

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

5 WASHOE EDUCATION SUPPORT
6 PROFESSIONALS,

7 Complainant,

8 vs.

9 WASHOE COUNTY SCHOOL DISTRICT,

10 Respondent.

11 AND

12 TEAMSTERS, LOCAL 533,

Amicus

) ITEM NO. 681A

) CASE NO. A1-045930

) **ORDER**

13 For Complainant:

Sandra G. Lawrence, Esq.
Dyer, Lawrence, Penrose, Flaherty & Donaldson

14 For Respondents:

Rick R. Hsu, Esq.
Maupin, Cox & LeGoy

15 For Amicus:

Michael Langton, Esq.

16 On the 10th of February, 2009, this matter came on for continued discussion,
17 deliberations, and decision by the Local Government Employee-Management Relations Board
18 (“Board”). Such matter was noticed pursuant to NRS and NAC chapters 288, NRS chapter
19 233B, and Nevada’s open meeting laws.
20

21 **Brief Procedural History of Present Litigation:**

22 On March 19, 2008, the Washoe Education Support Professionals (“Association”) filed a
23 Petition for Declaratory Order. The Washoe County School District (“School District”) filed its
24 response on April 11, 2008. On June 25, 2008, the Board entered an order noting that the issues
25 herein are important and “will have significant impact on local governmental employees,
26 employee organizations, and local governmental employers.” On or about July 3, 2008,
27 Teamsters Local 533 (“Teamsters 533”) filed its notice of intent to file an amicus brief.
28

1 Thereafter, the Association, the School District, and Teamsters 533 filed their briefs. The matter
2 was thereafter scheduled for hearing and the matter was heard on September 16, 2008.

3 Brief Procedural History of Prior Litigation:

4 The petition for declaratory ruling filed in this action resulted from two orders, one order
5 entered by this Board in the Washoe County School District versus Washoe Employees Support
6 Professionals and United We Stand (hereafter "Union"), Board Case No. A1-045880 (5-2-06)
7 (hereafter "Case #880"), and the order entered in United We Stand/AFT, et al., versus the
8 Washoe County School District and the Washoe Education Support Professionals, Board Case
9 No. A1-045888 (9-20-07) (hereafter "Case #888"). The issue in the cases pertained to
10 representation of employees not belonging to the currently recognized employee organization
11 during the grievance process.

12 In Case #880, the Board ruled that, in essence, an employee, who is not a member of the
13 incumbent employee organization, may choose another person or legal counsel to represent them
14 at any stage of the grievance or discipline process so long as it does not violate NRS chapter 288.
15 More specifically, the Board ruled:

16 IT IS HEREBY ORDERED that the Petition for Declaratory Order is granted as follows:

17 1. The Board finds that allowing only representatives of the current recognized
18 bargaining agent to represent a classified employee does not violate NRS 288.140 or
19 288.270.

20 2. The Board additionally finds that the decision by the District to allow
21 classified employees in the bargaining unit to choose another person or legal counsel to
22 represent them at any stage in the grievance, complaint or discipline process, including
23 arbitration, is permissible so long as it does not violate the intent of NRS 288.140 or
24 288.270.

25 In Case #888, the Board made the following findings:

26 8. If an employee belongs to the Association (i.e., the
27 incumbent employee organization), then such employee is committed
28 to have the incumbent employee organization represent him/her.

9. If an employee does not belong to the incumbent
employee organization, then such employee is allowed to have a
representative of his/her own choosing. (NRS 288.140(2) ". . . does
not preclude any local government employee who is not a member
of that employee organization from acting for himself . . .") This
would include the unfettered right to appoint someone to represent him/her.

Brief Discussion of Argument/Testimony Provided at Hearing:

Prior to the commencement of the hearing, the Board heard arguments concerning the

1 appropriateness of Teamsters Local 533 filing an amicus brief as well as indicating a desire to
2 participate in the arguments. The Board granted permission to Teamsters Local 533 to file an
3 amicus brief and to participate in the arguments. Other motions were made concerning whether
4 this matter was ripe, whether there is a justiciable controversy, and whether the affidavit of
5 Romero should be stricken. These matters were resolved informally between the parties, and the
6 motions concerning the issues were withdrawn at the hearing.

