LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

In the Matter of the RENO POLICE PROTECTIVE ASSOCIATION and JOSEPH BUTTERMAN, Complainants, vs. THE CITY OF RENO, Respondent.	)	Case No. A1-045334

D E C I S I O N

On September 15, 16, and 17, 1980, the Local Government Employee-Management Relations Board held a hearing in the above matter. The hearing was properly noticed and posted pursuant to Nevada's Open Meeting Law.

This written decision is prepared in conformity with NRS 233.B.125 which requires that the final Decision contain Findings of Fact and Conclusions of Law separately stated.

By complaint and amended complaint filed June 9, and July 7, 1980, respectively the Complainants, Reno Police Protective Association and Joseph Butterman (hereinafter Association or Butterman) charge the Respondent, City of Reno (hereinafter City) with violation of NRS 288.270. The thrust of the complaint is twofold: first, that by demoting Butterman from probationary sergeant to patrolman the city has engaged in a prohibited practice by discriminating against Butterman, president of the Association, because of his office in the Association and for performing the duties and responsibilities of that office; and second, that by refusing to participate in advisory factfinding proceedings pursuant to NRS 288.200 (including the selection of a neutral from the list of names secured from the Federal Mediation and Conciliation Service) the City has unlawfully refused to bargain in good faith with the Association.

The City denies the allegations and submits that the bad faith bargaining charge is now moot in that by Court order of June 30, 1980, Judge John E. Gabrielli of the Second Judicial District ordered the City to participate in advisory factfinding. Reno Police Protective Association and Joseph C. Butterman vs. The City of Reno, Case No. 80-5159, Decision June 30, 1980.

The Bad Faith Charge

Judge Gabrielli ordered the City to select a neutral advisory factfinding arbitrator and to participate in advisory factfinding in accordance with the ground rules agreement of the parties and in accordance with NRS 288, particularly NRS 288.200 and 288.270 (1) (e). Simply because the City ultimately complied with that order does not render the issue of the bad faith bargaining charge presently before the Local Government Employee-Management Relations Board moot. The necessity in public sector collective bargaining of securing a Court order instructing a party to perform in accordance with statutory requirements and their own agreement is an insult to the integrity of the process.

NRS 288.270 (1) (e) provides the following:

> (1) It is a prohibited practice for a local government employer or its designated representative willfully to:
> ...
> (e) Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and factfinding, provided for in this chapter.

NRS 288.200 sections (1) and (2) provide the following:

> (1) If by April 25, the parties have not reached agreement, either party, at any time up to May 25, may submit the dispute to an impartial factfinder for his findings and recommendations. These findings and recommendations are not binding on the parties except as provided in subsections 5, 6, and 9.
>
> (2) If the parties are unable to agree on an impartial factfinder within 5 days, either party may request from the American Arbitration Association or the Federal Mediation and Conciliation Service a list

> of seven potential factfinders. If the parties are unable to agree upon which arbitration service should be used, the Federal Mediation and Conciliation Service must be used. The parties shall select their factfinder from this list by alternately striking one name until the name of only one factfinder remains , who will be the factfinder to hear the dispute in question. The employee organization shall strike the first name.

There is no dispute that the Association properly pursued the procedure for invoking factfinding. Nevertheless, the City refused to participate in advisory factfinding.

Capsulized, the City's position is that in the absence of a Court order or in the absence of the Governor's determination to make factfinding binding pursuant to NRS 288.200 (6) or in the absence of mutual agreement the City need not and should not participate in advisory factfinding. The Board finds such a position untenable and is at a complete loss to understand the City's position.

Once either party has submitted the dispute to an impartial factfinder for his findings and recommendations NRS 288.200 leaves no room for discretionary or optional conduct on the part of the other party to decide whether or not it will participate in factfinding. Factfinding, with both parties participation, will occur and the only question which may remain is whether or not the factfinding will be binding. To construe the provisions of NRS 288.200 in any other way would frustrate the spirit and intent of the impasse resolution process.

The Association made a timely submission for factfinding. On May 29, 1980, the Association again requested the City to participate in advisory factfinding but they declined pending the Governor's determination to order or not to order the factfinding to be binding. On June 3, 1980, following the Governor's determination that factfinding would not be binding, the Association renewed its request that the City participate in advisory factfinding. The City refused.

