

FILED

DEC 17 2015

STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 1908

Complainant,

vs.

COUNTY OF CLARK, CLARK COUNTY
FIRE DEPARTMENT,

Respondent.

CASE NO. A1-046120

ORDER

ITEM NO. 811

On the 9th day of December, 2015, this matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Local Government Employee-Management Relations Act ("the Act"), NRS Chapter 288.

Complainant International Association of Firefighters, Local 1908 ("IAFF") and Respondent Clark County are parties to a collective bargaining agreement that covers a bargaining unit of firefighter employees; specifically the employee classes that are represented by IAFF are those listed in Appendix A of the agreement, which was introduced into evidence at the hearing. The position of EMS Coordinator is included within the bargaining unit. At the hearing, the parties stipulated that EMS Coordinator has been a bargaining unit position since approximately 1992. The EMS Coordinator position is a highly coveted position in terms of the assigned job duties and pay, as well as providing a stepping stone for employees to advance to higher positions within the Department.

On or about December 9, 2013, the County placed an employee named Troy Tuke into an EMS Coordinator position. Prior to this time there had only been a single EMS Coordinator. In order to place Mr. Tuke into an EMS Coordinator position the County created a second EMS Coordinator position. Mr. Tuke's placement into this second EMS Coordinator position

1 alarmed IAFF because it was not the result of a promotion of a bargaining unit employee
2 through a competitive application process and hence the employees represented by IAFF were
3 not able to compete for appointment into this second EMS Coordinator position. Instead, the
4 County placed Mr. Tuke into this position by demoting him from his prior position of Assistant
5 Fire Chief.¹ Assistant Fire Chiefs are considered management and are not part of the IAFF-
6 represented bargaining unit. In essence the County handed the coveted EMS Coordinator
7 position to an employee outside of the IAFF-represented bargaining unit.

8 In this case, we consider whether the County committed a prohibited labor practice
9 when it placed Mr. Tuke into the EMS Coordinator position. There are two components to this
10 question: (1) whether the Act forbids the County from placing non-bargaining unit employees
11 into bargaining unit positions without at least negotiating the matter with IAFF; and (2) whether
12 the manner in which the County did so in the particular case of Mr. Tuke was in violation of the
13 Act.

14 Appointment of a Non-Bargaining Unit Employee as EMS Coordinator

15 IAFF is understandably concerned with protecting the promotional opportunities for the
16 employees it represents. IAFF points out that under the County's merit personnel system, a
17 competitive process is generally required before the County may appoint an employee to a
18 position, and IAFF points specifically to Clark County Ordinance 2.04.050. In response, the
19 County claims that NRS 245.216 permits it to exempt a small percentage of employees from the
20 competitive service and that its appointment of Tuke without allowing for a competitive
21 application process was lawful. IAFF contends that any rights the County may hold under NRS
22 245.216 cannot encroach upon its bargaining obligations mandated by the Act, pointing to NRS
23 245.215(3).

24 While IAFF is correct to argue that the County cannot invoke NRS 245 in order to
25 encroach upon the bargaining obligations of the Act, we see no such encroachment in this case.
26 Nor would we expect to see encroachment upon bargaining obligations in most instances, as the
27

28 ¹ Prior to serving as an Assistant Fire Chief, Mr. Tuke had been the EMS Coordinator from June
30, 2008 to July 10, 2010.

1 appointment process under a merit personnel system does not, in concept, intersect with the
2 bargaining obligations imposed by the Act. The decision of whom to hire or appoint to a
3 particular position is a recognized management right under the Act. NRS 288.150(3)(a). The
4 scope of the management rights recognized in this subsection includes the issue of promotional
5 requirements. City of Sparks v. International Assoc. of Firefighters, Local 1265, Item No. 103,
6 EMRB Case No. A1-045332 (Sept. 15, 1980). Further, the evidence at the hearing did not
7 establish that EMS Coordinator appointments are significantly related to an enumerated
8 mandatory subject of bargaining. The Act provides that those subjects that are recognized
9 management rights are "not within the scope of mandatory bargaining." NRS 288.150(3). The
10 County and IAFF may of course still discuss the issue of employee appointments, but as the
11 issue is outside the scope of mandatory bargaining NRS 288.150(6) holds that the County "is
12 not required to negotiate" the matter with IAFF. Since there is no obligation to negotiate over
13 the issue of employee appointments, the good-faith bargaining requirements of NRS 228.150(1)
14 and NRS 288.270(1)(e) do not attach to the issue of employee appointments.

