

BEFORE THE LOCAL GOVERNMENT  
EMPLOYEE-MANAGEMENT RELATIONS BOARD

THE COUNTY OF LYON, a political )  
subdivision of the State of Nevada, )

ITEM NO. 229

Plaintiff-Petitioner, )

CASE NO. A1-045449

-vs-

DECISION

INTERNATIONAL UNION OF OPERATING )  
ENGINEERS STATIONARY LOCAL NO. 39, )

Defendant-Respondent. )

For the Petitioner: Zane Miles, Esq., Deputy District Attorney  
LYON COUNTY DISTRICT ATTORNEY'S OFFICE

For the Respondent: Larry D. Lessly, Esq.  
MOSCHETTI & LESSLY

For the EMRB: Salvatore C. Gugino, Chairman  
Tamara Barengo, Vice Chairman  
Howard Ecker, Board Member

STATEMENT OF THE CASE

This matter came before the Local Government Employee-Management Relations Board ("Board") upon the filing of a Complaint and Petition For Declaratory Judgment and Related Relief, or in the Alternative, Appeal From Award of Factfinder ("Complaint") by the County of Lyon ("County") seeking a determination that certain binding awards of a factfinder in a bargaining dispute with the International Union of Operating Engineers Stationary Local No. 39 ("Union") are unlawful, void, and of no effect.

In the summer of 1988, during the course of negotiating a first time collective bargaining agreement for County employees in the white and blue collar bargaining units, the County asserted that many of the articles proposed by the Union were illegal and that it would not negotiate them. After further negotiations and mediation in accordance with statutory provisions, the parties reached impasse on certain proposed articles.

1 The Union then sought and were granted final and binding factfinding or  
2 the remaining issues which were mandatory subjects of bargaining through a  
3 panel convened according to statutory provisions by the Commissioner of the  
4 Board.

5 During October of 1988, the County filed a Petition in District Court  
6 seeking a determination that certain issues that were awarded binding  
7 factfinding are unlawful, enjoining further actions by the Union seeking the  
8 proposals at issue. However, the Court granted the Union's Motion to  
9 Dismiss this Complaint on the grounds that the County had not stated a cause  
10 of action in either of its causes of action and had not exhausted its  
11 administrative remedies.

12 Factfinding hearings were held, and on April 24, 1989, the factfinder  
13 entered binding awards on the issues before him including those presently in  
14 dispute before this Board.

15 Subsequent to the factfinder's awards, the County again filed a Com-  
16 plaint in District Court. As of this date, that Complaint is still pending.

17 The Petitioner thereafter submitted some of the issues presently in  
18 dispute to the Board for its determination.

19 In their Prehearing Statements, the parties have submitted the follow-  
20 ing issues for the Board's determination:

21 a. Does the Local Government Employee-Management Relations Board have  
22 jurisdiction to interpret any statutes other than NRS Chapter 288?

23 b. Does the factfinder's binding award of a contract provision grant-  
24 ing to Union "exclusive use" of a portion of County's bulletin board violate  
25 NRS 288.270(1)(b) prohibiting County from assisting in the "administration"  
26 of Union?

27 c. Does the factfinder's binding award for a contract provision  
28 granting to Union "exclusive use" of a portion of County's bulletin boards

1 violate NRS 288.270(1)(c) prohibiting County from discrimination which would  
2 encourage or discourage membership in Union?

3 d. Does the factfinder's binding award of a contract provision grant-  
4 ing paid release time totaling 390 hours per year for Union members who are  
5 County employees to conduct Union business violate NRS 288.170(1)(c) pro-  
6 hibiting County from discriminating in any term or condition of employment  
7 to encourage or discourage membership in Union?

8 e. Does the factfinder's binding award of a contract provision  
9 requiring County to credit authorized Union leave for County's merit pay  
10 purposes violate NRS 288.270(1)(b) prohibiting County from assisting in the  
11 administration of any employee organization?

12 f. Does the factfinder's binding award of a contract provision  
13 requiring County to credit authorized Union leave for County's merit pay  
14 purposes violate NRS 288.270(1)(b) prohibiting County from discriminating to  
15 encourage or discourage membership in an employee organization?

