-examination, Hatcher stated that an employee must go through the Union
2 even in disciplinary matters. Tr. p. 205. He indicated that the Union does represent employees
3 pertaining to "job classifications." Tr. p. 205-6. When questioned about whether the Union
4 would file a grievance "about someone working outside- -someone being required by the County
5 to do tasks that the individual employee and the union believe are not within his job title," he
6 replied that it was "a possibility, but [he] would need to have more details." Tr. p.207.

7 Rather than provide closing arguments, the parties submitted post-hearing briefs for the
8 Board to consider.

9 FINDINGS OF FACT

10 1. It is undisputed that Burke is a County employee and has been since 1994. As such,
11 Burke is a government employee as defined in NRS 288.050.

12 2. It is undisputed that the County is a local governmental employer as defined in NRS
13 288.060.

14 3. It is undisputed that SEIU is the recognized bargaining agent for the unit in which
15 Burke belongs and that a CBA exists between the parties (Ex. 10). Burke, however, is not a
16 member of SEIU.

17 4. Burke filed a grievance with Denis Cederburg on October 26, 2006 (Ex. 1), indicating
18 that the correspondence was "formal notice of a grievance" that he has been performing duties
19 not within his job classification.

20 5. On October 31, 2006, Denis Cederburg responded to Burke that "[g]rievances can
21 only be filed by the union when there is a dispute with the interpretation and/or application of the
22 Collective Bargaining Agreement" and denied the grievance. Burke did not receive this
23 correspondence until November 15, 2006. The County did not provide any proof to the contrary,
24 i.e., the receipt of delivery for the certified letter.

25 6. On November 14, 2006, Burke provided the County with his request for a Step 2
26 meeting (Ex. 3); and on December 6, 2006, demanded Step 3 arbitration (Ex. 4).

27 7. On December 13, 2006, the County notified Burke that his grievances were untimely.
3 (Ex. 5). However, the County provided no explanation whatsoever at the hearing when

1 questioned about why it did not respond to Burke's allegations that he had not timely received
2 any responses to his grievance requests. Based upon the County's late response, the Board finds
3 these requests to be timely.

4 8. The County's correspondence of December 13, 2006 (Ex. 5) also stated that Burke's
5 "claim was not grievable" and that "an individual employee does not have independent grievance
6 filing rights absent membership in, and representation by, the union."

7 9. In response to an email from Burke, the County claimed that it had previously allowed
8 employees to pursue disciplinary actions without union assistance; however, the County claimed
9 that Burke's issue is contact [sic] interpretation which we do not allow to proceed without the
10 union as the outcome may effect many employees." Ex. 7.

11 10. Burke testified credibly that he was fearful of requesting an audit of his classification
12 for fear that he would be demoted. The County claimed it had never demoted anyone after an
13 audit; however, the Merit Personnel System (Ex. 9, Sec. IV, Bate Stamp p. 18) allows the County
14 to demote an employee after an audit.

15 11. The parties' CBA (Ex. 10, Article 11) clearly and unambiguously states that a
16 "grievance is defined as a filed dispute between the Union, on behalf of an employee(s), and the
17 County **over the interpretation and/or application of the express terms of this Agreement**
18 **OR a dispute over the issuance of discipline as defined herein.**" (Emphasis added.)
19 Typically, by the use of the word "or," two separate phrases/instances are intended (e.g., (a) the
20 interpretation and/or application of the CBA **OR** (b) concerning discipline). Testimony by the
21 County concerning this Article appears contradictory to this Article's plain and unambiguous
22 language.

23 12. It is undisputed that the parties' CBA refers to the County Merit Personnel System.
24 See CBA (Ex. 10), Article 38(3). Similar to the Merit Personnel System, the CBA also includes
25 procedures/information regarding a classification audit. See CBA (Ex. 10), Article 41. Thus,
26 the Board finds the County's arguments that this matter is not within the "four corners" of the
27 CBA less than credible.

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1 13. The Board finds the applicable statute to be NRS 288.140(2), namely:

2 The recognition of an employee organization for negotiation, pursuant to
3 this chapter, does not preclude any local government employee who is not a
4 member of that employee organization from acting for himself with respect to
5 any condition of his employment, but any action taken on a request or in
6 adjustment of a grievance shall be consistent with the terms of an applicable
7 negotiated agreement, if any. (Emphasis added.)

8 14. The requirement to perform tasks not assigned to, or beyond, the employee's specific
9 classification is a "condition of [an employee's] employment." Pursuant to the parties' CBA, the
10 Board finds that Burke attempted to comply with the terms of the parties' collective bargaining
11 agreement and the Board further finds that the County refused the grievance in violation of NRS
12 288.140(2).