15 Under the statutory system worked out by the legislature, a county's hiring and
16 appointment decisions are largely outside the scope of the Act,² and are instead governed by a
17 merit personnel system that is required by NRS 245.213-.216 and is worked out in detail in the
18 County's ordinances. IAFF argues that the merit personnel system itself should have opened
19 this appointment to the competitive process. However, it is not within our purview to determine
20 whether or not the appointment of Tuke complied with the County's merit personnel system.
21 This Board's authority is limited to matters arising under interpretation of, or performance
22 under, the Act. NRS 288.110(2). Whether the appointment of Tuke complied with the
23 County's merit personnel system raises a separate question that does not concern the
24 interpretation of or performance under the Act and lies beyond our authority to address. It is
25 sufficient for our purposes to conclude that the County was not obligated under the Act to
26 negotiate with IAFF over the decision to place Tuke into the second EMS Coordinator position.

27
28 ² This decision should not be construed as exempting a county's hiring decisions from the anti-
discrimination provisions of NRS 288.270.

1 IAFF also contends that there is an established past practice of promoting bargaining unit
2 employees into the position of EMS Coordinator. Under the past practice theory, the contours of
3 a term of employment may be established apart from the terms of a collective bargaining
4 agreement by an employer's established pattern of conduct. City of Reno v. Reno Police
5 Protective Assoc., 118 Nev. 889, 900, 59 P.3d 1212, 1219-1220 (2002). A pattern of past
6 practice can evidence specific terms of employment, but a past practice cannot convert a non-
7 mandatory subject of bargaining into one that is mandatory. The touchstone of the scope of
8 mandatory bargaining is the enumerated list codified at NRS 288.150(2). As stated above, the
9 decision to appoint Tuke to an EMS Coordinator position was a management right within the
10 prerogative of the County. NRS 288.150(3)(a).

11 The Manner of the County's Appointment

12 While the Act does not generally inhibit the County's authority to decide whom to hire
13 or whom to appoint into a bargaining unit position, the Act does not allow the County to do so
14 in a way that creates employee rights or obligations that differ with a negotiated agreement. It is
15 a bedrock principle of the Act that a bargaining agent and an employer will negotiate to jointly
16 establish the terms and conditions of employment affecting any position within the represented
17 bargaining unit. NRS 288.150(1); NRS 288.270(1)(e). When appointing an employee to a
18 bargaining unit position an employer cannot unilaterally create or alter the negotiated terms of
19 employment affecting an employee in that position, regardless of whether an employee is
20 "exempt-appointed" under NRS 245.216(3). NRS 245.215(3); NRS 288.150(1). There is no
21 middle ground under the Act that allows an employer to treat an employee in a bargaining unit
22 position as only partially or selectively covered by a collective bargaining agreement. Yet the
23 evidence at the hearing indicates that this is how the County's Fire Department has treated
24 Tuke.

25 There is no dispute that EMS Coordinator is a position included within the represented
26 bargaining unit. When Tuke was appointed to this bargaining unit position, his terms of
27 employment became those contained in the applicable collective bargaining agreement.

