

STATE OF NEVADA  
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT  
RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ) ITEM NO. 240  
ENGINEERS, STATIONARY ENGINEERS, )  
LOCAL NO. 39, AFL-CIO, ) CASE NO. A1-045451

Complainant, ) DECISION

-vs-

COUNTY OF LYON, a political )  
subdivision of the STATE OF NEVADA )  
and KEN HARVEY, in his capacity as )  
the County Commissioner of LYON )  
COUNTY, )

Respondents. )

For the Complainant: LARRY LESSLY, ESQ.  
MOSCHETTI & LESSLY

For the Respondent COUNTY OF LYON: WILLIAM G. ROGERS, ESQ.  
ZANE MILES, ESQ.

For the EMRB: SALVATORE C. GUGINO, Chairman  
TAMARA BARENGO, Vice Chairman  
HOWARD ECKER, Board Member

STATEMENT OF THE CASE

On June 28, 1989, Complainant INTERNATIONAL UNION OF  
OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL NO. 39,  
AFL-CIO, ("UNION"), brought its complaint against the COUNTY  
OF LYON ("COUNTY") and KEN HARVEY in his capacity as a County  
Commissioner, for certain acts and statements of Mr. HARVEY  
which the UNION has alleged amount to a prohibited practice.

Specifically, the UNION alleges that on May 15, 1989,  
Mr. HARVEY approached County employees Kathy Hall, Diana  
Lanier, Ida Faber, and Sandra Kuhl, and informed them that at  
the next Thursday meeting of the COUNTY Commissioners, the

1 employees should come to the meeting with their collective  
2 bargaining team in order to inform the COUNTY that they no  
3 longer wished to be represented by the UNION. The UNION  
4 further contended that in exchange, Mr. HARVEY promised the  
5 employees that they would receive the same monetary raise in  
6 salary as were to be given to the COUNTY's other unclassified  
7 employees and that, when the employees declined Mr. HARVEY's  
8 request, that he then threatened to lay off COUNTY employees,  
9 particularly Kathy Hall, as a means of reimbursing the COUNTY  
10 for its expenses incurred during the negotiations process.

11 The COUNTY, for its part, contends that if the alleged  
12 statements were made, that they would indeed constitute an  
13 unfair labor practice and a violation of law by the COUNTY.  
14 However, the COUNTY asserts that any such statements were  
15 uttered by Mr. HARVEY in his individual capacity and status as  
16 one of the five Commissioners, and that Mr. HARVEY was not  
17 authorized to speak for the bargaining team.

18 Like the COUNTY, Mr. HARVEY admitted in his Response  
19 that the conduct and statements alleged by the UNION, if true,  
20 would constitute a prohibited practice under NRS Chapter 288,  
21 but denied that the conversations and actions occurred as  
22 described. It should be noted that Mr. HARVEY purportedly  
23 filed his response "in propria persona" (in proper person).

24 On November 6, 1989, the LOCAL GOVERNMENT EMPLOYEE-  
25 MANAGEMENT RELATIONS BOARD ("BOARD") conducted a hearing in  
26 Reno, Nevada, in which the BOARD reviewed the papers and  
27 pleadings on file, took the testimony of witnesses for the  
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1 parties, examined evidence and heard arguments by the parties  
2 and their counsel. From all of the above, the BOARD has  
3 concluded, based upon due deliberation, that the Respondents  
4 have each committed prohibited practices in violation of NRS  
5 288.270(1)(a) and (b).

#### 6 DISCUSSION

##### 7 I

#### 8 THERE IS OVERWHELMING EVIDENCE THAT RESPONDENT 9 HARVEY MADE THE STATEMENTS ALLEGED IN THE COMPLAINT.

10 With regard to the statements attributed to Respondent  
11 HARVEY on May 15, 1989, the BOARD heard testimony from COUNTY  
12 employees Sandra Kuhl and Kathy Hall, both of whom asserted  
13 that Respondent HARVEY had asked them to leave the UNION  
14 whereupon they would be treated "right" by the Board of County  
15 Commissioners, but that, if they didn't, he would recoup  
16 COUNTY expenses incurred as a result of the negotiation  
17 process by laying off employees, in particular Ms. Kathy Hall  
18 (See Transcript at 18, 19, 20, and 47). According to Ms.  
19 Kuhl, "He had indicated that the board would do what he wanted  
20 them to do because they apparently had discussed it, treating  
21 us right, as they put it." (Transcript at 21, 22.)