The City's refusal to participate in advisory factfinding (until ordered to do so by Judge Gabrielli) was not in any way justifiable and it must be concluded that the conduct was designed to frustrate and delay the bargaining process. There can be no question that the conduct was a violation of the Act and constitutes an unfair labor practice: refusal to bargain collectively in good faith with the exclusive representative. NRS 288.200, NRS 200.270 (1) (e).

The Butterman Demotion

On or about early Sunday morning, May 4, 1980, then probationary Sergeant Butterman supervised the investigation of a case involving an off-duty Reno police officer's alleged assault and battery of a private citizen at a Reno discotheque, Jeremiahs. Although a somewhat unique incident in which proper police procedures were far from clear or agreed upon certain background information is apparent.

At the scene, Sgt. Butterman, instructed Officer Bochenski to take an arrest crime incident report. During the course of the investigation, the victim indicated that he wanted to do whatever was necessary to "file a complaint". After taking the victim's statement, Officer Bochenski provided him with a case number assigned to the incident and informed him that he could pursue the matter further, if he so desired, in the morning (or on Monday morning - the record is unclear) with the complaint Officer in the Reno Police Station. While the victim clearly desired action to be taken he apparently did not realize that by merely giving his statement he had not formally filed a complaint. In light of the fact that off duty police officers were involved one of the victim's friends was concerned about the potential for a police coverup.

Concurrently, Sgt. Butterman, who had ascertained the offending officer's identity, initiated a personnel complaint which is required when an officer is accused of misconduct such as

committing a criminal offense. In conducting the personnel complaint investigation Sgt. Butterman, unaware that the victim had been given a case number, cancelled the case number originally assigned to the criminal complaint of the assault and battery incident. At the close of Officer Bochenski's criminal investigation, Sgt. Butterman requested Bochenski's paperwork although the latter had not prepared a continuation (summary) report which apparently normally accompanies an arrest crime incident report. Sgt. Butterman completed the processing of the paperwork at the police station and submitted the personnel complaint forms, along with the criminal report forms (minus the continuation report, although whether or not the document was absolutely necessary remains uncertain) to the watch commander, Lt. Bloomster. Butterman made an oral report to Bloomster which included mention of the case number cancellation. A key question of fact is whether or not Butterman informed the Lt. that the victim wished to file a criminal complaint.

On Monday, May 5, 1980, the victim had to return to Wisconsin on an early flight but had a friend inquire about the status of the case. In contacting the Reno Police Department the friend discovered that the original case number had been reassigned and concern of a police coverup ensued. It is clear that no coverup was attempted; rather the retrieval of any paperwork pertaining to the case was delayed, partly because the case number had been cancelled and partly because the paperwork had been batched together - criminal complaint and personnel action - and submitted directly to Lt. Bloomster.

As allegations of a police coverup continued, the Police Department conducted an Internal Affairs investigation. The Board was denied access to the Internal Affairs Investigation Report. Nevertheless, as a result of that investigation, four police officers were disciplined for their actions and it is the disparity of discipline and the rationale for the discipline which created the basis for this complaint.

The off duty probationary officer who struck the victim received three days off without pay. A second off-duty officer received three days off without pay for interfering with a Jeremiah's employee immediately following the incident. Probationary Lt. Bloomster, the watch commander and supervising officer in charge, received twenty days off without pay. Probationary Sgt. Butterman, who directly supervised the investigation, was demoted for his conduct surrounding the incident.

Butterman had been promoted to probationary sergeant on or about March 3, 1980, with a probationary period of one year. He had received one evalutation, favorable, in May, 1980, which had been reviewed in late May by Lt. Bloomster, Captain Smart, and Assistant Chief Better, all of whom had some knowledge of the incident at Jeremiahs. Butterman's conduct regarding the incident at Jeremiah's was not considered in this review. Following previous requests, the Association again requested the City to participate in advisory factfinding on May 29, 1980. The City reserved response pending the Governor's determination regarding the awarding of binding factfinding and walked out of the negotiating session. On May 30, 1980, Probationary Sergeant Butterman was demoted. Butterman attempted to appeal the demotion through the Civil Service Commission but the City denied the appeal based upon Butterman's status as a probationary sergeant.

Clearly the instant case reflects disparity in treatment. Complainants urge that the sole reason for the differentiation in treatment between Butterman, who was demoted, and the other officers, who were suspended from duty for three to twenty days without pay, was because of Butterman's position as president of the Association and his activities relating thereto.