16 g. Does the factfinder's binding award of a contract provision that  
17 the contract "shall continue from year to year" unless modified by agreement  
18 of the parties constitute an unlawful contract in perpetuity which the  
19 factfinder is not authorized to impose pursuant to NRS Chapter 288?

20 h. Does the factfinder's binding award of a contract provision exempt-  
21 ing informal negotiations from statutory notice requirements constitute  
22 imposition of an unlawful term outside the authority of a factfinder to  
23 order pursuant to NRS Chapter 288?

24 i. Is the factfinder's binding award of the "merit pay" article in  
25 fact and law actually a binding award limiting County to granting "merit  
26 pay" adjustments solely on the basis of seniority violative of NRS  
27 281.270(1) which requires County to base all personnel actions solely on  
28 merit and fitness.

1       j. Whether the award of the factfinder providing that the County shall  
2 provide space on existing bulletin boards for exclusive use by the Union in  
3 each location where members of the bargaining unit work, violates NRS  
4 288.270(1)(b) since provision of exclusive space would "assist in the . . .  
5 administration" of the Union. The County's First Cause of Action goes on to  
6 allege that provision of exclusive space to the Union would have the effect  
7 of encouraging membership in the Union, and the exclusivity provision would  
8 discriminate against non-members of the Union.

9       k. Whether the factfinder's binding decision providing for release  
10 time with no loss of pay for the purpose of employees participating in the  
11 formal steps of a grievance procedure or negotiating with the County on  
12 matters subject to collective bargaining, when those negotiations occur  
13 during regular working hours, violates the provisions of NRS 288.270(1)(b)  
14 by constituting assistance in the administration of the employee organi-  
15 zation. The Second Cause of Action alleges further the issue that the  
16 payment by the County of 390 hours of release time per year for such pur-  
17 poses would discriminate in a term or condition of employment to encourage  
18 membership in an employee organization, in violation of NRS 288.270(1)(c).

19       l. Whether the binding finding of the factfinder providing that the  
20 contract should continue from year to year after the first termination date,  
21 unless the County and Union agree to change, amend, modify or terminate the  
22 agreement pursuant to the provisions of Chapter 288 of NRS, or the Union  
23 ceases to be the exclusive representative of the County employees, is an  
24 unlawful contract in perpetuity, ambiguous and uncertain, unenforceable at  
25 law, and overrules Nevada statute law.

26       m. Whether crediting of "authorized union leave" for an employee to  
27 qualify for a merit salary step advancement, as required by the binding  
28 decision of the factfinder, violates NRS 288.270(1)(b), as it constitutes



1 assisting in the administration of an employee organization. The Fourth  
2 Cause of Action goes on to allege that crediting of such "authorized union  
3 leave" violates NRS 288.270(1)(c), in that it discriminates in a term or  
4 condition of employment to encourage membership in an employee organization.

5 Both parties contending that there are no substantial facts in  
6 controversy and neither party requesting a hearing pursuant to NAC 288.400,  
7 the Board determined to decide the matter without the necessity of a  
8 hearing, based on all pleadings and papers on file.

9 DISCUSSION

10 I.

11 EXCLUSIVE USE OF BULLETIN BOARDS LAWFUL  
12 PURSUANT TO NRS CHAPTER 288.

13 The Board is not convinced by the County's arguments that the  
14 factfinder's award with respect to the use of bulletin boards violates the  
15 provision of NRS 288.270(b) and (c).

16 The language of the award reads as follows:

17 "The County shall provide space on existing bulletin boards  
18 for exclusive use by the Union, in each location where members of  
19 the bargaining unit work."

20 Exclusive rights of the bargaining agent are discussed in Item 2 of the  
21 Boards past decisions. In that decision a case is cited, NLRB v. Janes &  
22 Laughlin Steel Corp., 301 U.S. 1, 44, (1937) which establishes that an  
23 employer can grant to the bargaining agent certain exclusive contract rights  
24 and that the employer has an obligation to treat this representative  
25 exclusively and has a negative duty with respect to others.

26 A Memorandum Opinion and Order of the U.S. District Court filed June 3,  
27 1970 for the District of Colorado (Civil Action C-1393) states the following  
28 concerning the exclusive contract rights in a school district:

"It provides the duly elected representative ready means of  
communicating with all teachers, not just the DCTA membership.

