STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

CLARK COUNTY PUBLIC EMPLOYEES ASSOCIATION, SEIU LOCAL 1107, Complainant and Counter-Respondent, -vs- HOUSING AUTHORITY OF THE CITY OF LAS VEGAS, Respondent and Counter-Complainant.	ITEM NO. 270 CASE NO. A1-045478 DECISION

For the Complainant/
Counter-Respondent: Hope J. Singer, Esq.
TAYLOR, ROTH, BUSH & GEFFNER

For the Respondent/
Counter-Complainant: Malani Kotchka, Esq.
SMITH & KOTCHKA

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

STATEMENT OF THE CASE

On August 31, 1990, the Clark County Public Employees Association, SEIU Local 1107 ("Association") brought the instant Complaint against the Housing Authority of the City of Las Vegas ("Authority") with the Local Government Employee-Management Relations Board ("EMRB" and "Board"), alleging that the Authority made the following unilateral changes in violation of NRS 288.150(1), NRS 288.270(1)(a) and NRS 288.270(1)(e):

> (a) imposition of a modification in dependent health insurance coverage requiring a 100 percent employee contribution;

(b) a decrease in vacation leave for anyone with over two years' employment by one week;

(c) imposition of a maximum of 200 hours vacation time;

(d) a decrease in the maximum amount of sick leave accrual;

(e) a prohibition against cashing in sick leave at the time of termination;

(f) freezing of 401(k) plans such that no further employee or employer contributions may be made;

(g) imposition of a more burdensome standard for receipt of longevity pay;

(h) removal of holidays on Columbus Day and Good Friday; and

(i) imposition of at-will employee status.

The Authority alleged to the effect that no unilateral changes had been made which violated the statutes cited in the Complaint, and filed the following "COUNTERCLAIM":

1. On March 23, 1990, the Association and the Authority entered into a Settlement Agreement whereby the Association waived all prohibited practices as defined in NRS 288.270(1) which may have been committed by the Housing Authority prior to March 23, 1990.

2. The Association's filing of the Complaint on August 31, 1990 accusing the Housing Authority of engaging in prohibited practices prior to March 23, 1990 is both a breach of its Settlement Agreement and a refusal to bargain collectively in good faith with the Housing Authority in violation of NRS 288.270(2)(b).

WHEREFORE, the Housing Authority requests that (1) the Association be found to have committed a prohibited practice within the meaning of NRS 288.270(2)(b); (2) the Association be found to have bargained in bad faith with the Housing Authority; and (3) the Association be ordered to reimburse and make whole the Authority for all damages suffered as a result of the Association's failure to bargain in good faith, including the reimbursement of the Housing Authority's attorneys

fees and costs incurred in this proceeding.

At the pre-hearing conference held on February 1, 1991, the parties agreed to narrow the issues from the original thirty-three (33) to the following fifteen (15) issues:

1. Whether or not the Union filed the instant Complaint within the six-month statute of limitations pursuant to NRS 288.110(4);

2. Whether or not the Union has failed to include a clear and concise statement of the facts constituting the alleged prohibited practice, including the time and place of the occurrence of the particular acts and the names of the persons involved, as required by NAC 288.200(1)(c);

3. Whether or not the Union agreed in the March 23, 1990 Settlement Agreement to waive all prohibited practices as defined by NRS 288.270(1) which may have been committed by the Authority prior to March 23, 1990;

4. Whether or not the April 27, 1990 Settlement Agreement between the Authority and the Union became effective upon its approval by the Board of Commissioners ("Commissioners") on April 27, 1990;

5. Whether or not the Union and the Authority agreed in the April 27, 1990 Settlement Agreement that the Union would not become the recognized representative of the designated bargaining units until the Commissioners recognized the Union following certification of the election results by the Commissioner of the EMRB;

6. Whether or not it would have been illegal for the Authority to bargain with the Union over the changes alleged in the Union's Complaint prior to recognition of the Union as the exclusive bargaining representative for the two bargaining units defined in the April 27, 1990 Settlement Agreement;

7. Whether or not the Union's filing of the Complaint on August 31, 1990 accusing the Authority of engaging in prohibited practices prior to March 23, 1990 is a breach of the March 23, 1990 Settlement Agreement and a refusal to bargain collectively in good faith with the

Authority in violation of NRS 288.270(2)(b);

8. Whether or not the Authority had any obligation in 1990 to bargain over the subjects set forth in paragraph 9(a) through 9(i) of the Union's Complaint pursuant to NRS 288.180(1);

9. Whether or not the acts complained of in paragraph 9(b) through 9(i) of the Union's Complaint occurred on February 2 and February 28, 1990, prior to the Authority's recognition of the Union on June 13, 1990, and were unilateral changes in mandatory subjects of bargaining;

10. Whether or not the Authority's decision to require an employee contribution for dependent health insurance coverage made on April 27, 1990, prior to the EMRB's certification on May 16 and the Authority's recognition of the Union on June 13, 1990, was a unilateral change in a mandatory subject of bargaining;

11. Whether or not the subjects described in paragraph 9(f) and 9(i) of the Union's Complaint are mandatory subjects of bargaining as defined by NRS 288.150;

12. Whether or not the subject described in paragraph 9(i) of the Union's Complaint was a continuation of the Authority's existing policy and was not a unilateral change;

13. Whether or not the Authority is required to refrain from changing terms and conditions of employment during the course of an organizing effort in violation of NRS 288.270(1)(e);

14. Whether or not the Authority's duty to bargain as defined in NRS 288.150 arose only after recognition of the Union on June 13, 1990; and

15. Additionally, the Housing Authority raised this issue for the first time:

Whether the Union's Complaint is barred by claim preclusion theories of res judicata, collateral estoppel and splitting a cause of action.