7 Arguments were allowed by the attorneys for both parties and the amicus, without the
8 formality of calling witnesses. The Association argued that the Board's orders may allow "dual
9 unionism occurring within the same bargaining unit, which is something that the Nevada
10 legislature when it adopted the Dodge Act initially considered, but later took out of what became
11 Chapter 288, and the various bills that show that are attached to my petition for declaratory
12 ruling" Transcript of 9-16-08 hearing ("Tr.") p. 25. In addition to the Cone v. Nev. Serv.
13 Employees Union, 116 Nev. 473, 998 P.2d 1178 (2000) case, the Association argues that the
14 recent Supreme Court decision involving the University Medical Center physicians is applicable.
15 Tr. p. 31. Counsel indicated that the Association believes:

16 [t]he plain language of NRS [288.140(2)] clearly limits a nonmember employee
17 from representing himself or by extension of the case law hiring counsel, but that's a
18 long way from interpreting that section to mean that there's this unfettered right of
19 that nonmember in the classified bargaining unit to have representatives from other
20 organizations that aren't recognized by that local government employer represent
them. . . . But we don't believe that that language in sub 2 under NRS 288.140 is
interpreted so broadly as to mean that a nonmember has a right to have another rival
organization represent him or her with regard to employment matters. Tr. p. 33-4.

21 In response to a question from the Board, counsel for the Association stated that in
22 certain circumstances, the parties' collective bargaining agreement ("CBA") may override
23 statutes. Tr. p. 35. The Association continued that if a nonmember employee sought information
24 from it, its position "is we don't have to represent them for purposes of the grievance other than
25 informing them of how they can go about filing a grievance or that they could retain an
26 attorney." Tr. p. 35. She continued, that the Association has interpreted the Cone decision to
27 "indicat[e] that a union doesn't have to expend its treasury on nonmembers; if they don't see the
28 sense of joining the union and providing support to the union that would allow it to do

1 representation, that the association doesn't have to represent specifically nonmembers in the
2 grievance process." Tr. p. 36. The Association also indicated that you "basically lose any
3 confidentiality that you might have with regard to the discipline of' a particular employee should
4 outside individuals become representatives, and that the nonmember employee can only pursue a
5 grievance "on his own or he has to hire legal counsel." Tr. p. 38. The Association also indicated
6 that it does not have a fee schedule in place should a nonmember seek representation by the
7 Association. Tr. p. 43.

8 In response to another Board member, the Association stated that the lack of clarity in the
9 previous orders is that NRS 288.140(2) does not "giv[e] a nonmember an unfettered right to have
10 someone represent him or her. So in my mind that lacks clarity with the plain meaning of what
11 that statute actually states." Tr. p. 46. In response to another Board member's question that
12 either the nonmember "join and get the representation, or if you're not a member, we don't care;
13 even if you're willing to pay us, we're just not representing you," to which the Association
14 replied that such "would be the position" of the Association. Tr. p. 49. The Association also
15 stated that the Cone court did not consider the specific facts as found in the instant matter, and
16 that a prior Board decision regarding Allen Asch v. Clark County School District, et al., Board
17 Case No. A1-045541, Item No. 314 (5-19-93), is more applicable. Tr. p. 49-50.

18 The Association also responded to the Board that it believes NRS 288.140(2) should be
19 strictly construed to mean the employee can only act for himself/herself, and under the Cone
20 case, can only hire an attorney to represent him/her - - not any other agent or counselor (e.g.,
21 clergyman). Tr. p. 56-9. The Association also believes that the School District is obligated to
22 inquire whether the representative is "affiliated with a union or employee organization." Tr. p.
23 65. Having a representative from a rival employee organization may be a "problem" for the
24 currently recognized organization, and such can create "confusion" among members and
25 concerning the true meaning of the parties' CBA. Tr. p. 68-70. The Association remarked that
26 by allowing representation by a rival organization, such can also be seen as the employer
27 "putting a stamp of approval on that rival union's representation." Tr. p. 70-1. This would
28 allegedly "undercut [the Association's] ability to try to gain people who are nonmembers"

1 Tr. p. 71. It was also pointed out that the NLRB has a code similar to the Board's NRS
2 288.140(2), i.e., 29 USC §159(a). Tr. p. 73.