1 This is essential, since the DCTA represents all teachers, not  
2 just its membership. It eliminates inter-union competition for  
3 membership within the public schools except at time of representa-  
4 tion elections."

5 A similar argument would be appropriate in the instant case. The Board  
6 agrees with the Binding Factfinder's analysis that:

7 " . . . there is not merit to the County's contention that  
8 providing bulletin board space for the exclusive use of the union  
9 represents prohibited discrimination against employees for their  
10 "nonmembership" in a union. The statute requires employers to  
11 recognize and bargain with employee unions while preserving the  
12 rights of employees not to join the union if they choose. It  
13 would be an odd construction of the statute to assert that it  
14 simultaneously recognizes an exclusive representative and disables  
15 the employer from providing that exclusive representative access  
16 to its members so that it can fulfill its negotiating and  
17 grievance-handling responsibilities." (See Complaint, Exhibit "A"  
18 - Factfinding Report, pp. 18-19.)

## 19 II

### 20 PROVISION PROVIDING RELEASE TIME TO 21 CONDUCT UNION BUSINESS LAWFUL PURSUANT 22 TO NRS CHAPTER 288.

23 The provisions set forth in NRS 288.270(1)(b) and (c), prohibiting  
24 against assisting in the administration of an employee organization refers  
25 to actual interference in the administration of an employee organization or  
26 assisting in the formation of such an organization and participating in the  
27 active control of such an organization. Release time with no loss of pay or  
28 benefits for the express purpose of negotiating and handling grievance  
procedures does not assist the administration of the employee organization,  
it merely provides a vehicle by which both parties can carry out their  
statutorily mandated requirement to negotiate and to handle grievances. In  
light of the County's current labor problems and the difficulties involved  
in negotiating this first contract, it is ludicrous to think that this award  
will encourage Union membership. The fact that the County has granted  
similar language in the past to another bargaining unit would make this  
Board believe that the County doesn't really believe this argument either.

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III

TERM OF AGREEMENT PROVISION LAWFUL PURSUANT  
TO NRS CHAPTER 288.

The language of NRS Chapter 288 is permissive regarding the term of a negotiated contract. NRS 288.155 states:

"Agreements entered into between local government employers and employees' organizations pursuant to this chapter may extend beyond the term of office of any member or officer of the local government employer."

Further, NRS 288.150 mandates the bargaining of the duration of a collective bargaining agreement.

Based upon these provisions and the language included in the award that the contract would cease upon the Union's ceasing to be the exclusive representative of the County's employees, the Board finds that the award of the arbitrator does not violate NRS 288.270(1)(b) or (c).

The language in the term of agreement provision exempting informal discussions between the parties from the requirements of notice or time prescribed by statutes is also permissible under NRS Chapter 288. The language of the award expressly states that the "Article does not preclude informal discussion between the parties on any matter which is not subject to negotiation or contract." (Emphasis added.) If these matters are not subject to negotiation or contract, it is difficult to see how they are subject to the notice requirements of our public employee bargaining statute.

IV

CONTRACT LANGUAGE BASING MERIT PAY ON  
SENIORITY DOES NOT CONSTITUTE PROHIBITED  
PRACTICE.

The Board agrees with the factfinder's statement (see Factfinding Report, p. 11) that "length of service ('seniority') is highly correlated with fitness for the position in which one serves." Further, it appears to

1 the Board that keeping more experienced employees when layoffs are necessary,  
2 is in keeping with a policy of basing personnel actions on merit and  
3 fitness.

4 The Board is unconvinced by the County's argument that the provision of  
5 NRS 281.370(1) which the County contends conflicts with the use of seniority  
6 as a criterion in certain personnel matters, states:

7 "All personnel actions taken by state, county or municipal  
8 departments, agencies boards or appointing officers thereof must  
be based solely on merit and fitness."

9 This statute, of which this section is a part, is designed, in the County's  
10 words, "to eliminate unlawful discrimination in public employment and public  
11 contracting." The section quoted is very general in nature and appears, to  
12 the Board, to support the usage of an objective criteria such as seniority  
13 as a basis for certain personnel actions. We do not see the conflict.

