

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

5 JERRY MANN,

6 Complainant,

7 vs.

8 CLARK COUNTY SCHOOL DISTRICT;
9 CLARK COUNTY EDUCATION
10 ASSOCIATION; NEVADA STATE
11 EDUCATION ASSOCIATION; DOES I-V,
12 inclusive; and ROE CORPORATIONS I-V,
13 inclusive,

14 Respondent.

ITEM NO. 721A

CASE NO. A1-045969

ORDER

15 For Complainant: Amberlea Davis, Esq.

16 For Respondents: C.W. Hoffman, Jr., Esq.
Clark County School District

17 Sandra G. Lawrence, Esq.
Dyer, Lawrence, Penrose, Flaherty, Donaldson, & Prunty
For Clark County Education Association and Nevada State
Education Association

18 On the 17th day of February, 2010, this matter came on before the State of Nevada, Local
19 Government Employee-Management Relations Board ("Board"), for consideration and decision
20 pursuant to the provisions of NRS and NAC chapters 288, NRS chapter 233B, and was properly
21 noticed pursuant to Nevada's open meeting laws.

22 Complainant Jerry Mann filed his prohibited practices complaint with this Board on
23 December 1, 2009. After filing the complaint, Respondents Clark County Education Association
24 and Nevada State Education Association (the "Association") filed a motion to dismiss the
25 complaint.

26 Mann's complaint asserts two claims against the Association. Each alleges a breach of
27 the duty of fair representation. First, the complaint asserts that the unions failed to timely request
28 an arbitration hearing within ten days of Mann's dismissal, an obligation that is established under

1 the terms of the collective bargaining agreement. (Complaint ¶ 40). The complaint also asserts a
2 claim for a breach of the duty of fair representation by asserting inadequate representation at an
3 arbitration which presented Mann's grievance against his employer, the Clark County School
4 District. (Complaint ¶ 41). These claims arise under the Employee-Management Relations Act,
5 and are proper before this Board. *Weiner v. Beatty*, 121 Nev. 243, 116 P.3d 829 (2005).

6 The Association's motion to dismiss is based upon the timeliness of Mann's complaint.
7 NRS 288.110(4) states that that "[t]he Board may not consider any complaint or appeal filed
8 more than 6 months after the occurrence which is the subject of the complaint or appeal." The
9 Association asserts that any claims filed prior to the arbitration proceeding are barred as untimely
10 because they could not have occurred prior to March 31, 2009, when the arbitration took place.
11 The complaint was filed more than 6 months beyond that date on December 1, 2009. As to the
12 inadequate representation claim, the Associations assert that these claims accrued on March 31,
13 2009, or alternatively on May 20, 2009 when the arbitrator issued her decision.

14 As to Mann's claim that the Association did not timely request an arbitration hearing, we
15 hold that this issue is non-justiciable. Because this claim is non-justiciable, we need not
16 determine if it is timely filed. This Board's authority to order relief is limited to "restoring to the
17 party aggrieved any benefit of which he has been deprived by that action." NRS 288.110(2).
18 Mann's allegation is that the Association failed to timely request arbitration following his
19 suspension. Yet the Association still brought Mann's claims against the District to arbitration.
20 Even if Mann is factually correct that the Association was remiss in timely requesting arbitration,
21 he was not deprived of any benefit due to the Association's inaction, and the Board could not
22 grant relief to Mann on this claim. Because this is a non-justiciable claim, it is immaterial
23 whether or not such a claim is subject to tolling.

24 Mann's second claim against the Association is that it breached the duty of fair
25 representation by purposely providing Mann with inadequate representation at the arbitration
26 proceeding. The District asserts that this claim is time-barred because the arbitration hearing
27 was conducted on March 31, 2009, and the arbitrator issued her decision on May 20, 2009.
28 Mann's complaint was filed with this Board on December 1, 2009.

1 When considering statute of limitations questions, we first look to the Nevada Supreme
2 Court for guidance. Although the Nevada Supreme Court has not directly addressed the issue of
3 accrual of a claim for breach of fair representation under NRS 288.110(4), it has held that in
4 similar situations a claim for legal malpractice due to inadequate representation in litigation will
5 not accrue until the dismissal of the contested matter. *Kopicko v. Young*, 114 Nev. 1333, 971
6 P.2d 789 (1998). Federal decisions applying the National Labor Relations Act also hold that the
7 claim for an unfair labor practice against a union based upon inadequate representation at an
8 arbitration hearing does not accrue until actual dismissal of the action. *Galindo v. Stoodly Co.*,
9 793 F.2d 1502 (9th Cir. 1986).

