

STATE OF NEVADA  
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT  
RELATIONS BOARD

STATIONARY ENGINEERS, LOCAL 39, ) ITEM NO. 231  
INTERNATIONAL UNION OF OPERATING )  
ENGINEERS, AFL-CIO, and FRANK KAY, ) CASE NO. A1-045441  
Complainants, ) DECISION  
-vs- )  
COUNTY OF LYON, a political )  
subdivision of the State of Nevada, )  
Respondent. )

For the Complainant: Larry D. Lessly, Esq.  
MOSCHETTI & LESSLY  
For the Respondent: Zane Miles, Deputy District Attorney  
LYON COUNTY DISTRICT ATTORNEY'S OFFICE  
For the EMRB: Salvatore C. Gugion, Chairman  
Tamara Barengo, Vice Chairman  
Howard Ecker, Member

STATEMENT OF THE CASE

This matter came before the Local Government Employee-Management Relations Board ("Board") upon the filing of a Complaint by the Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, ("Union") and Frank Kay alleging willful discrimination for personal reasons by the County in violation of NRS 288.270(1)(f).

The case arises from the termination of Frank Kay from his employment as Mechanic with the County. The Association contends that personal animus existed between Mr. Kay and his immediate supervisor and it was this personal animus which resulted in the termination of Mr. Kay. They further contend that this charge is substantiated and bolstered by a denial of due process in an attempt by the County to make an example of this employee in

1 the midst of other labor problems in the Union's first year of recognition  
2 as the exclusive bargaining agent for the County's employees. The County  
3 contends that Mr. Kay was terminated for proper cause, i.e. knowingly and  
4 deliberately falsifying an official record of the County, to-wit, his time-  
5 card and that any procedural errors possibly committed during his  
6 termination did not result in denial of due process.

7 On or about August 4, the County filed a Motion For Continuance on the  
8 basis that the counsel of record for Respondent had been subpoenaed by  
9 Complainant as a witness and was forced to withdraw as counsel pursuant to  
10 SCR 178. The Motion was opposed by Complainant contending that the counsel  
11 of record was notified that he would be called as an adverse witness in the  
12 Prehearing Statement filed on or about April 26, 1989 and had sufficient  
13 time to determine if there was a conflict of interest and act accordingly.  
14 The Board denied the Motion on the basis that (1) counsel for Respondent had  
15 notice, actual and constructive, from the time of service of Complainant's  
16 Prehearing Statement filed on or about April 26, 1989, and (2) counsel was  
17 being called for the purpose of serving as an adverse witness, which under  
18 the circumstances, the Board did not view as prejudicial to Respondent.

19 The Board conducted a hearing in Reno, Nevada on August 10, 1989. The  
20 Union presented evidence and argument in support of its Complaint. The  
21 County presented evidence and argument in opposition to the Complaint and in  
22 support of its actions.

23 During the hearing the County contended, as a threshold matter, that  
24 absent a labor agreement reached pursuant to NRS 288 between the County and  
25 the Union, a determination in this matter and a review of the findings by  
26 Respondent's Board of Commissioners was beyond the jurisdiction of the  
27 Board.

28 At the conclusion of the hearing, the matter was submitted to the Board

1 for decision.

2 DISCUSSION

3 As a threshold matter, the Board rejects the County's argument that the  
4 Board lacks jurisdiction to make a determination in this case.

5 First, NRS 288.270 sets forth the definition of an unfair labor  
6 practice, as follows:

7 1. It is a prohibited practice for a local government  
8 employer or its designated representative willfully to:

9 (f) Discriminate because of race, color, religion, sex, age,  
10 physical or visual handicap, national origin or because of  
11 political or personal reasons or affiliations. (Emphasis added.)

12 Further, NRS 288.280 states that "any controversy concerning prohibited  
13 practices may be submitted to the board . . ."