On February 8, 1991, the Board conducted a hearing on the instant case. At the beginning of said hearing the parties agreed to eliminate Issues No. 4 and 5 as enumerated

above.

On March 11, 1991, the Authority filed a Motion to Add to the Record (1) the testimony of an Employer-witness regarding an Association exhibit and (2) the two labor agreements which the parties consummated subsequent to the hearing. The Association filed an Opposition to Respondent's Motion on March 21, 1991, alleging that the Authority made no showing that it was unable or incapable of presenting the testimony of this witness the day of the hearing and the Authority demonstrated no basis for adding the collective bargaining agreements to the record. The Authority replied to the Association's Opposition to Respondent's Motion on April 1, 1991, rebutting the latter arguments in the premise and contending that the testimony and labor agreements which the Authority desired to add to the record were necessary to avoid prejudicing the Authority. On April 8, 1991, the Board denied the Authority's Motion to Add to the Record for the reason(s) that ". . . the authenticity of Petitioner's Exhibit "A" nor the conduct (good faith or bad faith) of Respondent during the bargaining process which resulted in the aforementioned labor agreements are deemed to be determinative considerations in the adjudication of the Complaint and Counter-Complaint, the absence of said testimony and documents will not prejudice Respondent's right to due process in this case."

The following are a Discussion of the issues, the Board's Findings of Fact and the Board's Conclusions of Law.

/ / /

DISCUSSION

There are three preliminary issues which must be addressed affirmatively before the Board can address the Complaint on its alleged merits. They are Issues 1, 2 and 15, supra. A finding against the Association on any one of these three preliminary issues will require that the Association's Complaint be dismissed. In this regard, the Board finds as follows:

FIRST PRELIMINARY ISSUE: COMPLAINT FILED WITHIN SIX (6) MONTHS OF THE DATE(S) OF THE OCCURRENCE(S) ON WHICH IT IS BASED. (Issue No. 1)

The Authority states, without contradiction from the Association, that the decisions complained of (except the modification of dependent health insurance coverage) were made on February 2 and February 28, 1990, and contends that the Association's Complaint was not filed within six (6) months of February 28, 1990, as required by NRS 288.110(4), which reads as follows:

> The Board may not consider any complaint or appeal filed more than 6 months after the occurrence which is the subject of the complaint or appeal.

The Association, however, contends that the Authority did not inform its employees of the Board of Commissioners decision to implement all of the unilateral changes in conditions of employment (acts complained of) except the change in health insurance coverage, until the week of March 5, 1990; i.e., by memorandum dated March 2, 1990. This contention stands substantially without contradiction.

Contractual time limitations such as that set forth in NRS 288.110(4), supra, have been consistently held to have been met when the claim or complaint is determined to have been filed within the time prescribed of the Complainant's first knowledge of the occurrence(s) or act(s) upon which it is based. In other words, the time limits do not begin to toll until the aggrieved becomes aware of the alleged violation which forms the basis of its complaint. NPER OH-20621, Ohio Dept. of Safety vs. FOP Ohio Labor Council, SERB, et. al.; NPER CA-21046, San Marino Unified School District vs. NEA, CTA, San Marino Teachers Assn.; NPER FL-21189, City of Fort Walton Beach vs. Fort Walton Beach Fire Fighters Assn., Local 2601.

Since the employees were not constructively notified as to the earliest change in benefits unilaterally implemented by the Authority until the week of March 5, 1990, the Board finds that the Complaint was timely filed within the parameters of NRS 288.110(4).

SECOND PRELIMINARY ISSUE: ASSOCIATION'S COMPLAINT INCLUDES A CLEAR AND CONCISE STATEMENT OF FACTS CONSTITUTING THE ALLEGED PROHIBITED PRACTICE. (Issue No. 3)

NAC 288.200(c) provides that a complaint must include:

> A clear and concise statement of the facts constituting the alleged practice, including the time and place of the occurrence of the particular acts and names of persons involved; . . .

The purpose of this provision is to require the complainant to furnish respondent with sufficient information to enable the latter to determine the basis for the complaint

and to prepare a defense against same, requirements which ar fundamental to due process. The Board finds that the ins r Complaint is sufficient to meet that purpose.

THIRD PRELIMINARY ISSUE (No. 15 of the issues agreed to by the parties):
ASSOCIATION'S COMPLAINT NOT BARRED BY CLAIM PRECLUSION THEORIES OF RES JUDICATA, COLLATERAL ESTOPPEL AND SPLITTING A CAUSE OF ACTION.

In its Amended Pre-Hearing Statement filed on February 4, 1991, the Authority added the following issue of law:

> Whether the Association's Complaint is barred by the claim preclusion doctrines of res judicata, collateral estoppel, splitting a cause of action and Peyton Packing Company, Inc., 255 NLRB No. 39 (1981).