22 The statements were made in the presence of other COUNTY  
23 employees, Diana Lanier and Ida Faber, both of whom were  
24 prepared to testify on behalf of the UNION (Transcript at 22,  
25 54). Their testimony was clear and concise. In contrast, the  
26 testimony of Respondent HARVEY as to his version of the facts  
27 was simply not credible. See Reno Police Protective  
28 Association v. The City of Reno, EMRB Item No. 175, Case No.

1 A1-045390, citing Innes v. Beauchene, 370 P.2d 174 (Alaska,  
2 1962). Moreover, the testimony of COUNTY Commissioner Kathy  
3 Jensen revealed that, within a day or two of the alleged  
4 incident, she had been contacted by COUNTY employee Kathy Hall  
5 who repeated the incident to her and asked for her advice  
6 (Transcript at 104, 105). COUNTY Commissioner Marianne Hamer  
7 stated that she was personally aware of incidents in which  
8 Respondent HARVEY went to COUNTY employees seeking concessions  
9 and taking inappropriate actions (Transcript at 74).

10 In light of the above, the BOARD unanimously concurred  
11 that Mr. HARVEY made the statements attributed to him.

12 II

13 RESPONDENT HARVEY ACTED IN HIS CAPACITY  
14 AS A COUNTY COMMISSIONER WHEN HE MADE  
HIS STATEMENTS TO THE EMPLOYEES.

15 At the time that Respondent HARVEY made his statements  
16 to the COUNTY employees, he was not only chairman of the Board  
17 of COUNTY Commissioners, but he was also chairman of their  
18 negotiating team (Transcript at 21, 58, 59). His political  
19 position was formidable in relation to these employees, and  
20 any statements or suggestions made by Respondent HARVEY could  
21 not be easily ignored by them. In effect, he statements and  
22 actions had a "chilling effect" upon their activities in  
23 association with the UNION. The BOARD takes note that the  
24 COUNTY was aware of the effect which such statements might  
25 have, and cites the statement of COUNTY Commissioner Kathy  
26 Jensen under cross-examination by Respondent HARVEY:

27 / / /



1 Q. Did you really think it was that big of a  
2 deal, that if what I was accused, that I did this,  
did you think it was a big deal?

3 A. Yes, I did.

4 I think that our position as commissioners,  
anything we say is a big deal. People take it  
personally.

5 I think that whether you said it or you didn't  
6 say it -- If you did say it, that would be a big  
deal, yes, because those employees, they don't  
7 have any way to fight back. We're their employer  
and if we threaten them or lay down ground rules  
8 to them they have to take it.

9 (See Transcript at 107.)

10 Under the totality of the circumstances, it would be  
unreasonable for the employees to have assumed that Respondent  
11 HARVEY was acting in anything other than his capacity as a  
12 COUNTY Commissioner and chairman of the negotiating team.

13 The COUNTY, in its defense, has asserted that the  
14 employees should not have felt threatened by Respondent  
15 HARVEY's remarks, since it takes three (3) Commissioners to  
16 take an official action and that, therefore, HARVEY had no  
17 authority to make good on his statements. This completely  
18 misses the legal issue involved here. NRS 288.270(1)(a) makes  
19 it a prohibited practice for a local government employer or  
20 its designated representative to willfully ". . . interfere,  
21 restrain or coerce any employee in the exercise of any right  
22 guaranteed under this chapter." Further, subsection (1)(b) of  
23 the statute prohibits a designated representative from  
24 statements and conduct which might willfully ". . . Dominate,  
25 interfere or assist in the formation or administration of any  
26 employee organization."

27 There is no question that the COUNTY appointed  
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1 Respondent HARVEY as its designated representative at th  
2 bargaining table. What specific authority he might have had  
3 at the time is of no matter. His ability to chill the union  
4 activities of COUNTY employees by the mere nature of his  
5 political position is sufficient.

6 The BOARD therefore concludes that Respondent HARVEY has  
7 committed prohibited practices pursuant to NRS 288.270(1)(a)  
8 and (b).