14 Second, there remains no labor agreement between the two parties one  
15 (1) year and four (4) months after recognition of the current bargaining  
16 agent. The instant case was filed during apparently serious labor  
17 disagreements, this being the fourth petition filed before this Board in the  
18 past seven (7) months. See EMRB Case Nos. A1-045449, A1-045451 and  
19 A1-045457. As an additional occurrence during this ongoing labor dispute,  
20 the instant case certainly falls within the jurisdiction of the Board. The  
21 County itself substantiates this link in its December 1, 1988 hearing before  
22 the County Commissioners concerning the appeal of the Employee Management  
23 Committee decision on the termination of Frank Kay. Deputy District  
24 Attorney Zane Miles connects this case to ongoing Union disputes by noting:

25 This county has not, in the past, found it necessary to use  
26 time clocks and to uh check hourly employees in and out for sick  
27 leave and other uh purposes. With the advent of the union, it is  
28 apparent that we may have to do that. (Emphasis added.) Joint  
Exhibit 3, p. 65.

Therefore, the Board rejects the County's arguments concerning  
jurisdiction.

1 As discussed in Clark County Public Employees Association v. County of  
2 Clark, Item 215, Case No. A1-045425 (1988), of the Boards past decisions,  
3 the United States Supreme Court established in McDonnell Douglas Corp. v.  
4 Green, 411 U.S. 792, 802 (1973), a tripartite analysis for disparate  
5 treatment claims: The plaintiff must prove a prima facie case; the  
6 defendant must offer a legitimate, nondiscriminatory reason for its actions;  
7 and the plaintiff must establish that the defendant's proffered explanation  
8 is a pretext to mask an illegal motive. 411 U.S. at 802-04. See also, Reno  
9 Police Protective Assn. v. City of Reno, 102 Nev. 98, 715 P.2d 1321 (1986);  
10 NLRB v. Transportation Management Corp., 462 U.S. 393 (1983); NLRB v. United  
11 Sanitation Service, 737 F.2d 936 (11th cir. 1984).

12 I. The complainant has established sufficient prima  
13 facie evidence in support of discrimination based  
upon personal reasons.

14 The Board believes that the Union has made a prima facie showing  
15 sufficient to support the inference that personal animus, supported by a  
16 desire to make an example of this employee in the County's dealings with the  
17 Union, was the motivating factor in the termination of the aggrieved  
18 employee. This personal animus was directed toward Frank Kay primarily by  
19 Ralph Richardson, his immediate supervisor.

20 The animus apparently stemmed from an incident in which Frank Kay horse  
21 traded an alternator that didn't work with Ralph Richardson. Richardson had  
22 apparently held this against Kay for some time.

23 The animosity that developed on the part of Richardson towards Kay and  
24 disparate treatment on the part of the County was evidenced by the following  
25 actions testified to by witnesses at the hearing:

26 1. Mr. Richardson refused to talk to him. (Testimony by Mr. Kay,  
27 Tr.66)

28 2. Mr. Richardson would give Frank Kay four or five jobs at a time and



1 wouldn't allow anyone else to help, even if they were doing nothing.  
2 (Testimony by Mr. Kay, Tr.66 and testimony by Oscar Munoz, Tr.142)

3 3. Unlike his rules for other employees, Mr. Richardson would not  
4 allow Mr. Kay to talk to others while on the job. (Testimony of Mr. Kay,  
5 Tr.66-67)

6 4. There were lots of arguments and friction between them. (Testimony  
7 of Frank Booth, Tr.90, 92)

8 5. Mr. Richardson treated Mr. Kay more harshly than other employees.  
9 (Testimony of Leo McMinn, Tr.136)

10 6. Mr. Richardson indicated to other employees that they were not  
11 supposed to associate with Mr. Kay. (Testimony of Oscar Munoz, Tr.142)

12 Further, the testimony indicates that the decision by Mr. Richardson to  
13 fire Mr. Kay was bolstered by the help and support of the Deputy District  
14 Attorney Zane Miles whose motive was apparently to make an example of this  
15 employee in the County's dealings with the Union with whom they were  
16 embroiled in a labor dispute.

17  
18 II. Respondent's attempt to establish a legitimate  
19 explanation for the termination is pretextual  
in nature.

20 An examination of the evidence reveals substantial evidence that the  
21 County's stated reason for the dismissal was pretextual.