3 The Association indicated that it would want to "sit in" on any employee grievance in
4 which a rival organization is involved. Tr. p. 79-80. The Association indicated that a union
5 officer, member of the grievance committee, or an organization specialist may represent their
6 members during the grievance process; and at the arbitration level, an attorney will be hired. Tr.
7 p. 88-90. Yet, the Association is interpreting NRS 288.140(2) to mean that the nonmember can
8 represent himself/herself, or hire an attorney, but cannot get a union officer, member of a
9 grievance committee, or organizational specialist from either the Association itself or from a
10 rival organization. Tr. p. 89-90. The Association's "position is that if [a representative
11 for the nonmember is] affiliated with that [rival] employee organization, then the [School]
12 District shouldn't allow that representation" Tr. p. 92.

13 When questioned about the ruling in Cone, i.e., a "union has the obligation to represent
14 all employees in the bargaining unit without regard to union membership, and the employee has
15 a corresponding obligation if permissible under the CBA and required by union policy to share in
16 defraying the costs," the Association stated that its obligation towards all employees is the
17 "negotiation of the collective bargaining agreement" rather than representation during the
18 grievance process. Tr. p. 94.

19 The School District expressed its concern over this matter because of increased "labor
20 fees. We were interested in having a bright-line rule that will be clear enough so that we will not
21 be subject to any further [Board] litigation, something clear that we can point to that is not going
22 to need further meetings and gatherings." Tr. p. 104. The School District stated that it is not its
23 role to "ask whether or not [an employee is] a member or a nonmember" and that such is
24 prohibited by NRS 288.140(1). Tr. p. 105. He indicated that there is a limited time period in
25 which an employee can "drop" his/her union membership; and that may present a problem if the
26 drop time has expired and the employee simply does not want representation by the incumbent
27 organization. Tr. p. 106. After one of the earlier cases, the School District felt the bright-line rule
28 to be if it knew the representatives were from a rival organization, they would not allow the

1 representation, but would allow representation by an attorney. Tr. p. 107. The School District
2 feels it is discriminatory to ask the employees whether they are dues-paying members as the
3 nonmember employees have more representation choices than the member employees. Tr. p.
4 111-12. The School District did not take a position on the meaning of the word "counsel" in the
5 Cone decision. Tr. p. 114-15.

6 The School District has previously allowed employees to bring non-union representatives
7 with them during the grievance process. Tr. p. 115-16. Unless the grievance is filed by the
8 Association, the School District does not ask if the employee is bringing a representative or who
9 that representative is until the day of the meeting or hearing. Tr. p. 123. If a member of the rival
10 organization appeared with the employee, the School District would inform the employee to find
11 other representation and the hearing or meeting would be rescheduled. Tr. p. 124.

12 Teamsters Local 533, as an amicus, stated that an employee organization should tell an
13 employee that they have the "right to have anybody they want" to represent them, and if they are
14 a member and do not want the incumbent organization, they should "sign a release" indicating
15 the same. Tr. p. 128. It was also argued that it is "really important to balance the rights of not
16 only the individual versus the association, but also the individual rights of members versus
17 nonmembers." Tr. p. 129. However, Teamsters Local 533 warned too liberal of a statutory
18 construction of NRS 288.140(2) may result in absurd consequences such as a nonmember acting
19 on his own behalf sitting at the negotiation table, i.e., acting for himself with respect to any
20 condition of employment. Tr. p. 133. With reference to the Cone case, it was pointed out that
21 the word "legal" did not appear before counsel, and the word "counsel" has a "broader meaning
22 than [just] an attorney." Tr. p. 134. The attorney for Teamsters Local 533 stated that an
23 employee's representative should not have on the rival organization's jacket or emblems, and
24 that representative "should [not try] to subvert the provisions of the contract. They should be
25 there to be the representative." Tr. p. 138.

26 Findings of Fact

27 1. The Board finds that the Association chose not to have a fee schedule for the
28 representation of nonmembers, and indicated that it would not represent such nonmembers. The

1 Association is, however, the recognized exclusive bargaining agent for the employees of the
2 School District.

3 2. The Board finds that the Association provides minimal information to nonmembers
4 regarding grievance procedures; however, pursuant to statutes, regulations, and the decision in
5 Cone, representation is due to all employees within the bargaining unit, **whether or not a**
6 **member.**

7 3. The Board finds that the term "counsel" as used in the Cone case is broader than the
8 interpretation of "an attorney" and finds that if the Supreme Court meant for the term to be
9 limited to "legal counsel" then it would have indicated the same. Thus, a broader definition of
10 "counsel" appears to be implied by the Supreme Court.