28 ///

1 At the hearing, the Board heard evidence that the County's Fire Department persists in
2 treating Tuke differently than the other EMS Coordinator, specifically in regards to seniority,
3 longevity and the applicability of the grievance procedures. Unlike the decision to appoint Tuke
4 as EMS Coordinator, these topics do concern mandatory subjects of bargaining. NRS
5 288.150(2)(a); (2)(o); (2)(v). The evidence also showed that the County did not negotiate with
6 IAFF for the ability to treat Tuke differently than other bargaining unit members and the
7 continuing impact of the County's actions on these multiple issues evidences an actual change
8 in policy towards the second EMS Coordinator position. Pursuant to NRS 288.150(1) and NRS
9 288.270(1)(e) the County's Fire Department may not unilaterally apply different standards to
10 Tuke than to the other members of the bargaining unit. In this aspect the County Fire
11 Department's actions were an unlawful unilateral change in violation of NRS 288.270(1)(e).

12 Initially, the Complaint in this matter alleged a claim of direct dealing by the County
13 when it secured an exempt status letter from Tuke upon his appointment as an EMS
14 Coordinator. That exempt status letter indicated that Tuke would be an at-will employee
15 governed by County Personnel Policies rather than the collective bargaining agreement. The
16 County has since stipulated that this action was a prohibited labor practice and as a result the
17 parties agreed to narrow the issues and remove the direct dealing allegations. The County also
18 indicated that it is still contemplating what actions it will take to address Tuke's status. The Act
19 compels only one course of action: Tuke occupies a bargaining unit position, and the County
20 must treat Tuke no differently than any other member of the bargaining unit.

21 NRS 288.110(2) provides that this Board may remedy a prohibited labor practice by
22 ordering a party to refrain from the unlawful action. The Board will order the County to refrain
23 from treating Tuke in a manner inconsistent with the negotiated terms of the collective
24 bargaining agreement, including as to Tuke's seniority, longevity, and the applicability of the
25 agreement's grievance procedures.

26 Finally, we do not find that the appointment of Tuke was a reclassification of the EMS
27 Coordinator position. The method used to classify employees is a mandatory subject of
28 bargaining. NRS 288.150(2)(k). Under this subsection an employer cannot unilaterally assign

1 new job duties to a position that alter the nature of a job classification. International Association
2 of Firefighters, Local 731 v. City of Reno, Item No. 370; Case No. A1-045573 (March 14,
3 1996). The evidence did show that many of the duties that Tuke performed as an Assistant
4 Chief followed him to the position of EMS Coordinator, but this in and of itself does not
5 establish that a reclassification occurred. The County asserts that there was already an overlap
6 between some of the job duties of Assistant Chief and EMS Coordinator, such that some duties
7 could be performed either by an EMS Coordinator or an Assistant Chief, and that the duties that
8 followed Tuke to the EMS Coordinator position are within this category. The County's position
9 is supported by the evidence. The Board received evidence of the pre-existing job description
10 for EMS Coordinator. We credit the testimony of Chief Klassen to the effect that those duties
11 which did follow Tuke from his position as Assistant Chief, and that he now performs as an
12 EMS Coordinator, are within the scope of the pre-existing job description of EMS Coordinator.
13 Accordingly, the evidence does not show that a reclassification of the EMS Coordinator
14 position occurred in this case.

15 Based upon the foregoing, the Board finds and concludes as follows:

16 FINDINGS OF FACT

17 1. IAFF is the bargaining agent for a bargaining unit of firefighter employees in
18 Clark County. The position of EMS Coordinator is within the bargaining unit represented by
19 IAFF.

20 2. Prior to December 9, 2013, there was only one EMS Coordinator position in the
21 bargaining unit.

22 3. On or about December 9, 2013, the County created a second EMS Coordinator
23 position and appointed an employee name Troy Tuke to the second EMS Coordinator position.

24 4. The County did not utilize a competitive process that would have allowed the
25 employees represented by IAFF to compete for appointment to the second EMS Coordinator
26 position.

27 5. Prior to appointment as EMS Coordinator, Tuke had been an Assistant Fire
28 Chief, a position that is not part of the bargaining unit represented by IAFF.