Implicit in the Authority's addition of the above "issue of law" is that the Authority is taking the position that the Complaint is barred under the theory(s) advanced. The basis for the Authority's addition of the aforementioned issue of law and the Authority's implied position with respect thereto, if such exist(s), is assumed to have been set forth in the Authority's Amended Pre-Hearing Statement, which is quoted in pertinent part below:

> I. Issues Of Fact And Law
>
> 1. Whether the Association's Complaint is barred by the claim preclusion doctrines of res judicata, collateral estoppel, splitting a cause of action and Peyton Packing Company, Inc., 255 NLRB No. 39 (1981). On February 1, 1991, at the prehearing conference, the Authority notified the Association and the EMRB that it would be addressing this issue at the hearing scheduled for February 8, 1991. In addition, at the prehearing conference on January 31, 1991, the Association agreed that the only issue regarding whether the Authority was required to refrain from changing

> terms and conditions of employment during the course of an organizing effort constituted a refusal to bargain in good faith and violated NRS 288.270(1)(e). The Association agreed that whether the motive was to restrain or coerce and whether the purpose was to influence the election or to punish the employees were not issues for the hearing on February 8, 1991. In reliance on that representation, the Authority is not going to have witnesses present to testify about the motive or purpose in making the changes in the terms and conditions of employment and is not going to introduce evidence of a legitimate business motive. The Authority understands that the Association is only accusing the Authority of violating NRS 288.270(1)(e) by refusing to bargain in good faith by implementing unilateral changes as enumerated in the Complaint. The Authority is relying on this representation and will not be litigating whether the purpose of making the changes was to restrain or coerce bargaining unit employees in violation of NRS 288.270(1)(a).

During the hearing the parties stipulated that the Authority's motive for making the subject-unilateral changes was not at issue in the instant dispute; although the Association indicated that it is not necessary to show motive in order to establish interference and/or coercion prohibited by NRS 288.270(1)(a). Based on this stipulation by the parties, the Board stated that the Authority's motive for making the subject-unilateral changes would not be considered in its determinations. This would appear to have resolved the issue described in the Authority's Amended Pre-Hearing Statement, quoted supra. However, in its Post-Hearing Brief the Authority changed the basis for its position that the Complaint is barred by the claim preclusion theories of res judicata, collateral estoppel and splitting a cause of action. Essentially, the Authority's position, as set forth for the first time in its Post-Hearing Brief, is based on the premise

that the Complaint is barred (under the aforementioned theories) by the Settlement Agreements of March 23 and Ap[illegible] 20, 1990, and the EMRB Decisions of April 17, 1990 and May 11, 1990, dismissing with prejudice the Complaints covered by Case No. A1-045458 and Case No. A1-045470, respectively.

The Board finds that none of the unilateral changes in employee benefits which form the basis of the instant Complaint were involved in the issues addressed and/or disposed of by the Board's aforementioned Decisions, and the Board did not intend or contemplate that said Decisions would dispose of any other issues. Likewise, the Board finds no basis for concluding that the Association contemplated or intended to dispose of the issues before the Board in the instant Complaint, when it entered into the aforementioned Settlement Agreements.

For the above reasons the Board finds that the Union's (Association's) Complaint is not barred by the claim preclusion theories of res judicata, collateral estoppel and splitting a cause of action.

The Board, having found in favor of the Association on all of the preliminary issues, now addresses the remaining issues:

UNION (ASSOCIATION) DID NOT AGREE TO WAIVE ALL PROHIBITED PRACTICES. (Issue No. 3)

In September 1989, the Association filed a Complaint against the Authority, alleging that the Authority had committed a prohibited practice (refused to bargain with th

Association on the premise that it, the Authority, had assisted in organizing the employees) and requested that this Board order the Authority to recognize the Association. On March 23, 1990, in order to "resolve all of their differences and to avoid further investment of time and expense in any litigation over the issue of recognition", the parties entered into a SETTLEMENT AGREEMENT, drafted by Respondent's counsel, which reads in pertinent part as follows:

> The Association waives all prohibited practices as defined in NRS 288.270(1) which may have been committed by the Authority prior to the date of this Agreement, March 23, 1990, and agrees to withdraw with prejudice their Complaint against the Authority filed in September 1989.

The Authority contends that by virtue of this Settlement Agreement the Association waived any right it may have had to cite any prohibited practices committed by the Authority prior to March 23, 1990, and all of the alleged prohibited practices cited by the Association (except for the modification of dependent health insurance) occurred prior to that date. The Association, however, contends that by adopting the above-quoted provision, it agreed to waive only those prohibited practices involved in the Complaint filed against the Authority in September 1989.

Any waiver of a statutory right must be "clear and unmistakable". The Timken Roller Bearing Company vs. National Labor Relations Board, 325 F.2d 746 (6th Cir. 1963); New York Mirror, 151 NLRB 834, 59 LRRM 1465 (1965); and Norris Industries, 231 NLRB 50, 96 LRRM 1078 (1977). In assessing whether the language of Article 23 meets the "clear and

unmistakable" test, however, the Board must consider the bargaining history of Article 23 and the parties' interpretation of the language contained therein. Reynolds Elec. & Eng'g Co., General Counsel Advice Memo., Case No. 31-CA-16234, 125 LRRM 1368 (1987). While the language of the March 23, 1990, Settlement Agreement may be "clear and unmistakable" as to the intention of the parties to waive any prohibited practices forming the basis of the Complaint which was disposed of (the Complaint filed in September, 1989), said language is not "clear and unmistakable" as to the intention(s) of the parties regarding the prohibited practices (unilateral changes) allegedly committed by the Authority between the date said Complaint was filed (September, 1989) and the date of said Settlement Agreement (March 23, 1990).