10 The limitations period under NRS 288.110(4) is triggered when a complainant has reason
11 to believe that an unfair labor practice has occurred. *Cone v. SEIU*, 116 Nev. 473, 477, 998 P.2d
12 1178, 1181 n.2 (2000). The Ninth Circuit in *Galindo* noted that “[w]here a duty of fair
13 representation suit seeks to overturn an unfavorable arbitration award on the ground that the
14 union committed errors in the arbitration proceedings, the claim accrues when the employee
15 learns of the arbitrator's award.” *Galindo* at 1509. Thus, the limitations question in this case is
16 dependant upon when Mann learned of the arbitrator’s decision to dismiss his claim. Mann’s
17 complaint would be time-barred if he learned of the arbitrator’s decision more than six months
18 prior to filing his complaint on December 1, 2009.

19 The burden to demonstrate that a claim is time-barred rests with the Respondent. *A&L*
20 *Underground and Plumbers Local # 8*, 302 N.L.R.B. 467, 469 (1991). Generally, the question of
21 when a party discovers, or has reason to discover, a cause of action presents a question of fact.
22 *Millspaugh v. Millspaugh*, 96 Nev. 446, 611 P.2d 201 (1980).

23 In this case, the parties have presented conflicting testimony on the question of when
24 Mann first became aware of the arbitrator’s decision. The Association asserts that Mann became
25 aware of the arbitrator’s decision on May 29, 2009. The Association has included an affidavit
26 from Paul Cotsonis, Esq. stating that he spoke with Mann on May 29, 2009, advising him of the
27 arbitrator’s decision, as well as redacted billing records indicating a telephone call “with member
28 regarding negative arbitration award.” Mann however, asserts that he first learned of the

1 negative arbitration decision on June 4, 2009. Mann has provided a copy of a letter dated June 4,
2 2009 from Mr. Cotsonis that references the negative arbitration award and refers to a telephone
3 conversation from that same day.

4 This conflicting evidence creates a question of fact sufficient to defeat the Association's
5 motion at this stage of the proceedings.

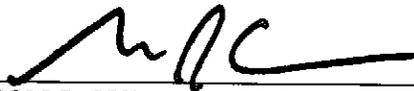
6 Based upon the foregoing, and good cause appearing therefore:

7 IT IS HEREBY ORDERED that Respondents' motion to dismiss is Granted in part as to
8 Mann's claim that the Association did not timely request arbitration; and

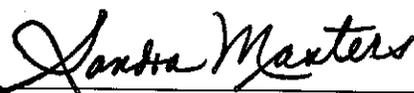
9 It is further ordered that Respondents' Motion to dismiss is Denied without prejudice in
10 part, as to Mann's claims of inadequate representation before the arbitrator, as there is a question
11 of fact as to when Mann actually became aware of the arbitrator's dismissal.

12 DATED this 24th day of February, 2010.

13 LOCAL GOVERNMENT EMPLOYEE-
14 MANAGEMENT RELATIONS BOARD

15 BY: 
16 SEATON J. CURRAN, ESQ., Chairman

17 BY: 
18 JAMES E. WILKERSON, SR., Vice-Chairman

19 BY: 
20 SANDRA MASTERS, Board Member

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LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
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inclusive,

Respondent.

CASE NO. A1-045969

NOTICE OF ENTRY OF ORDER

To: Amberlea Davis, Esq.

To: C.W. Hoffman, Jr., Esq.
Clark County School District

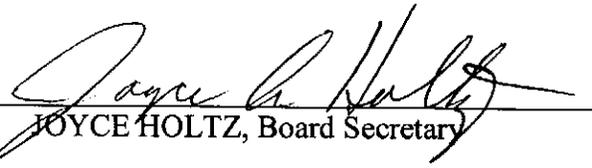
To: Sandra G. Lawrence, Esq.
Dyer, Lawrence, Penrose, Flaherty, Donaldson, & Prunty
For Clark County Education Association and Nevada State
Education Association

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on
February 24, 2010.

A copy of said order is attached hereto.

DATED this 24th day of February, 2010.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY 
JOYCE HOLTZ, Board Secretary