14 However, even if such a conflict does exist, a test for determining  
15 which of two conflicting statutes governs is set forth in Rownow v. City of  
16 Las Vegas, 57 Nev. 332, 365, 65 P.2d 133, 146 (1937):

17 "Where one statute deals with a subject in general and  
18 comprehensive terms, and another deals with another part of the  
19 same subject in a more minute and definite way, the special  
statute, to the extent of any necessary repugnancy, will prevail  
over the general one."

20 NRS Chapter 288 is a specific and definite enactment, and our  
21 determination in this Complaint is necessarily based upon our review and  
22 construction of this special labor statute. Regardless, the County has  
23 provided no convincing arguments that seniority as a criteria for certain  
24 personnel actions, as awarded by the factfinder, constitutes a violation of  
25 Nevada law. The use of seniority in the instant case is clearly lawful  
26 pursuant to NRS Chapter 288.

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28 / / /

THE COUNTY'S OBSTRUCTIVE ACTIONS  
CONSTITUTE A PROHIBITED PRACTICE.

The Board is mindful of the Union's argument that the County is attempting through this complaint to delay and avoid finalization of this and future collective bargaining agreements. The Board observes that the factfinder's award would seem to be, in part, a result of the County's apparent attempt to avoid a final agreement with the Union rather than make a concerted effort to reach agreement or to come as close as possible on each of the issues pursuant to the spirit of NRS Chapter 288 before resorting to factfinding.

The County's arguments are so numerous, are so bizarre, and are so at odds with the normal construction of the alleged conflicting statutes that any further delays in complying with the binding awards of the arbitrator will undoubtedly be viewed by the Board as an intentional avoidance of the requirement to engage in collective bargaining under NRS Chapter 288, an act which constitutes a prohibited practice pursuant to NRS 288.270(1)(e).

FINDINGS OF FACT

1. That the Petitioner, the County of Lyon, is a local government employer.

2. That the Respondent, International Union of Operating Engineers, Stationary Local No. 39, is a local government employee organization.

3. That on April 27, 1988, a certified election was held in which the Union was chosen as the bargaining agent for three units of County employees.

4. That negotiations began on or about June 1, 1988.

5. That subsequently the County asserted that many of the articles proposed by the Union were illegal and that it would not negotiate about them.



1       6. That after further negotiations and mediation in accordance with  
2 statutory provisions, the parties reached impasse on certain proposed  
3 articles.

4       7. That on September 26, 1988, the Union requested that the  
5 Commissioner of the Board form a panel to determine whether the findings and  
6 recommendations of the factfinder on the issues submitted would be final and  
7 binding.

8       8. That on October 3, 1988, the County filed a Complaint and Petition  
9 For Declaratory and Injunctive Relief in District Court against the Union  
10 setting forth two causes of action: (1) alleging that the Union's  
11 insistence that certain personnel actions be based on seniority would  
12 violate NRS 281.370(1), and (2) alleging that the Union's proposals provided  
13 privileges and benefits for Union members that would violate NRS 613.250.

14       9. That on December 6, 1988, the Court granted the Union's Motion to  
15 Dismiss on the grounds that the County had not stated a cause of action in  
16 either of its causes of action for declaratory relief and had not exhausted  
17 its administrative remedy.

18       10. That on January 30, 1989, the panel convened by the Commissioner of  
19 the Board pursuant to NRS 288.200(6), NRS 288.201, and NRS 288.202, met and  
20 determined "that the factfinder selected shall render a Final and Binding  
21 Award on the following items: (1) Recognition, (2) Employee Rights, (3)  
22 Release Time, (4) Dues Deduction, (5) Discipline/Discharge/Demotion, (6)  
23 Grievance/Arbitration, (7) Layoff/Recall, (8) Basic Work Week, (9) Placement  
24 of entry level positions on the salary schedule, (10) Overtime Pay, (11)  
25 Standby and Call-Back Pay, (12) Shift Differential, (13) Temporary Super-  
26 visors Pay, (14) Merit Salary Adjustment, (15) Holidays, (16) Vacation, (17)  
27 Sick Leave, (18) Retirement Contribution, (19) Group Insurance, (20)  
28 Longevity, and (21) Term of Agreement.