9 III

10 UNDER THE CIRCUMSTANCES, THE COUNTY IS  
11 ALSO LIABLE FOR ITS COMMISSION OF  
PROHIBITED PRACTICES.

12 The COUNTY contends that it should not be held in  
13 violation of the statute because it did not authorize  
14 Respondent HARVEY's actions nor did it ratify them. The fact  
15 appear otherwise. Testimony from the COUNTY Commissioners  
16 given at the hearing revealed that the Commissioners were well  
17 aware of Respondent HARVEY's "continuing litany" of actions or  
18 statements made by Mr. HARVEY to various employees from  
19 January of 1987 through July of 1989, and that he harbored  
20 certain hostilities for these employees. (Transcript at 82,  
21 83, 93.) Yet, the COUNTY placed him on the negotiating team  
22 (Transcript at 83). He was, in fact, made chairman of that  
23 negotiating team for the COUNTY, and the COUNTY cannot now  
24 contend that they should not be held accountable for the  
25 prohibited acts which HARVEY subsequently committed in the  
26 course and scope of his position as COUNTY Commissioner and  
27 negotiations team chairman.  
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IV

THE COUNTY DEMONSTRATED ITS RATIFICATION OF  
RESPONDENT HARVEY'S ACTIONS DURING THE COURSE  
OF THE HEARING.

Aside from the prior knowledge of Respondent HARVEY's propensities, cited above, the COUNTY also demonstrated that it continued to support HARVEY "after the fact" by virtue of its unusual involvement in HARVEY's defense.

The BOARD concludes that the surreptitious involvement of the COUNTY in Respondent HARVEY's defense, as well as the totality of the circumstances, demonstrates a ratification of Respondent HARVEY's prohibited practices.

V

THE COUNTY MUST BE HELD ACCOUNTABLE FOR  
THE ACTS AND REPRESENTATIONS OF ITS  
DISTRICT ATTORNEY AND DEPUTY DISTRICT  
ATTORNEY IN THIS MATTER.

The BOARD feels compelled to comment upon the actions of District Attorney WILLIAM G. ROGERS and Deputy District Attorney ZANE STANLEY MILES in this matter. These attorneys came before the BOARD and actively represented that Respondent HARVEY was representing himself in proper person (Transcript at 6, lines 10-12). As the proceeding continued, the following facts were revealed:

1. That the District Attorney prepared HARVEY's answer for him (Transcript at 128);

2. That the District Attorney did so "Because it was in the best interest of the Lyon County taxpayers, because if he hadn't did that I (Respondent HARVEY) wouldn't have even showed up here today." (Transcript at 129, lines 1-3);

1           3. That, after the Complaint was filed, the Deputy  
2 District Attorney asked Mr. HARVEY to provide him a written  
3 description of "what happened". (Transcript at 129, lines  
4 21-25; 130, lines 1-3);

5           4. That the District Attorney's Office also prepared  
6 Respondent HARVEY's prehearing statement for him (Transcript  
7 at 132, lines 13-15).

8           It should be noted that Respondent HARVEY's Response  
9 requested attorneys fees and costs. It is obvious that Mr.  
10 HARVEY would not be entitled to such a recovery unless he was  
11 represented by counsel. The BOARD is therefore left with the  
12 inescapable conclusion that the District Attorney and his  
13 Deputy actually represented Mr. HARVEY in this matter as well  
14 as the COUNTY, yet actively misrepresented themselves to the  
15 BOARD on this issue at the time of hearing.

16           Deputy MILES displayed an incredible lack of legal  
17 ethics in this matter by first representing that Mr. HARVEY  
18 was appearing "in proper person" and then later excusing this  
19 sub-rosa activities on behalf of Mr. HARVEY as a "common  
20 practice" in the legal profession (Transcript at 151, lines  
21 12-15). While it may be a "common practice" for attorneys to  
22 prepare "in proper person" pleadings for a party in a case,  
23 the BOARD believes that it is somewhat less than ethical for a  
24 co-respondent's counsel to encourage the filing of pleadings,  
25 to then prepare them, and then to expressly represent to the  
26 BOARD that the party on whose behalf such documents were  
27 prepared is there without counsel.