Additionally, where an employer relies on contract language as a purported waiver to establish its right to unilaterally change terms and conditions of employment not contained in the contract, evidence is required that the matter in issue was "fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter." GTE Automatic Elec., 261 NLRB 297, 110 LRRM 1193 (1982), supplementing 240 NLRB 297, 100 LRRM 1204 (1979). See also NPER OH-21856, City of Huber Heights, Docket No. 89-ULP-09-0508, issued Aug. 17, 1990. No such evidence has been proffered in the instant case.

/ / /

For the reasons set forth above, the Board finds that the language adopted by the parties in the Settlement Agreement of March 23, 1990, insofar as it evidences the intentions of the parties regarding other prohibited practices allegedly committed by the Authority (prohibited practices not involved in the complaint disposed of by said Settlement Agreement), does not meet the requisite "clear and unmistakable" criteria. The Board, therefore, finds no basis for holding that the Association waived its right to pursue redress for the alleged prohibited practices cited as the basis for the instant Complaint.

UNION'S (ASSOCIATION'S) FILING OF THE INSTANT COMPLAINT WAS NOT A BREACH OF THE MARCH 23, 1990 SETTLEMENT AGREEMENT AND DOES NOT CONSTITUTE A REFUSAL TO BARGAIN IN GOOD FAITH. (Issue No. 7)

The Authority contends the Association has failed to abide by the terms of the Settlement Agreement and has repudiated same by filing the instant claim.

As stated previously, the language adopted by the parties in the Settlement Agreement of March 23, 1990, insofar as it evidences the intentions of the parties regarding prohibited practices not involved in the complaint disposed of by said Settlement Agreement, does not meet the requisite "clear and unmistakable" criteria. Timken Roller Bearing, et. al., supra. Accordingly, the Board finds no basis for concluding that the Association breached the March 23, 1990 Settlement Agreement and/or refused to bargain in good faith.

/ / /

AUTHORITY UNDER NO OBLIGATION, PRIOR TO EMRB'S CERTIFICATION OF THE ASSOCIATION, TO BARGAIN WITH THE ASSOCIATION OVER THE SUBJECTS SET FORTH IN PARAGRAPHS 9(a) THROUGH 9(i) OF THE INSTANT COMPLAINT. (Issues No. 6, 8 and 14)

The Authority contends that the Association's attempt to meet the requirements of NRS 288.180(1) by hand-delivering a letter to the Authority on January 31, 1990, notifying the Authority of its desire to negotiate over monetary subjects, ostensibly in anticipation of its election as exclusive bargaining agent, must be rejected. The premise for the Authority's contention in this regard is that an employer's obligation to bargain collectively is limited to bargaining concerning mandatory subjects of bargaining with representatives of the recognized employee organization; i.e. until recognition occurs, there is no duty to bargain, and the Association was not recognized until June 13, 1990. The Authority cites in support of its contention that part of NRS 288.150(1), reading in pertinent part:

> . . . every local government employer shall negotiate in good faith through one or more representatives of its own choosing concerning the mandatory subjects of bargaining set forth in sub-section 2 with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees . . .
>
> (Emphasis added.)

The Authority is correct only to the extent that it had no duty to bargain with the Association until the EMRB's certification thereof on May 16, 1990. Upon certification to the Association and after receipt of the Association's request

of May 22, 1990, the Authority then became obligated to bargain collectively with the Association concerning non-monetary subjects for the year 1990, and concerning subjects requiring the budgeting of money for the fiscal 1991 year.

Recognition, absent a legitimate reason for withholding same, is assumed to immediately follow certification, unless the certification is appealed. In the instant case, the EMRB's certification was not appealed. Assuming, arguendo, that it had been appealed, that act in and for itself would not have operated to stay the Authority's duty to bargain during the pendency of said appeal. NPER PA-18074, Chartiers Township (February 27, 1987). In other words, the obligations which flowed to the employer (Authority) as a result of the certification were effective with the certification and were not contingent upon the Authority's "recognition" of the Association. It is the date of "certification", not the date of the employer's recognition, that is controlling insofar as concerns determining when the employer became obligated to bargain with the Association.

The Authority's position in the instant case also carries the implication that an employee organization is statutorily barred from initiating negotiations over matters which necessitate the budgeting of money when the notice requesting said negotiations is filed subsequent to February 1. Again, the Authority is only partially correct. Application of that part of NRS 288.180(1) requiring the

employee organization to give notice of its desire to negotiate concerning subjects which will necessitate budgeting of money on or before February 1, is somewhat different for employee organizations with existing labor agreements, as compared to newly certified and/or recognized employee organizations filing notice of their desire to negotiate an initial labor agreement, such as the instant case. In the former case, NRS 288.180(1) operates as a statutory bar to prevent the employee organization from reopening negotiations during mid-term. This is to enable the local government employer to actuate budgeting processes mandated by statute to provide for any additional funding which may be required as a result of negotiations. To interpret this requirement as precluding an employee organization, newly certified and/or recognized subsequent to February 1, from requesting negotiations concerning matters requiring the budgeting of money, would render said certification and/or recognition essentially meaningless until the fiscal year which follows said certification and/or recognition. Such interpretation would be unreasonable and contrary to the purpose of NRS 288.180(1). This statutory bar clearly was not intended to apply to terms and conditions of employment which are not covered or addressed in an existing labor agreement. 9 NPER PA-18097, Carbon Lehigh Intermediate Unit 21 vs. Carbon Lehigh Education Assn. (April 21, 1987). It follows, therefore, that is does not operate to prevent a newly certified and/or recognized employee organization