22 First, the witnesses do not agree, in their testimony before the Board,  
23 on the reason for Frank Kay's dismissal. The Deputy District Attorney, Zane  
24 Miles, states that Mr. Kay was fired because he had "submitted a false  
25 document." (Tr.107, 121). Ralph Richardson, Mr. Kay's immediate super-  
26 visor, who initialed the dismissal, testified that Mr. Kay was fired "for  
27 abuse of sick leave" (Tr.185), for bringing in his doctor's excuse too late  
28 (Tr.186), because he "got tired of being treated the way [he] was."

1 (Tr.186), and for not following instructions (Tr.186-187).

2 Second, the County provided no evidence to refute Mr. Kay's claim  
3 sick leave on the days in question. Although both Deputy District Attorney  
4 Zane Miles and Ralph Richardson admit that Mr. Kay has back and spinal  
5 problems and pain resulting from an injury, they contend that Mr. Kay was  
6 not eligible for the eight hours of sick leave claimed on each of the days  
7 in question. However, the County never had any evidence that Mr. Kay did  
8 not go to the doctor, nor did they require Mr. Kay to get an independent  
9 medical examination to determine whether he was incapacitated sufficiently  
10 to be out for those days while receiving treatment. Furthermore, it is  
11 apparent that it is common practice for county employees to take a full day  
12 off for sick leave for the purpose of seeing a physician outside of Lyon  
13 County even though the full day is not required for purposes of travel and  
14 the appointment.

15 Third, by no reasonable standards can Mr. Kay's actions be construed to  
16 constitute falsification of records or theft of County property. In Moulor  
17 v. American Life Ins. Co., 111 U.S. 335, 345, 4 S.Ct. 446, 471, 28 L.Ed.  
18 447, the Court said that "'false' should be construed to mean intentionally  
19 untrue." It is incumbent on the party making the claim to show that the  
20 statements were untrue and that the individual accused of making the  
21 statement knew or should have known that they were untrue at the time they  
22 were made. North American Acc. Inc. Co. v. Tebbs 10 Cir., 107 F.2d 856.  
23 Frank Kay did not act in such a manner in claiming sick leave on the days in  
24 question. He even checked to see if what he was doing was proper. The  
25 County offered no convincing arguments or evidence that Frank Kay  
26 intentionally falsified the timecard with the intent to defraud the County  
27 or that his actions constituted attempted theft of County property.

28 / / /

1 Fourth, if the dismissal was for abuse of sick leave as Mr. Richardson  
2 contends, rather than falsification of records, then the County ignored and  
3 violated their own policies and procedures in the termination. Section 112  
4 of the Merit Personnel Ordinance (Joint Exhibit 2, p. 38) states "For  
5 absences in excess of 3 days, or cases of apparent abuse, he may require the  
6 employee to submit substantiating evidence, including but not limited to, a  
7 physician's certificate. If no evidence is submitted, the appointing  
8 authority may grant leave without pay for the first offense and dismiss the  
9 employee upon the second offense." (Emphasis added.) In the instant case  
10 the County ignored progressive discipline, did not give notice and time for  
11 improvement, but simply fired Mr. Kay on the first alleged offense.

12 Fifth, Mr. Kay was deprived of due process in the termination. The  
13 actions of the County in their attempt to redo the process after having made  
14 the decision to fire him and against the decision of their own Employee  
15 Management Committee, did not remedy the denial of due process. The Board  
16 agrees with the Union's argument that the blatant denial and violation of  
17 Mr. Kay's procedural rights under the Merit Personnel Ordinance by the  
18 County are further evidence that their proffered legitimate explanation for  
19 the dismissal has been shown to be a pretext to mask an illegal motive.

20 Thus, the Board finds that the County's explanation is pretextual, and  
21 that the evidence conclusively restores the inference of unlawful  
22 motivation, particularly on the parts of Ralph Richardson and Zane Miles.

23 Therefore, the Board concludes that Union member Frank Kay was  
24 subjected to arbitrary, capricious, discriminatory and bad faith discipline.  
25 Since it is a prohibited practice for a local government employer willfully  
26 to discriminate because of personal reasons pursuant to NRS 288.270(1)(f),  
27 the termination of Frank Kay constitute a prohibited practice within the  
28 meaning of NRS 288.270(1)(f).

FINDINGS OF FACT

1. That the Complainant, Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO, is a local government employee organization engaged in the representation of local government employees of Lyon County, including Complainant Frank Kay.