Butterman, a nine year police veteran with the Reno Police Department, is the president of the Reno Police Protective Association, a member of the negotiating committee and formerly served on the Associations's Board of Directors. In March of 1980, the

Association considered affiliation with Teamsters Local 995. As president of the Association, Butterman made comments to the media regarding the Association and its contemplated affiliation with the Teamsters. The comments were critical of the City's labor relations attitude and of the Police Department.

At this time, according to testimony of Sgt. Butterman, the Chief of Police commented on television to the effect that he thought the Association was smarter than to affiliate with the Teamsters. The fact that the entire negotiating climate in 1980 was less than cordial is evidenced by the City's refusal to participate in advisory factfinding. In addition, the Association was internally divided over the issues of discharge and discipline procedures and the Teamsters affiliation resulted in the Administrative Employees and Captains withdrawing from the Association and certain members of the Supervisory unit, including the Lieutenants, attempting to withdraw from the Association.

It is not the function of the Board to determine precisely proper police procedures in incidents such as this. Nor is it the function of the Board to determine whether or not the denial of the Civil Service appeal process was proper. Rather, the issue to be determined by the Board is whether the demotion of probationary Sergeant Butterman constitutes an unfair labor practice.

Prior EMRB decisions reflect enforcement of the rights of officers - employees to associate and speak as members in representative capacities of labor organizations regarding matters concerning employment relations with their employer as well as other matters of significant importance and concern to the citizens of the community as well as the Association. In Re North Las Vegas Police Officers Association vs. W.L. Tharp, Chief of Police, et.al., Case No. A1-045325, Item No. 94 (Feb., 1980); Carson City Sheriff's Employees Association vs. Sheriff and County of Carson City, Case No. A1-045319, Item No.87 (Oct., 1978) and Item No. 88 (Feb., 1979); Paul L. Duclerque, et.al. vs. City of Sparks, Case No. A1-045305,

Item No. 66 (Mar., 1977); North Las Vegas Police Officers Association, Inc. et.al. vs. City of North Las Vegas, Case No. A1-001673, Item No. 18 (Nov., 1974).

Disciplinary action may not be taken because of an employee's conduct acting in the capacity as president of an employee organization as opposed to acting in the capacity as an individual employee of the employer. In Re North Las Vegas Police Officers Association vs. W.L. Tharp, et.al., Item No. 94, supra. In fact, the conduct of an employer is improper if taken against the employee because of his activities relative to an employee organization as opposed to actions taken as an individual local government employee and related to any such organization. Id.

To assign a work place, to transfer or to discipline an employee are long standing common law rights of management; however an employer may not exercise these rights in a discriminatory manner because of union membership or activities. In the Matter of Valdemar Arredondo and Clark County Teachers Association vs. Board of Trustees of the Clark County School District and the Clark County School District, Case No. A1-045337, Item No. 102-A (April, 1981) and cases cited therein. Complainants urge that the sole reason for the differentiation in treatment between Butterman, who was demoted, and the other officers, who were suspended from duty for three to twenty days without pay, was because of Butterman's position as president of the Association and his activities relating thereto.

In Las Vegas Police Protective Association Metro, Inc. vs. Las Vegas Metropolitan Police Department, Case No. A1-045309, Item No. 75 (March, 1978) the EMRB was confronted with a sex discrimination claim wherein the Board reasoned that the employer bears the burden of demonstrating that there is a rational basis for the treatment, and in the absence of demonstrated rational basis,

discrimination will be found in violation of NRS 288. In that case, the Board stated:

> " We find no rational basis for this differentiation in treatment, and therefore conclude that the individual complainants are being treated differently because they are women. This is an invalid basis for differentiation and in violation of NRS 288.270 (1)(f)."

Clearly the instant case reflects disparity in treatment. Further, the Board is not unmindful of the fact that City Manager Etchemendy did not review Butterman's personnel record or personally interview him before meting out his punishment. Nor is the Board unmindful that the Notice of Complaint and Disciplinary Action, in which the manager set forth the disciplinary action against Butterman, contained errors.

However, concluding that the senior officers should receive harsher punishment than the junior officers the manager awarded his punishment proportionately. In disciplining Butterman, the manager (in addition to relying upon the Internal Affairs report) focused primarily upon three factors: Butterman's removal of the case number, his initial instruction to Bochenski not to complete a continuation report and his failure to inform Lt. Bloomster that the victim wished to file a criminal complaint. His sole distinguishing reason for the differentiation in discipline between Bloomster and Butterman was the latter's failure to inform Lt. Bloomster that the victim wished to file a criminal complaint.