subsequent to February 1 from negotiating an initial labor agreement. A reasonable interpretation of this statute as concerns its intended application to an employee organization which is certified and/or recognized subsequent to February 1, would be that said newly certified and/or recognized employee organization may submit a request to negotiate regarding subjects which require the budgeting of money; however, the effective date of any agreements resulting therefrom must accommodate the budgetary processes mandated for any additional funding which may be required, the same as would obtain if the request to negotiate regarding such subjects were filed prior to February 1 of the following fiscal year.

The Board's rationale for interpreting NRS 288.180(1) in this manner is also supported by decisions of the NLRB involving the contract bar doctrine. The NLRB has held that it will not condition certification of a new bargaining representative on acceptance of its predecessor's labor agreement. The NLRB ruled that unless the new collective bargaining representative was to be "emasculated" in the exercise of its functions, it must be permitted to negotiate the terms and conditions of employment for its constituents. It (the NLRB), therefore, refused to "hobble" the newly certified collective bargaining representative with its predecessor's labor agreement. American Seating Co., 106 NLRB 250, 32 LRRM 1439 (1953); American Sunroof Corp., 243 NLRB 1128, 102 LRRM 1086 (1979); Montgomery Ward & Co., 137 NLRB 346, 50 LRRM 1137 (1962); and Gate City Optical Co., 175 NLRB

1059, 71 LRRM 1118 (1969).

The NLRB subsequently reaffirmed its American Seat decision, holding in Ludlow Typograph Co., 113 NLRB 724, 36 LRRM 1364 (1955), that an employer was required, not simply permitted, to bargain with a new bargaining representative over rates of pay, hours, and other matters covered in the unexpired labor contract with the superseded union.

The United States Supreme Court has accepted American Seating as a correct statement of the law. In NLRB vs. Burns International Detective Agency, Inc., 406 U.S. 272, 80 LRRM 2225 (1972), the Court cited the rule to support its holding that a successor employer is not bound by a collective bargaining agreement negotiated by its predecessors which it has not agreed to or assumed. However, the rule of American Seating is restricted to cases where the union without a labor agreement is a new and different representative and not merely a continuation or successor of the union party to the unexpired labor agreement.

While the instant case involves interpretation of a statutory bar (rather than a contract bar) and negotiation of an initial labor agreement with a newly certified and/or recognized employee organization where no labor agreement exists (rather than negotiation of initial labor agreements with successor organizations), the Board concludes from the case law, supra, that neither an alleged statutory bar, such as NRS 288.180(1), nor an alleged contract bar should be interpreted to preclude a newly certified and/or recognize

employee organization from negotiating an initial labor agreement during the term of either an existing labor agreement or during the current fiscal year, where no labor agreement exists.

For the reasons set forth above, the Board finds that although the Authority was under no obligation to bargain with the Association on <u>any</u> subject prior to the EMRB's certification of the Association, it became obligated to bargain with the Association on <u>all</u> mandatory subjects, including those involving the budgeting of money, with the effective date of any agreements requiring additional funding to be determined as if the negotiations occurred pursuant to a notice filed on or before February 1 of the following fiscal year.

UNILATERAL CHANGES MADE BY THE AUTHORITY INVOLVED SUBJECTS OF MANDATORY BARGAINING BY VIRTUE OF EITHER THE SUBJECTS BEING SPECIFICALLY SET FORTH IN NRS 288.150(2) OR THE SUBJECTS BEING SIGNIFICANTLY RELATED TO WAGES, RULES AND WORKING CONDITIONS. (Issues No. 9, 10, 11 and 12)

The Authority admits that all subjects (unilateral changes) listed in the Complaint, except the 401-K plan and the imposition of at-will employee status, are subjects of mandatory bargaining pursuant to NRS 288.150(2); albeit requiring the budgeting of money.

One of the Authority's unilateral changes forming the basis of the Complaint is the "freezing of 401-K plans" pursuant to the Board of Commissioners' decision of February 28, 1990, involving a subject (401-K employee benefit plans)

which is not included in the mandatory bargaining subjects listed in NRS 288.150(2). The Authority contends that it has no obligation to bargain with the Association on this subject because it is not a mandatory subject of bargaining under NRS 288.150(2).

The evidence of record indicates that the Authority's 401-K Employee Benefit Plan was a long-standing program; i.e., it appears to have been in effect since at least 1985. Benefits provided employees for a period of years as a matter of practice become subjects which may not be eliminated or reduced except through collective bargaining with the certified and/or recognized employee organization representing the employees who may be affected by such a change. Accordingly, the unilateral change in the 401-K employee benefit plan which the Authority made constitutes a failure to bargain in good faith in violation of NRS 288.270(1)(e). 9 NPER FL-18150, Pensacola Junior College vs. Pensacola Junior College Faculty Assn. (June 11, 1987) and 9 NPER NY-14625, Town of Henrietta vs. CWA, Local 1170, Roadrunners Assn. (December 15, 1986). Likewise, the fact that in the instant case the Association had not been certified and/or recognized as the exclusive bargaining agent for the employees so affected on the date of said change, did not in any way mitigate the Authority's obligation to continue the 401-K employee benefit program, and its failure to do so constitutes a failure to bargain in good faith in violation of NRS 288.270(1)(e). 9 NPER NJ-18191, Camden Housing Authority vs.