2. That the Respondent, County of Lyon, is a political subdivision of the State of Nevada, being one of its sixteen counties, and is a local government employer.

3. That the incidents leading to the instant case occurred in a climate of bargaining unrest and an apparent problem by the County in working with or gaining a collective bargaining agreement with the Union.

4. That the parties have stipulated to the following facts (Tr.5):

a. Frank Kay was employed by Lyon County on June 1, 1982, as a full-time employee, Mechanic II, Grade 27, Step 1.

b. On November 23, 1982, Frank Kay's performance evaluation report rated his overall performance as "very good".

c. No formal disciplinary action was taken against Frank Kay for any reason whatsoever during his employment with Lyon County, until his termination.

d. In the rating period July 1, 1987, to June 17, 1988, Frank Kay was given an "employee over-all evaluation" of "standard".

e. On July 1, 1988, Frank Kay was recommended for and granted a 2-1/2% merit salary increase.

f. On September 21, 1988, Ralph Richardson, Mr. Kay's supervisor, signed a specification of charges and notice addressed to Mr. Kay, alleging violation of Section 159(F)(1) and Section 130(18) of the Lyon County Personnel Ordinance, specifically

1 charging that Mr. Kay submitted a time sheet for July 28 through  
2 August 10, 1988, claiming sick leave for days for which he had  
3 previously requested annual leave, and not showing annual leave  
4 taken on his time sheet. He was charged with abuse of the  
5 County's sick leave provision of the Personnel Ordinance in that  
6 notice. The notice dismissed him effective upon delivery of the  
7 specifications of charges and notice, which delivery occurred on  
8 September 21, 1988.

9 g. On September 22, 1988, Frank Booth, Superintendent of the  
10 Lyon County Road Department, sent a letter to Mr. Kay advising him  
11 that he must pick up his tools by the close of business, Friday,  
12 September 23, 1988.

13 h. On September 22, 1988, Zane Stanley Miles, Deputy  
14 District Attorney of Lyon County, sent a letter to Mr. Kay  
15 advising him that the notice of termination directed to him on  
16 September 21, 1988, was withdrawn, pending a pre-termination  
17 hearing, and setting the termination hearing for 10:00 a.m. on  
18 Tuesday, September 27, 1988, at the office of the Lyon County  
19 District Attorney. That correspondence further placed Mr. Kay  
20 upon administrative leave with pay pending pre-termination  
21 hearing.

22 i. A pre-termination hearing was conducted on September 27,  
23 1988, at which Mr. Kay was present with John Kidwell,  
24 representative of International Union of Operating Engineers,  
25 Local 39, the bargaining agent from the unit to which Mr. Kay  
26 belonged.

27 j. On September 27, 1988, Ralph Richardson, Shop Supervisor,  
28 and Frank Booth, Road Superintendent, executed the letter advising



1 Mr. Kay that pursuant to the pre-termination hearing conducted on  
2 September 27, 1988, his employment with Lyon County would  
3 terminate as of 4:30 p.m. that date, and that he may appeal the  
4 action to the Board of Lyon County Commissioners.

5 k. On September 28, 1988, Mr. Kay directed a letter to the  
6 personnel office of the Lyon County Road Department requesting a  
7 hearing concerning his termination to be held before the Employee  
8 Management Committee of Lyon County.

9 l. On October 28, 1988, Mr. Kay received a hearing before  
10 the Employee Management Committee. Mr. Kay was present, and  
11 represented by Mr. Kidwell. Lyon County was represented by Zane  
12 Stanley Miles, Deputy District Attorney. The recommendation of  
13 the Employee Managemet Committee was that Frank Kay be reinstated  
14 to his position as Mechanic II with the Lyon County Road  
15 Department with back pay to September 28, 1988, and that he be  
16 given all the benefits he would have earned during that time. It  
17 was further recommended that a written reprimand be given to Mr.  
18 Kay and placed in his personnel file for not complying with his  
19 supervisor's request for a doctor's verification of sick leave in  
20 a timely manner. The report and recommendation of the Employee  
21 Management Committee was dated November 1, 1988.