11 4. The Board finds that should an employee be a member of the recognized employee
12 organization, then such an employee is to be exclusively represented by that recognized
13 employee organization.

14 5. The Board finds that NRS 288.140 allows an employee to not join an employee
15 organization and provides the right for that nonmember employee to represent himself with
16 respect to the grievance process or choose a representative to so represent him/her. The Board
17 notes that not all representatives are licensed attorneys, even though such representative may
18 serve as "counsel" to the nonmember employee.

19 6. The Board finds that the orders entered in Case No. 880 and Case No. 888 were not
20 ambiguous and did not need clarification.

21 7. The Board finds that legislative history, at times, is sparse; however, it would present
22 an incomplete picture of the legislation if the opinions/remarks of only one legislator is reviewed
23 and considered. Furthermore, there is no need to resort to legislative history if the statute at issue
24 is plain and unambiguous, as in the present case.

25 8. The Board finds that the Association's duties toward nonmember employees extend
26 beyond the negotiation of a collective bargaining agreement **and includes representation of**
27 **that nonmember employee during the grievance process.**

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1 9. Should any finding be deemed more appropriate as a conclusion of law, may it be so
2 construed.

3 Conclusions of Law

4 1. This Board has jurisdiction over the parties and the subject matters of the Petition on
5 file herein pursuant to the provisions of NRS and NAC Chapters 288.

6 2. The Association and Teamsters 533 are employee organizations, with the Association
7 serving as the exclusive bargaining agent for certain employees of the School District, as defined
8 in NRS 288.027 and NRS 288.040.

9 3. The School District is a local governmental employer pursuant to NRS 288.060.

10 4. Pursuant to NRS 288.110(2), the Board may hear and determine any complaint arising
11 out of the interpretation of, or performance under, the provisions of this chapter by any local
12 government employer, local government employee or employee organization. The Board shall
13 conduct a hearing within 90 days after it decides to hear a complaint. The Board, after a hearing,
14 if it finds that the complaint is well taken, may order any person to refrain from the action
15 complained of or to restore to the party aggrieved any benefit of which he has been deprived by
16 that action. The Board shall issue its decision within 120 days after the hearing on the complaint
17 is completed. Pursuant to NRS 288.110(6), the Board may award reasonable costs, which may
18 include attorneys' fees, to the prevailing party.

19 5. Applicable regulations to the present case include NAC 288.380 (Petition for
20 declaratory order), NAC 288.390 (Response to petition for declaratory order), NAC 288.400
21 (Request for hearing), and NAC 288.410 (Consideration by Board).

22 6. NRS 288.140 states, in part:

23 1. It is the right of every local government employee, subject to the
24 limitation provided in subsection 3, to join any employee organization of his
25 choice or to refrain from joining any employee organization. A local
26 government employer shall not discriminate in any way among its employees on
27 account of membership or nonmembership in an employee organization.

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

1 7. NRS 288.027 defines “bargaining agent” as an employee organization recognized by
2 the local government employer as the exclusive representative of all local government employees
3 in the bargaining unit for purposes of collective bargaining. It is undeniable that the Association
4 is the exclusive bargaining agent for the employees of the School District at issue in this matter.

5 8. NRS 288.067 defines “recognition” as the formal acknowledgment by the local
6 government employer that a particular employee organization has the right to represent the local
7 government employees within a particular bargaining unit. It is undeniable that the Association
8 is recognized as the employee organization with the ultimate right to represent the local
9 governmental employees at issue herein, including the employees who are nonmembers of the
10 Association.

11 9. The Association cannot refuse to represent nonmembers as if it is the “exclusive
12 representative of all local government employees in the bargaining unit” as set forth in the
13 statutes mentioned in these Conclusions of Law. The Association, however, can charge the
14 nonmember a reasonable fee for his/her representation in a grievance filed pursuant to the terms
15 of the applicable collective bargaining agreement.

16 10. The School District, as the employer, cannot discriminate between members and
17 nonmembers of an employee organization as set forth in the statutes mentioned in these
18 Conclusions of Law.

19 11. The Board concludes that the Supreme Court in Cone did not intend to limit the
20 representation of the employee to himself/herself and/or an attorney, and that by using the word
21 “counsel” rather than “legal counsel” intended to imply a broader category of representatives.
22 Testimony was provided at the hearing that the Association does not even use legal counsel until
23 grievances have reached the arbitration level and it would be discriminatory to nonmembers to
24 require them to hire attorneys at earlier stages of the grievance process.