New Jersey Civil Service Assn, Council 10 (May 22, 1987).

As concerns the Authority's alleged unilateral imposition of at-will employee status, the evidence of record indicates that, historically, the Authority's employees have been considered at-will employees. Accordingly, the inclusion of a provision in the revised personnel handbook, stating that the employees were "at-will" did not constitute a unilateral change in their status.

AUTHORITY WAS REQUIRED TO MAINTAIN STATUS QUO DURING THE COURSE OF THE ASSOCIATION'S ORGANIZING EFFORT AND THE UNILATERAL CHANGES WHICH IT IMPLEMENTED WERE VIOLATIONS OF THIS OBLIGATION. (Issue No. 13)

In its Pre-Hearing Brief and Answer to the Authority's Counterclaim, the Association contended that the Authority had violated NRS 288.270(1)(a) and (e) by changing the terms and conditions of employment during the pre-election period and after the representation election certified by EMRB. In support of its contention the Association submitted the following argument(s) and case law:

> The National Labor Relations Board has long held that employer interference with employees' rights to organize under Section 7 of NLRA by changing terms and conditions of employment in retaliation for their protected concerted activity violates Section 8(a)(1) of the Act. See, e.g., Davis Wholesale Co., Inc., 165 NLRB 271, enf'd 413 F.2d. 407 (D.C. Cir. 1969). The National Labor Relations Board has also consistently held that withholding of benefits in employees' terms and conditions of employment during the course of a union organizing campaign violates the National Labor Relations Board. Goodyear Tire & Rubber Co., 170 NLRB 539 enf'd 413 F.2d. 158 (6th Cir. 1969). These historic and basic concepts have been held by the NLRB to apply in situations where the employer imposed more onerous terms and conditions of employment in the wake of the

employees' union organizing activities. See, e.g., Mississippi Chemical Corp., 280 NLRB 413, 418 (1986); and where the employer imposed different terms and conditions in retaliation for employees' organizing efforts, Ohio New & Rebuilt Parts, Inc., 267 NLRB 420, 431-431 (1983). By changing certain basic terms and conditions of employment during the organizing drive and after the Union election, Respondent violated NRS 288.270.

The Authority contends that the unilateral changes involved in the instant Complaint had been under consideration since before the Association commenced its organizing effort, in view of which (the Authority alleges) the unilateral changes in employee benefits cannot be considered a violation of the status quo. The Board does not agree. The unilateral changes which the Authority implemented during the Association's organizing effort (except for the alleged imposition of "at-will" status) were not constructive scheduled prior to commencement of the organizing effort, clearly altered the status quo and constitute violations of the Authority's duty to bargain in good faith. The Authority knew or should have known that once the organizing effort commenced it was obligated to maintain that level of benefits which existed prior to commencement of the organizing effort, pending resolution of said organizing effort and collective bargaining with the potential representative. However, there is no evidence in the record to indicate that the Authority gave any consideration whatsoever to its obligations in this regard. In fact, the Board of Commissioners continued to deliberate regarding the changes in benefits and eventuall implemented same, in contravention of its duty to bargain

regarding said changes after the Association's organizing effort was successfully concluded. While the Authority's motivation for making the subject changes is irrelevant and not at issue in the instant dispute [American Freightway Co., Inc., 124 NLRB 146, 147 (1959)], the actions of the Authority in implementing such changes during the organizing effort have appearance of actions which were designed and intended to circumvent the Authority's duty to bargain regarding said changes upon certification and/or recognition of the Association as exclusive representative for employees of the bargaining unit. Such actions are considered prohibited practices under NRS 288.170(1)(e). 9 NPER CA-18090, California State University vs. California Faculty Assn. (April 29, 1987); 9 NPER NJ-18191, Camden Housing Authority vs. New Jersey Civil Service Assn., Council 10 (May 22, 1987); and 9 NPER FL-18150, Pensacola Junior College vs. Pensacola Junior College Faculty Assn. (June 11, 1987). Additionally, notwithstanding the Authority's motivation and/or intent, it is clear that the unilateral implementation of said changes during the Association's organizing effort had the same effect as conduct which interferes with the rights of the employees to organize and bargain collectively regarding their benefits, etc. The principle established by American Freightway, therefore, applies to the Authority's actions and requires that the Board consider same as prohibited under NRS 288.270(1)(a) and (e).

/ / /

TOTALITY OF AUTHORITY'S CONDUCT INDICATED A LACK OF GOOD FAITH AND CONSTITUTED A PROHIBITED PRACTICE.

The Board does not operate in a vacuum and notes with concern that from the beginning (the Association's initial request for recognition and bargaining) the relationship between the Authority and the Association has been undermined by the Authority's apparent reluctance to recognize the Association (as evidenced by the 60-day "cooling off period" unilaterally imposed by the Authority), and the Complaint which resulted therefrom; the delay in commencing negotiations on an initial labor agreement, which the Association encountered as a result of the Authority's refusal and/or reluctance to recognize and bargain with it; and the unilateral changes in employee benefits set forth in the instant Complaint which the Authority made during the Association's organizing effort, in an apparent attempt to circumvent its duty to bargain regarding said changes. In consideration thereof, the Board also finds that the totality of the Authority's conduct indicated a lack of good faith and constituted a prohibited practice under NRS 288.270(1)(e). 9 NPER CA-18118, Temple City Unified School District vs. Temple City Education Assn., NEA, CTA (June 24, 1987) and NLRB vs. Virginia Elec. & Power Co., 314 U.S. 469, 9 LRRM 405 (1941).