22 m. On November 3, 1988, after discussion in a personnel  
23 session, at which Mr. Kay was not present, the Board of County  
24 Commissioners of Lyon County voted unanimously to uphold the  
25 termination of Mr. Kay. On November 16, 1988, Maryanne Rogers,  
26 Administrative Assistant to the Board of Lyon County  
27 Commissioners, signed a letter to Mr. Kay indicating that the  
28 Board had taken this action on November 3, 1988; and that on

1 November 14, 1988 the Board had reviewed and discussed Mr. Kay's  
2 November 10, 1988 correspondence requesting a hearing before the  
3 Board concerning his termination.

4 n. On November 18, 1988, Ralph Richardson sent a letter to  
5 the Board of Lyon County Commissioners appealing the decision of  
6 the Employee Management Committee made November 3, 1988, ordering  
7 reinstatement of Frank Kay. That correspondence stated Mr.  
8 Richardson's understanding that the appeal had been set for public  
9 hearing at 9:30 a.m. on Thursday, December 1, 1988.

10 o. On November 18, 1988, Sherilyn Ostrander, Personnel  
11 Technician in the Lyon County Controller's Office, sent a letter  
12 to Mr. Kay advising Mr. Kay that Ralph Richardson had appealed the  
13 November 3, 1988 decision of the Employee Management Committee to  
14 the Board of Lyon County Commissioners, and that the appeal was  
15 set for December 1, 1988 at 9:30 a.m. and would be public.

16 p. A December 5, 1988 memorandum to Mr. Kay's personnel file  
17 from the Board of Lyon County Commissioners indicates that at the  
18 regular meeting on December 1, 1988, the Board voted unanimously  
19 to uphold the original termination decision by Ralph Richardson,  
20 thereby overturning the decision of the Employment Management  
21 Committee for reinstatement of Mr. Kay.

22 q. On January 5, 1989, John Kidwell, Business Representative  
23 for Stationary Engineers, Local 39, wrote Maryanne Hamer, Chairman  
24 of the Lyon County Commissioners, which correspondence was  
25 received on January 9, 1989. The letter requested, pursuant to  
26 the provisions of the Lyon County Merit Personnel Ordinance,  
27 Chapter XIV, Section 146(6), a rehearing in the matter of the  
28 termination of the employment of Frank Kay.

1           r. On January 25, 1989, Nikki Bryan, Administrative  
2 Assistant to the Board of Lyon County Commissioners, sent the  
3 letter to Mr. Kidwell, reflecting that on January 19, 1989, the  
4 Lyon County Commissioners voted by a majority of four to one to  
5 deny Mr. Kay's request for a rehearing concerning his termination.

6           s. On September 20, 1988, a memorandum was placed in Mr.  
7 Kay's personnel file with Lyon County, the memo being dated May  
8 13, 1988, and signed by Ralph Richardson.

9           t. Mr. Richardson executed a memo to the files dated August  
10 19, 1988, with respect to Mr. Kay's use of leave and on September  
11 15, 1988, concerning a doctor's release for sick leave.

12          u. An office memo to the files regarding annual or sick  
13 leave dated June 3, 1987, and signed by Ralph Richardson, was  
14 placed in the maintenance department files, concerning Mr.  
15 Richardson's talking to six employees of the maintenance shop,  
16 including Frank Kay, about use and abuse of sick leave.

17          v. That prior to and after the termination of Frank Kay,  
18 Lyon County has not terminated any employee or taken any formal  
19 disciplinary action against any employee for utilizing a full  
20 day's sick leave for a medical appointment not requiring a full  
21 eight hours for travel and treatment.

22          w. That Frank Kay provided a Disability Certificate from his  
23 treating chiropractor approximately five (5) weeks after requested  
24 to do so, reflecting treatment on August 2 and 5, 1988.

25          5. That little or no evidence was presented by the Respondent to  
26 refute Mr. Kay's claim that he attended doctor appointments on August 2, 3,  
27 and 4, 1988.

28       / / /

1       6. That it is common practice for County employees to take a full day  
2 off for sick leave for the purposes of seeing a physician outside of Lyon  
3 County even though the full day is not required for purposes of travel and  
4 the appointment.

5       7. That upon returning to work Frank Kay changed his timecard, which  
6 had previously indicated approved annual leave on the dates in question, to  
7 reflect sick leave taken for the purpose of attending doctor appointments on  
8 each of these days.