1 Rule 172 of the Supreme Court Rules provides in  
2 subsection (1)(a) that,

- 3 1. A lawyer shall not knowingly:  
4 (a) Make a false statement of material  
5 fact or law to a tribunal;

6 It should be noted that the evidence revealed the  
7 District Attorney's Office asked Mr. HARVEY for his statement  
8 of the facts after the Complaint was filed and then prepared a  
9 Response on behalf of HARVEY and an additional one on behalf  
10 of the COUNTY which alleged that HARVEY was acting in his  
11 individual capacity. This would appear on its face to be  
12 detrimental to Respondent HARVEY's defense.

13 Rule 158 of the Supreme Court Rules provides under  
14 subsection 2 that,

- 15 2. A lawyer shall not use information  
16 relating to representation of a client to the  
17 disadvantage of the client unless the client  
18 consents after consultation.

19 For the above reasons, the BOARD expresses its concern  
20 about the ethics of District Attorney ROGERS and Deputy MILES  
21 in their representations on this matter.

#### 22 FINDINGS OF FACT

23 1. That on May 15, 1989, Respondent KEN HARVEY, in his  
24 capacity as a COUNTY Commissioner and chairman of the  
25 negotiations team for the COUNTY approached County employees  
26 Kathy Hall, Diana Lanier, Ida Faber and Sandra Kuhl, and  
27 informed them that at the next Thursday meeting of the COUNTY  
28 Commissioners, the employees should come to the meeting with  
their collective bargaining team in order to inform the COUNTY  
that they no longer wish to be represented by the UNION.

1           2. That, on May 15, 1989, Respondent KEN HARVEY also  
2       stated that, in exchange for relinquishing UNION  
3       representation, that the employees would receive the same  
4       monetary raises in salary as were to be given to other COUNTY  
5       employees.

6           3. That, on May 15, 1989, Respondent KEN HARVEY, when  
7       the employees declined to relinquish UNION representation  
8       thereupon threatened to lay off employees, particularly Kathy  
9       Hall, as a means of reimbursing the COUNTY for its expenses  
10      incurred during the negotiations process.

11          4. That the COUNTY's legal representatives, District  
12      Attorney WILLIAM G. ROGERS, ESQ., and ZANE STANLEY MILES,  
13      ESQ., interviewed co-Respondent KEN HARVEY, took statements  
14      from him, and prepared his Response as well as his Pre-Hearing  
15      Statement in this matter.

16          5. That the COUNTY Commissioners, at the time they  
17      voted Respondent KEN HARVEY chairman of the negotiating team,  
18      knew of his "continuing litany" of hostilities toward  
19      employees, yet placed him on the team in spite of said  
20      knowledge.

#### 21                                      CONCLUSIONS OF LAW

22          1. That the Local Government Employee-Management  
23      Relations Board possesses original jurisdiction over the  
24      parties and subject matter of this complaint pursuant to the  
25      provisions of NRS Chapter 288.

26          2. That the INTERNATIONAL UNION OF OPERATING ENGINEERS,  
27      STATIONARY ENGINEERS, LOCAL NO. 39 AFL-CIO, is a local  
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1 government employee organization within the term as defined in  
2 NRS 288.040.

3 3. That the COUNTY OF LYON is a local government  
4 employer within the term as defined in NRS 288.060.

5 4. That Respondent KEN HARVEY, at all times relevant  
6 herein, was acting within the course and scope of his official  
7 capacity as a COUNTY Commissioner and chairman of the  
8 negotiating team for the COUNTY.

9 5. That the COUNTY ratified the acts and statements of  
10 Respondent KEN HARVEY.

11 6. That Respondents COUNTY and KEN HARVEY have  
12 committed prohibited practices in violation of NRS  
13 288.270(1)(a) and (b).

14 ORDER

15 From the foregoing Discussion, Findings of Fact and  
16 Conclusions of Law,

17 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

18 1. That Respondents COUNTY and KEN HARVEY shall cease  
19 and desist from the prohibited practices complained of herein;  
20 and

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1           2. That Complainant UNION shall be awarded attorneys  
2 fees and costs in the sum of \$2,500.00.

3           DATED this 23<sup>RD</sup> day of February, 1990.

4                               LOCAL GOVERNMENT EMPLOYEE-  
5                               MANAGEMENT RELATIONS BOARD

6                               By Salvatore C. Gugin  
7                               SALVATORE C. GUGINO, Chairman

8                               By Tamara Barengo  
9                               TAMARA BARENGO, Vice Chairman

10                              By Howard Ecker  
11                              HOWARD ECKER, Member  
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