The Board notes for the record that the Authority has not only engaged in conduct which had the effect of interfering with the right of its employees to organize and bargain collectively, but has also engaged in conduct whic..

appears to have been designed to frustrate the Board and prevent it from meeting its statutory duty to decide issues involving alleged violations of NRS Chapter 288. Such conduct is manifested in the following:

(1) The Authority improperly filed an "Offer of Proof" in an apparent attempt to circumvent the Board's denial of its "Motion to Add to the Record", further burdening the record with evidence which the Board had previously declined to consider in adjudicating the instant Complaint.

(2) The Authority advanced a plethora of theories as allegedly supporting its numerous position(s) in the dispute, in an apparent attempt to confuse the issues and overwhelm the record with argument and/or evidence of questionable relevance. Such "buckshot pleading" unnecessarily encumbers the record and is manifestly unfair because it tends to place the other party in an untenable or indefensible position. It not only frustrates the process of adjudicating the dispute, but also has a chilling effect on the duty of the parties to bargain in good faith; e.g., the tactics employed by the Authority in pleading this case before the Board cannot be conducive to establishing and/or maintaining a good working relationship between the parties.

(3) The Authority waited until it filed its Post-Hearing Brief to advance a new basis for its position that the Complaint is barred by the claim preclusion theories of res judicata, collateral estoppel and splitting a cause of action. This resulted in Complainant not being afforded an opportunity to reply to the argument and/or evidence which the Authority introduced for the first time in its Post-Hearing Brief. Although the propriety of the Authority's action in this regard has been made moot to some extent by the Board's finding that the Complaint is not barred, it does evidence an apparent attempt on the part of the Authority to deny the Association due process. It also contributed to the Board's frustration in attempting to determine the relevant issues, argument and evidence.

(4) In its Post-Hearing Brief the Authority introduced argument and evidence relating to the labor agreements and testimony involved in its Motion to Add to the Record, which the Board

denied for the reason that neither "the authenticity of the Petitioner's Exhibit "A" nor the conduct . . . of Respondent during the bargaining process are deemed to be determinative considerations in the adjudication of the Complaint and Counter-Complaint". This argument and evidence is improperly before the Board not only because of the Board's denial of the Authority's Motion to Add to the Record, and because Complainant was not afforded an opportunity to answer or respond to any evidence or argument introduced for the first time in the Authority's Post-Hearing Brief, but also because it consists of new argument and the introduction of at least one new issue not included in the issues stipulated to by the parties; i.e., whether or not the Complaint is barred by the "Zipper Clause" contained in the labor agreements. The Authority has also stated in its Post-Hearing Brief that if the Board finds that it violated NRS 288.270(1)(e), "the Authority hereby moves the EMRB to reconsider its decision to deny the Authority's Motion to Add to the Record." The Authority's aforementioned actions represent either an attempt to continue deliberation on the pleadings in perpetuity or an attempt to establish some basis for having the Board's Decision overturned on appeal. In either instance, the Board considers such actions to be an inappropriate and improper attempt to frustrate the Board in meeting its statutory duty to decide Complaints involving alleged violations of NRS Chapter 288.

FINDINGS OF FACT

1. That the Complainant/Counter-Respondent, Clark County Public Employees Association, SEIU Local 1107, is a local government employee organization.

2. That the Respondent/Counter-Complainant, the Housing Authority of the City of Las Vegas, is a local government employer.

3. That on September 11, 1989, the Authority refused to recognize the Association as the exclusive bargaining agent for employees of the bargaining unit, on the premise that .

(the Authority) had assisted in organizing the employees.

4. That on October 10, 1989, the Association filed a Complaint with the EMRB on the premise that the Authority's refusal to recognize it constituted a prohibited practice.

5. That on January 31, 1990, the Association, in alleged anticipation of its election as the exclusive bargaining agent of the bargaining unit employees, hand-delivered a letter to the Authority, notifying the Authority of its desire to negotiate over monetary subjects.

6. That on February 2 and 28, 1990, the Board of Commissioners, which govern operation of the Authority, decided to make the following changes in employee benefits:

A. Decreased vacation leave for anyone with over two years employment by one week.
B. Imposed a maximum of 200 hours vacation time.
C. Decreased the maximum amount of sick leave accrual.
D. Prohibited the cashing in of sick leave at the time of termination.
E. Froze 401-K plans so that no further employee or employer contributions may be made.
F. Imposed a more burdensome standard for receipt of longevity pay.
G. Removed Columbus Day and Good Friday holidays.

(Authority also published fact that its employees are "at-will" employees.)

7. That during the week of March 5, 1990, the employees of the bargaining unit became aware of the aforementioned unilateral changes in benefits.

8. That on March 23, 1990, the parties entered into a Settlement Agreement "to resolve all of their differences and

to avoid further investment of time and expense in litigation over the issue of recognition" and/or to dispose of e Complaint which the Association had filed with the EMRB as a result of the Authority's refusal to recognize it as the exclusive bargaining agent for employees of the bargaining unit.