1 6. Upon appointment to the EMS Coordinator position, the County has treated Tuke
2 differently than other members of the bargaining unit on matters concerning seniority,
3 longevity, and the applicability of the grievance procedure.

4 7. If any of the foregoing findings is more appropriately construed a conclusion of
5 law, it may be so construed

6 CONCLUSIONS OF LAW

7 1. The Board has exclusive jurisdiction over the statutory prohibited labor practices
8 defined in NRS 288.270.

9 2. The good-faith bargaining obligations of NRS 288.270(1)(e) prevent an
10 employer from unilaterally changing the terms of employment that affect a mandatory subject
11 of bargaining.

12 3. Pursuant to NRS 288.150(3)(a) the County has a management right to decide
13 whom to hire or appoint to any position.

14 4. Promotional requirements and appointment requirements are not a mandatory
15 subject of bargaining under the Act.

16 5. The County was not obligated to negotiate the appointment of Tuke to the
17 position of EMS Coordinator.

18 6. The Board lacks authority to decide whether the County's merit personnel
19 system required a competitive appointment process in this case.

20 7. Seniority, longevity and the grievance procedure are each mandatory subjects of
21 bargaining.

22 8. The County unilaterally changed the seniority, longevity and grievance
23 procedure affecting the second EMS Coordinator position when it indicated that Tuke's rights
24 on these issues were incongruent with the negotiated terms of the collective bargaining
25 agreement.

26 9. The County's actions violated NRS 288.150(1) and NRS 288.270(1)(e).

27 10. The complaint in this matter is well-taken.

28 11. An award of costs and fees under NRS 288.110(6) is not warranted in this case.

1 12. The remedies identified in this decision are intended to effectuate the policies
2 and purposes of the Act.

3 13. If any of the foregoing conclusions is more appropriately construed a finding of
4 fact, it may be so construed.

5 ORDER

6 Based upon the foregoing and as set forth above, it is hereby ordered that Respondent
7 Clark County shall immediately cease and refrain from treating EMS Coordinator Troy Tuke in
8 a manner that conflicts with the applicable collective bargaining agreement between IAFF and
9 the County.

10 DATED the 17th day of December, 2015.

11 LOCAL GOVERNMENT EMPLOYEE-
12 MANAGEMENT RELATIONS BOARD

13 BY: 
14

PHILIP E. LARSON, Chairman

15 BY: 
16

BRENT C. ECKERSLEY, Vice-Chairman

17 BY: 
18

SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, LOCAL 1908

Complainant,

vs.

COUNTY OF CLARK, CLARK COUNTY
FIRE DEPARTMENT,

Respondent.

CASE NO. A1-046120

NOTICE OF ENTRY OF ORDER

To: International Association of Fire Fighters, Local 1908, by and their attorneys W. David Holsberry, Esq. and McCracken, Stemerman & Holsberry;

To: County of Clark, Clark County Fire Department, by and through their attorney, Yolanda T. Givens, Esq., District Attorney's Office.

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on December 17, 2015.

A copy of said order is attached hereto.

DATED this 17th day of December 2015.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY


MARISU ROMUALDEZ ABELLAR
Executive Assistant

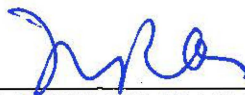
1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Local Government Employee-Management
3 Relations Board, and that on the 17th day of December, 2015, I served a copy of the foregoing

4 **ORDER** by mailing a copy thereof, postage prepaid to:

5 W. David Holsberry, Esq.
6 McCRACKEN, STEMERMAN & HOLSBERRY
7 1630 S. Commerce Street, Suite A-1
8 Las Vegas, NV 89102

9 Yolanda T. Givens, Esq.
10 Deputy District Attorney
11 CIVIL DIVISION
12 500 S. Grand Central Pkwy., 5th Floor
13 Las Vegas, NV 89155

14 

15 _____
16 MARISU ROMUALDEZ ABELLAR
17 Executive Assistant
18
19
20
21
22
23
24
25
26
27
28