1 11. That the panel further determined, based on the evidence and  
2 testimony presented during the hearing, that "the County's refusal to  
3 negotiate deduction of dues for the recognized employee organization, a  
4 subject which is specifically delineated in NRS 288.150(2) as a mandatory  
5 subject of bargaining, constituted in our opinion, bad faith bargaining."

6 12. That pursuant to NRS 288.200, factfinding hearings were held on  
7 February 8 and 27, 1989.

8 13. That on April 24, 1989, the factfinder entered binding awards on  
9 articles including those presently in dispute before this Board.

10 14. That on May 16, 1989, the County filed a Complaint and Petition For  
11 Declaratory Judgment and Related Relief appealing the factfinder's binding  
12 award regarding certain articles which the County alleges are in violation  
13 of Nevada statutes.

14 CONCLUSIONS OF LAW

15 1. That the Local Government Employee-Management Relations Board  
16 possesses original jurisdiction over the parties and the subject matter of  
17 this Petition pursuant to the provisions of NRS Chapter 288.

18 2. The Petitioner, International Union of Operating Engineers  
19 Stationary Local No. 39, is a recognized employee organization within the  
20 terms defined by NRS 288.040 and is the exclusive representative of three  
21 bargaining units of Lyon County Employees pursuant to NRS 288.160.

22 3. That the factfinder's binding award of a contract provision  
23 granting to Union "exclusive use" of a portion of County's bulletin board  
24 does not violate NRS 288.270(1)(b) prohibiting County from assisting in the  
25 "administration" of Union.

26 4. That the factfinder's binding award for a contract provision  
27 granting to Union "exclusive use" of a portion of County's bulletin boards  
28 does not violate NRS 288.170(1)(c) prohibiting County from discrimination

1 which would encourage or discourage membership in Union.

2 5. That the factfinder's binding award of a contract provision  
3 granting paid release time totaling 390 hours per year for Union members who  
4 are County employees to conduct Union business does not violate NRS  
5 288.170(1)(c) prohibiting County from discriminating in any term or  
6 condition of employment to encourage or discourage membership in Union.

7 6. That the factfinder's binding award of a contract provision  
8 requiring County to credit authorized Union leave for County's merit pay  
9 purposes does not violate NRS 288.270(1)(b) prohibiting County from assist-  
10 ing in the administration of any employee organization.

11 7. That the factfinder's binding award of a contract provision  
12 requiring County to credit authorized Union leave for County's merit pay  
13 purposes does not violate NRS 288.270(1)(b) prohibiting County from  
14 discriminating to encourage or discourage membership in an employe  
15 organization.

16 8. That the factfinder's binding award of a contract provision "shall  
17 continue from year to year" unless modified by agreement of the parties  
18 constitutes a lawful contract pursuant to NRS Chapter 288.

19 9. That the factfinder's binding award of a contract provision exempt-  
20 ing informal discussions on matters not subject to negotiations from  
21 statutory notice requirements constitute a lawful term within the authority  
22 of a factfinder to order pursuant to NRS Chapter 288.

23 10. That factfinder's binding award of the "merit pay" article is  
24 lawful and binding pursuant to NRS Chapter 288.

25 ORDER

26 Based upon the above findings of fact and conclusions of law,

27 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

28 / / /

1        1. That the Complaint and Petition for Declaratory Judgment by the  
2 County, or in the Alternative, Appeal From Award of Factfinder, is denied.


3        2. That the Contract between the County and the Union, including the  
4 articles in the award of the factfinder, shall be effective as of the date  
5 of the binding factfinding award.

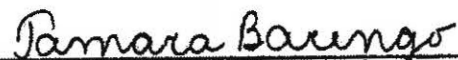
6        3. That the County shall immediately implement the full Contract  
7 entered into between the parties, including the factfinder's awards.

8        4. That each party is to bear its own costs and fees in the  
9 above-entitled matter.

10       DATED this 4<sup>th</sup> day of October, 1989.

11                                LOCAL GOVERNMENT EMPLOYEE-  
12                                MANAGEMENT RELATIONS BOARD

13                                By   
14                                SALVATORE C. GUGINO, Chairman

15                                By   
16                                TAMARA BARENGO, Vice Chairman

17                                By   
18                                HOWARD ECKER, Board Member  
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