13 15. The Board further finds that this statute (NRS 288.140) has been in existence since
14 1969, without any changes thereto by the Legislature. Such silence by the Legislature indicates
15 acquiescence by the Legislature of the Board's interpretation of the same.

16 16. Furthermore, this Board finds the ruling in the Nevada Supreme Court case of Cone
17 v. Nev. Service Employees Union/SEIU Local 1107, 116 Nev. 473, 478, 998 P.2d 1178, 1181
18 (2000), as informative and controlling in this matter, when the Court indicated:

19 Further, with regard to statutory language, there is another Nevada statute,
20 NRS 288.140(2), that explicitly authorizes a nonunion member to act on his
21 own behalf "with respect to any condition of his employment." This statute
22 provides an individual with a right to forego union representation. (Emphasis
23 added.)

24 17. Should any finding of fact be more properly construed as a conclusion of law, may it
25 be so deemed.

26 CONCLUSIONS OF LAW

27 1. This Board has jurisdiction over the parties and the subject matters of the complaint
28 on file herein pursuant to the provisions of NRS chapter 288.

29 2. The County is local government employer as defined in NRS 288.060.

30 3. The Union (SEIU) is an employee organization as defined by NRS 288.040.

31 4. Burke is an employee of a local governmental employer as defined by NRS 288.050.

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1 5. Prohibited labor practices are defined in NRS 288.270; and Section 1 thereof states
2 that it is a prohibited labor practice for a local governmental employer to "interfere, restrain or
3 coerce any employee in the exercise of any right guaranteed under this chapter" and to
4 "discriminate against any employee" because of union involvement (or in this case, non-union
5 involvement). NRS 288.140(2) provides Burke, as an employee, the right to act for himself with
6 respect to any condition of his employment with the County.

7 6. Pursuant to NRS 288.110(2), the Board may hear and determine any complaint arising
8 out of the interpretation of or the performance under the provisions of NRS chapter 288.
9 Pursuant thereto, the Board noticed this matter for hearing.

10 7. The Board concludes that the County violated NRS 288.270(1) by interfering and
11 restraining Burke from acting for himself (i.e., filing and pursuing a grievance) pursuant to NRS
12 288.140(2) concerning a condition of his employment.

13 8. Should any conclusion be more properly construed as a finding of fact, may it be so
14 deemed.

15 DECISION AND ORDER

16 Based upon the above, the Board hereby orders as follows:

17 1. IT IS HEREBY ORDERED that the Board finds in favor of Burke and against Clark
18 County.

19 2. IT IS FURTHER ORDERED that:

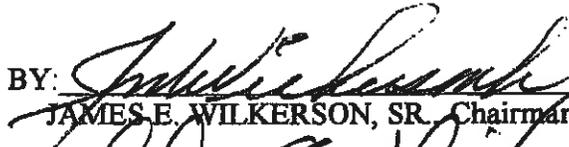
- 20 a. That the County shall rescind its ruling/denial of Burke's grievance,
21 b. That the County shall process Burke's grievance pursuant to the terms of the
22 parties' CBA as if it had been timely pursued by Burke.
23 c. That the County shall post a notice of its prohibited conduct in this matter on
24 all bulletin boards for communications with all County Personnel. The notice
25 to be posted shall be provided by this Board. The notice shall be posted for a
26 period of 90 days and the Board's Commissioner may inspect the facility to
27 determine whether the County is in compliance with this order.

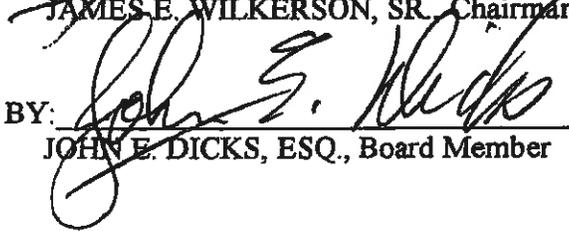
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1 d. That the County shall pay all attorney's fees and costs incurred by Burke's
2 private counsel in pursuing this matter. Burke is, therefore, ordered to submit
3 relevant billing invoices and other supporting documentation for his counsel's
4 fees, within twenty (20) days of the date of the instant order. The County has
5 ten (10) days thereafter to oppose such billings and reply authorities in
6 support of his request for fees and costs may be filed by Burke within ten (10)
7 days thereafter.

8 DATED this 3rd day of April, 2008.

9 LOCAL GOVERNMENT EMPLOYEE-
10 MANAGEMENT RELATIONS BOARD

11 BY: 
12 JAMES E. WILKERSON, SR., Chairman

13
14 BY: 
15 JOHN E. DICKS, ESQ., Board Member
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