9. That on April 20, 1990, the parties entered into another Settlement Agreement, effective April 27, 1990, setting forth the ground rules for conducting a representation election.

10. That on April 27, 1990, the Board of Commissioners decided to unilaterally implement a change in employee health insurance coverage by requiring a 100% employee contribution effective July 1, 1990.

11. That on May 7, 1990, the EMRB held representation elections for two bargaining units, i.e., a non-supervisory non-confidential unit and a supervisory non-confidential unit.

12. That on May 16, 1990, the Commissioner of the EMRB certified the Association's election as the exclusive bargaining representative for the Authority's supervisory and non-supervisory non-confidential bargaining units.

13. That on May 22, 1990, the Association again requested bargaining with the Authority.

14. That on June 13, 1990, the Board of Commissioners recognized the Association as the exclusive bargaining agent for the Authority's supervisory and non-supervisory non-confidential bargaining units, pursuant to the April 27,

1990 Settlement Agreement and the election conducted by EMRB.

15. That on August 31, 1990, the Association brought the instant Complaint before the Board, alleging the unilateral changes made by the Authority were in violation of NRS 288.150(1), NRS 288.270(1)(a) and NRS 288.270(1)(e).

16. That on September 24, 1990, the Authority filed Counterclaim, alleging that the Association's Complaint of August 31, 1990, was a breach of the March 23, 1990 Settlement Agreement and constituted a refusal to bargain in good faith and a prohibited practice under NRS 288.270(2)(b).

CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board has jurisdiction over the parties and the subject matter of this Complaint, pursuant to the provisions of NRS Chapter 288.

2. That the Complainant/Counter-Respondent, Clark County Public Employees Association, SEIU Local 1107, is a recognized employee organization as defined by NRS 288.040.

3. That the Respondent/Counter-Complainant, Housing Authority of the City of Las Vegas, is a recognized local government employer as defined by NRS 288.060.

4. That the Association applied for recognition as exclusive bargaining agent for the Authority's non-professional employees, pursuant to NRS 288.160.

5. That an election was conducted pursuant to NRS 288.160(4) and NAC 288.110, following which the Association was certified as the exclusive representative for bargaining

unit employees consisting of non-supervisory and supervisor non-confidential units.

6. That the instant Complaint was filed within six (6 months of the date(s) of the employees first knowledge of th occurrence(s) on which it is based as required by NR 288.110(4).

7. That the instant Complaint is sufficiently clear and concise to meet the requirements of NAC 288.200.

8. That the instant Complaint is not barred by claim preclusion theories of res judicata, collateral estoppel and splitting a cause of action, and is properly before the Board for consideration on its merits under NRS 288.110 and NAC 288.200.

9. That the Association did not agree to waive all practices prohibited by NRS 288.270(1) which may have been committed prior to the March 23, 1990 Settlement Agreement.

10. That the Settlement Agreement entered into on April 20, 1990, effective April 27, 1990, did not operate to stay the Authority's duty to bargain pursuant to NRS 288.150(1), following the EMRB's certification of the Association on May 16, 1990.

11. That the Authority was not obligated to bargain with the Association prior to the EMRB's certification of the Association on May 16, 1990, however, the Association's notice of January 31, 1990, reiterated by its request of May 22, 1990, obligated the Authority to immediately begin collecti bargaining on all matters subject to mandatory bargaining,

including subjects involving the budgeting of money for th fiscal 1991 budgetary period, pursuant to NRS 288.150.

12. That the Association's filing of the instan Complaint constituted neither a breach of the March 23, 199(Settlement Agreement nor a refusal to bargain in good faith ir violation of NRS 288.270(2)(b).

13. That the unilateral changes made by the Authority involved mandatory bargaining subjects by virtue of either the subject(s) being specifically set forth in NRS 288.150(2) or the subjects being significantly related to wages, rules and/or working conditions.

14. That the Authority was required to maintain the status quo during the course of the Association's organizing effort and that the unilateral changes implemented by the Authority in 1990 represent conduct which in its totality constitutes a failure to bargain in good faith and had the same effect as conduct which interferes with the rights of employees to organize and bargain collectively regarding their benefits, etc., practices which are prohibited by NRS 288.270(1)(a) and (e).

DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Association's Complaint is upheld to the extent set forth in the Board's Conclusions of Law, and the Authority shall immediately restore the status quo ante by retroactively reinstating the employee benefits which it eliminated or reduced pursuant to action(s) of the Board of

Commissioners of February 2 and 28, 1990 and April 27, 1990 and maintain said benefits until changed pursuant to the collective bargaining procedures mandated by NRS Chapter 288;

2. That the aforementioned restoration of benefits shall be retroactive to the date(s) said change(s) were implemented;

3. That any subsequent changes in benefits which are subject to mandatory bargaining shall be made pursuant to collective bargaining pursuant to the provisions of NRS Chapter 288; and

4. That the Respondent/Counter-Complainant, Housing Authority of the City of Las Vegas, shall pay the Complainant/ Counter-Respondent, Clark County Public Employees Association, SEIU Local 1107, $2,500.00 for costs and attorney's fees incurred in connection with this proceeding.

DATED this 25th day of July, 1991.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By _____
HOWARD ECKER, Chairman

By _____
SALVATORE GUGINO, Vice Chairman

By _____
TAMARA BARENGO, Member