In the Board's view the manager has provided a rational basis for the differentiation in treatment and the complainant has failed to sufficiently discredit the managers rationale. That basis was Butterman's failure to inform Lt. Bloomster that the victim wished to file a criminal complaint. Lt. Bloomster lacked that knowledge when he passed the paperwork up the chain of command.

Despite the Complainants contention to the contrary the Board is unpersuaded that the basis of the disparity of treatment stemmed from Butterman's position as president of the Association or his activities related thereto.

Finding of Fact

1. Complainant Reno Police Protective Association is a local government employee organization and a bargaining agent for collective bargaining purposes.

2. Complainant Joseph Butterman is a local government employee.

3. The City of Reno is a local government employer.

4. The Association and the City entered into collective bargaining negotiations in January of 1980.

5. The Association and the City agreed to employ impasse resolution procedures as set forth in NRS Chapter 288.

6. The Association properly pursued the procedure for invoking factfinding.

7. The City declined to participate in advisory factfinding.

8. On May 29, 1980, the Association again requested the City to participate in advisory factfinding but the City declined pending the Governor's decision as to whether or not said factfinding would be binding.

9. On June 3, 1980, following the Governor's determination that the factfinding would not be binding, the Association renewed its request that the City participate in advisory factfinding.

10. Until ordered to do so the City refused to participate in advisory factfinding.

11. Judge Gabrielli of the Second Judicial District ordered the City to participate in advisory factfinding.

12. The City's refusal to participate in advisory factfinding was in no way justifiable and it is concluded the conduct was designed to frustrate and to delay the bargaining process.

13. On or about early Sunday morning, May 4, 1980, Probationary Sergeant Butterman supervised the investigation of an alleged assault and battery of a private citizen by an off duty Reno Police Officer.

14. Proper police procedures in such an incident were unclear and not agreed upon.

15. The victim of the crime indicated a desire to "file a complaint".

16. Butterman instructed Officer Bochenski to take an arrest crime incident report.

17. Bochenski provided the victim with a case number assigned to the incident and told the victim that he could pursue the matter in the morning with the complaint officer.

18. In view of the fact that off duty police officers were involved a member of the victim's party was concerned about a police coverup.

19. The victim did not realize that by merely providing a statement he had not formally filed a complaint.

20. Butterman, who had ascertained the suspects identity, initiated a personnel complaint, which is required when an officer is accused of misconduct.

21. In conducting the personnel complaint investigation Butterman, unaware that the victim had been given a case number, cancelled the number assigned to the criminal assault and battery complaint.

22. At the close of Bochenski's criminal investigation Butterman requested Bochenski's paperwork although Bochenski had not yet prepared a continuation report.

23. Butterman submitted the personnel complaint forms, along with the criminal report forms (save for the continuation report) to the watch commander, Lt. Bloomster.

24. Butterman made an oral report including mention of the case number cancellation to Bloomster.

25. Butterman failed to inform Bloomster that the victim wished to file a criminal complaint.

26. On Monday, May 5, 1980, a friend of the victims contacted the Reno Police Department but discovered the original case number had been reassigned and concern of a coverup ensued.

27. No coverup was attempted, rather retrieval of any paperwork pertaining to the case was delayed, partly because of the case

number cancellation and partly because the paperwork - criminal and personnel complaints - had been submitted together to Lt. Bloomster.

28. The Police Department conducted an Internal Affairs investigation pursuant to the incident. The Board was denied access to the Internal Affairs report.

29. Following the Internal Affairs investigation four policemen were disciplined for their actions regarding the incident: The off duty probationary officer who struck the victim received three days off without pay; a second off duty officer received three days off without pay for interfering with an employee of Jeremiahs; probationary Lt. Bloomster, the watch commander and supervising officer in charge received twenty days off without pay; probationary Sgt. Butterman, who directly supervised the investigation, was demoted.

30. In late May of 1980, Butterman received one evaluation, favorable, which had been reviewed by Lt. Bloomster, Captain Smart and Assistant Chief Better, all of whom had some knowledge of the incident at Jeremiahs.

31. Butterman attempted to appeal the demotion through the Civil Service Commission but the City denied the Appeal based upon Butterman's status as a probationary Sergeant.

32. The City Manager reviewed the case in lieu of the Chief of Police or the Assistant City Manager who were involved in collective bargaining negotiations with the Association.