9       8. That Mr. Kay changed the timecard only upon inquiring of the  
10 Secretary of the Road Department as to whether the substitution of sick  
11 leave for the vacation time could be done by others and rescinding an  
12 affirmative answer.

13       9. That Mr. Kay's immediate supervisor, Ralph Richardson, stated in  
14 his testimony before the Board that he fired Mr. Kay for "abuse of sick  
15 leave". (Tr.185)

16       10. That the County's Merit Personnel Ordinance states that, for  
17 apparent abuse of sick leave, leave without pay may be granted for the first  
18 offense, and the County may dismiss the employee upon the second offense.

19       11. That evidence does not support the County's contention that Frank  
20 Kay willfully and knowingly falsified his timecard or that he is a "would be  
21 thief" (Points and Authorities in Support of Pre-Hearing Statement of  
22 Respondent, p. 10) attempting to "defraud Respondent Lyon County of actual  
23 money, sick leave, which is theft of County property."

24       12. That the testimony of Zane Miles, Deputy District Attorney in Lyon  
25 County, concerning the County's proffered legitimate explanation for firing  
26 Frank Kay lacks credence and was not believed by the Board.

27       13. That the County fired Frank Kay without due process, violating his  
28 procedural rights under the County's Merit Personnel Ordinance, which was

1 not remedied by their attempt to go back and redo it at the insistence of  
2 the Union.

3 CONCLUSIONS OF LAW

4 1. That the Local Government Employee-Management Relations Board  
5 possesses original jurisdiction over the parties and subject matter of this  
6 Complaint pursuant to the provisions of NRS 288.

7 2. That Complainant, Stationary Engineers, Local 39, International  
8 Union of Operating Engineers, AFL-CIO, is a recognized employee organization  
9 within the terms defined by NRS 288.040.

10 3. That the Respondent, County of Lyon, is a local government employee  
11 within the terms defined by NRS 288.060.

12 4. That the Union made a prima facie showing supporting their  
13 contention that the firing of Frank Kay resulted from the personal animus  
14 and vendetta on the part of his immediate supervisor, Ralph Richardson  
15 along with the help and support of the Deputy District Attorney, Zane Miles,  
16 whose motive was apparently to make an example of this employee in the  
17 County's dealings with the Union.

18 5. That the County's proffered legitimate explanation for firing Frank  
19 Kay, was shown to be a pretext to mask an illegal motive; i.e.  
20 discrimination based on personal animus along with other personal reasons.  
21 That illegal motive was substantiated and bolstered by the procedure that he  
22 went through in order to obtain a semblance of due process.

23 6. That Frank Kay was subjected to arbitrary, capricious,  
24 discriminatory and bad faith discipline by his supervisors Ralph Richardson  
25 and Frank Booth along with the help of the Deputy District Attorney, Zane  
26 Miles.

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4 8. That the firing of Frank Kay constituted a prohibited practice  
5 within the meaning of NRS 288.270(1)(f).

7 Upon decision rendered by the Board at its meeting on August 17, 1989,  
8 it is hereby

28 / / /

- 1 1. That the Union's Complaint be, and the same hereby is, upheld;
- 2 2. That the County shall immediately cease and desist, and in
- 3 future, refrain from engaging in the prohibited practice set forth above;
- 4 3. That the County shall, within ten (10) days of the date of this
- 5 Order, reinstate Frank Kay to his former or a similar position of equal pay
- 6 and benefits and shall pay full back pay and benefits; and
- 7 4. That the District shall pay \$9,700.00 to the Union as
- 8 attorneys fees and, in addition, shall pay costs in the amount of
- 9 \$1,258.88 incurred by the Union in these proceedings.

10 DATED this 29<sup>th</sup> day of September, 1989.

11 LOCAL GOVERNMENT EMPLOYEE-  
12 MANAGEMENT RELATIONS BOARD

13 By Salvatore C. Gugino  
14 SALVATORE C. GUGINO, Chairman

15 By Tamara Barengo  
16 TAMARA BARENGO, Vice Chairman

17 By Howard Ecker  
18 HOWARD ECKER, Member  
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