25 12. The Board concludes that the Supreme Court in Cone intended for the recognized
26 employee organization to be the exclusive bargaining agent for the employees in the specific
27 bargaining unit and that the employee organization owes a duty of representation to all
28 employees in the bargaining unit, whether members or not.

1 13. Pursuant to case law, stare decisis does not apply in administrative law; and this
2 Board is not bound by its prior decision in Asch.

3 14. The Board concludes that NRS 288.140(2) plainly and unambiguously allows an
4 employee, who is not a member of the incumbent employee organization, to act for himself and
5 that statute does not preclude that employee from designating legal counsel to represent him,
6 including legal counsel.

7 15. The Board concludes that the Cone case provides an employee the option to appoint
8 "counsel" to represent him and that the word "counsel" is interpreted more liberally than merely
9 meaning "legal counsel." Based thereon, the nonmember employee may appoint a representative
10 for himself who is not "legal counsel" but is simply "counsel" to that employee. Any such
11 representation, however, shall be "consistent with the terms of an applicable negotiated
12 agreement" pursuant to NRS 288.140(2). To monitor the compliance with the applicable CBA
13 and the provisions of NRS chapter 288, a representative from the incumbent, recognized
14 employee association may appear at any meeting or hearing regarding "any action taken on a
15 request or in adjustment of a grievance." NRS 288.140(2).

16 16. An employer would violate NRS 288.140 if it did not allow the employee or his
17 representative to grieve "any condition of [the employee's] employment." However, a local
18 government employer, such as a School District, cannot ask a representative regarding his
19 professional association and/or occupation. It is not the local government employer's duty or
20 obligation to inquire into a representative's background or association, but it has a duty and/or
21 obligation to scrutinize the representative's conduct during any meeting and/or hearing to assure
22 that such representation does not transgress into a prohibited labor practice.

23 17. A representative being from a rival employee organization is not an appropriate
24 ground or reason to exclude that representative from participating as counsel for the nonmember
25 employee, so long as that representative does not attempt to promote the rival organization
26 through the use of clothing, emblems, symbols, insignia, etc., during the course of representation.
27 This decision, however, in no way prevents the local government employer from scrutinizing

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1 inappropriate or unauthorized conduct of a rival employee organization or its representative
2 during any representation of a nonmember employee.

3 18. Pursuant to NRS chapter 288, the incumbent employee organization's obligations as
4 that bargaining unit employees' "exclusive bargaining agent" are more expansive than simply
5 negotiating a collective bargaining agreement.

6 19. Should any conclusion of law be deemed more appropriate a finding of fact, may it
7 be so deemed.

8 ORDER

9 BASED upon the above, and as found and concluded herein, a declaratory order is
10 HEREBY ISSUED that a nonmember employee can appoint any representative, or "counsel,"
11 pursuant to NRS and NAC chapters 288 to represent him/her concerning "any condition of his
12 employment, but any action taken on a request or in adjustment of a grievance shall be
13 consistent with the terms" of the parties' collective bargaining agreement, if any. NRS
14 288.140(2).

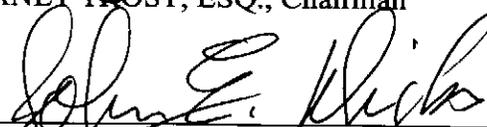
15 IT IS FURTHER ORDERED that each party shall bear their own fees and costs incurred
16 in this declaratory relief action.

17 DATED this 10th day of February, 2009

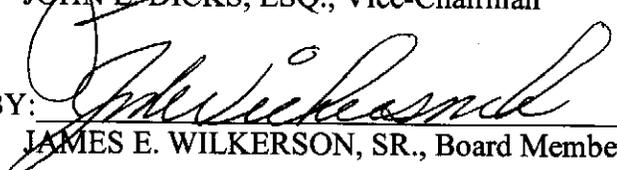
18 LOCAL GOVERNMENT EMPLOYEE-
19 MANAGEMENT RELATIONS BOARD

20 BY: 
21 _____

JANET TROST, ESQ., Chairman

22 BY: 
23 _____

JOHN E. DICKS, ESQ., Vice-Chairman

24 BY: 
25 _____

JAMES E. WILKERSON, SR., Board Member