33. The City Manager did not review Butterman's personnel record or personally interview him before meting out his punishment.

34. The Notice of Complaint and disciplinary action against Butterman, contained errors.

35. In disciplining Butterman the manager (in addition to relying upon the Internal Affairs report) focused primarily upon three factors: Butterman's

removal of the case number, his initial instruction to Bochenski not to complete a continuation report and his failure to inform Lt. Bloomster that the victim wished to file a criminal complaint.

36. The manager's sole distinguishing reason for the differentiation in discipline between Bloomster and Butterman was the latter's failure to inform Lt. Bloomster that the victim wished to file a complaint.

37. Butterman, a nine year veteran with the Reno Police Department, is the president of the Association, a member of the negotiating committee and a former Board of Directors member.

38. In March, 1980, the Association considered affiliation with Teamsters Local 995.

39. As president of the Association, Butterman made comments to the media regarding the Association and its contemplated affiliation with the Teamsters. The comments were critical of the City's labor relations attitude and of the Police Department. The City Manager was aware of some of these statements.

40. According to testimony by Sgt. Butterman the Chief of Police commented on Television that he thought the Association was smarter than to affiliate with the teamsters.

41. Butterman was promoted to probationary sgt. on or about March 3, 1980, with a probationary period of one year.

Conclusions of Law

1. Pursuant to the provisions of the Nevada Revised Statutes, Chapter 288, the Local Government Employee-Management Relations Board possesses original jurisdiction over the parties and the subject matter of this complaint. NRS 288.110.

2. Complainant Reno Police Protective Association is a local government employee organization and the bargaining agent as the terms are defined in NRS 288.040 and NRS 288.027, respectively.

3. Complainant Joseph Butterman is a local government employee within the terms as defined in NRS 288.050.

4. The Respondent City of Reno is a local government employer within the term as defined in NRS 288.060.

5. The Association and the City entered into collective bargaining in accordance with the provisions of NRS 288, including NRS 288.190 and NRS 288.200.

6. The Association properly pursued the procedure for invoking factfinding. NRS 288.190, NRS 288.200.

7. Once either party has submitted the dispute to an impartial factfinder for his findings and recommendations NRS 288.200 leaves no room for discretionary or optional conduct on the part of the other party to decide whether or not it will participate in factfinding. Factfinding, with both parties participation, will occur and the only question which may remain is whether or not the factfinding will be binding. NRS 288.200.

8. The City's unjustifiable refusal to participate in advisory factfinding violates the Act and constitutes an unfair labor practice, refusal to bargain collectively in good faith with the exclusive representative NRS 288.200, 288.270 (1)(e).

9. The demotion of probationary Sergeant Butterman does not constitute an unfair labor practice. NRS 288.270.

With respect to the bad faith charge the Board finds in favor of the complainants and against the Respondents and orders the Respondents to pay all costs and attorney fees relative to that portion of complainants case in the amount of $1,840.10.

With respect to the demotion of Sgt. Butterman, the Board finds in favor of the Respondents and against the Complainants and that portion of the Complainants case is hereby dismissed. Each party shall bear its own costs and attorney fees in relation thereto.

Dated this 4th day of August 1981.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

Earl L. Collins, Board Vice-Chairman

Chairman Vilardo (concurring)

While I agree with the result reached in this decision I would not credit the City Manager with having employed a rational basis for meting out the various punishments. I simply fail to find that the Complainant has met its burden in showing that the disparity of treatment resulted from Butterman's position as president of the Association and his activities relating thereto.

Carole Vilardo, Board Chairman

Certified Mail: Paul H. Lamboley, Esq.
Don Gladstone, Esq.

xc: Board Members

Board Member Eisenberg (concurring in part and dissenting in part)

I concur that the City's refusal to proceed to advisory factfinding was unjustifiable and constitutes bad faith bargaining in violation of NRS 288.270. Awarding attorney fees for that portion of the case is the only way to attempt to make the complainants whole at this point in time. However, I respectfully dissent from the result reached by my fellow Board Members with respect to the demotion of Sgt. Butterman.

The actions in this case and the conduct of the City cannot be viewed in and of themselves but must be seen in the totality of the difficulties and hostilities of the negotiations at the time. There had been delay, frustration and bad faith by the City and it cannot be discounted lightly that at the time of the demotion Sgt. Butterman was the president of the Association, a member of the negotiating team and was heavily involved in the negotiating process. Butterman was outspoken, critical of the administration and the department, and had voiced his views publically.

Like Chairman Vilardo, I fail to see that the difference in

discipline administered had a rational basis but unlike Ms. Vilardo, I find that Complainant has met its burden in showing that the disparity in treatment resulted from Butterman's position as president of the Association and his activities related thereto. There is of course considerable difference between suspension/ loss of pay and loss of rank.

Complainant's counsel skillfully and effectively destroyed the pretext for discipline as enunciated by the City Manager in the Notice of Complaint and disciplinary action. To state, as does the majority, that the notice "contained errors" describes the notice in the kindest of terms. Boiled down, the manager's basis for Butterman's demotion focused upon three factors: the cancellation of the case number; the initial instruction to Bochenski not to complete a continuation report and the alleged failure to inform Lt. Bloomster that the victim desired to file a criminal complaint. In my view the first two factors are of such minimal consequence as to make no difference whatsoever. Testimony reflected that proper police procedures in this type of situation are at best arguable. In fact, at a Sergeants meeting following Butterman's demotion even the Chief of Police was at a loss as to what, precisely, Butterman had done "wrong". In fact, no new policies or guidelines were offered as to how to handle such cases in the future. And it was a unique case. The third factor, the failure to inform Lt. Bloomster that the victim wished to make a criminal complaint, (and which the manager relied on exclusively to differentiate the discipline between Bloomster and Butterman) is a disputed fact at best. Sgt. Butterman indicated that he <u>had</u> so informed the Lt. In any event a Lt. would certainly be aware that the possibility for a criminal prosecution in a case such as this exists.

Lt. Bloomster did indicate that he understood Butterman's punishment to be partially the result of Butterman's conduct during the course of the Internal Affairs investigation, partic-

ularly his refusal to accept responsibility for his actions and to acknowledge that he had erred. But Butterman also expressed a belief during the internal affairs investigation that he would be "railroaded" because of his position in the Association. In light of the enormous disparity in the punishment administered a fair inference is that that is precisely what occurred. A demotion of the Association president at the height of negotiations cannot help but have a chilling effect on the Association and its activitites.

In reaching the majorities decision, Vice Chairman Collins places great reliance on this Boards ruling in Las Vegas Police Protective Association Metro, Inc. vs. Las Vegas Metropolitan Police Dept., Item #75, supra, which enunciated the rational relation test.

However, I believe the Board's decision in In the Matter of Valdemar Arredondo et.al. vs. Board of Trustees of the Clark County School District et.al., Item #102-A, supra, is far more instructive. In deciding unfair labor practice cases over the years the Board has examined the employer's conduct in differing lights.

In the Board's initial case, Laborers International Union of North America, Local Union #169 for Reginald D.J. Becker vs. Washoe Medical Center, Case No. 1, Item No. 1, a termination proceeding, the Board stated, "even in cases where the employee has extensively engaged in union activity to the displeasure of the employer and is discharged, the employee has no right to be reinstated if the employer can show the discharge was for any other reason than union membership or activity."

From "any other reason than union membership or activity" the Board proceeded to the "rational relation" test enunciated in The Las Vegas Police Protective Association Metro, Inc. vs. Las Vegas Metropolitan Police Dept., Case No. A1-045309, Item No. 75

(March,1978).

In addressing acceptable employer conduct in Washoe School District Nurses Association et.al., vs. Washoe County School District, Case No. A1-045329, Item #109, the Board, while not citing the rational relation test of Las Vegas Police Protective Association Metro, supra, spoke of "justifiable activities", not merely arbitrary or capricious.

Finally in In the Matter of Valdemar Arredondo et.al. vs. Board of Trustees et.al., supra, the Board outlined the legal standards governing an employer's discriminatory conduct as follows:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight" antiunion motivation must be proved to sustain the charge IF the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to SOME extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."
> (italics in original)

It can reasonably be concluded that the disparity of treatment in the instant case is both discriminatory, because of Butterman's Association position and activities, and inherently destructive. I would find an unfair labor practice, notwithstanding the City Manager's purported rationale. Notwithstanding differing fact patterns, to me the BUTTERMAN case is the ARREDONDO case. Having decided in favor of Arredondo, I would also rule in favor of Butterman.

Dorothy Eisenberg, Board Member

Certified Copies: Paul H. Lamboley
Don Gladstone or John Petty

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