

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

ESMERALDA COUNTY CLASSROOM
TEACHERS ASSOCIATION,

Complainant,

-vs-

ESMERALDA COUNTY SCHOOL
DISTRICT, THE ESMERALDA COUNTY
BOARD OF SCHOOL TRUSTEES, and
HAROLD TOKERUD,

Respondents.

ITEM NO. 273

CASE NO. A1-045497

DECISION

For the Complainant: Michael W. Dyer, Esq.
DYER AND MCDONALD

For the Respondents: C. Robert Cox, Esq.
WALTHER, KEY, MAUPIN, OATS,
COX, LEE & KLAICH

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

STATEMENT OF THE CASE

In a pre-hearing conference held August 7, 1991, the Complainant, ESMERALDA COUNTY CLASSROOM TEACHERS ASSOCIATION ("Association"), and Respondents, ESMERALDA COUNTY SCHOOL DISTRICT, THE ESMERALDA COUNTY BOARD OF SCHOOL TRUSTEES, and HAROLD TOKERUD (collectively referred to as "District"), narrowed the issues to the following:

1. Whether or not the filing of a grievance under the labor agreement in effect between the parties precludes the Board from "going forward with action" (considering the Complaint on its merits) pending resolution of the grievance through prescribed procedures for binding arbitration;

1 2. Whether or not Respondents' decision
2 to consider Ms. Mary Jane Fulgham's failure
3 to return a signed contract within ten (10)
4 days as a rejection of the contract, pursuant
5 to NRS 391.3196, was due to Mrs. Fulgham's
6 union activities; and

7 3. If so, whether or not Respondents'
8 decision constitutes a prohibited practice
9 under NRS 288.270(1)(a), (c), (d) and (f).

10 Also, during the aforementioned pre-hearing conference,
11 the parties stipulated to the following facts:

12 1. Complainant, ESMERALDA COUNTY CLASS-
13 ROOM TEACHERS ASSOCIATION ("Association") is
14 an employee organization as defined by NRS
15 288.040 and pursuant to NRS 288.160 is a duly
16 recognized employee organization for the
17 licensed employees of the ESMERALDA COUNTY
18 SCHOOL DISTRICT.

19 2. Respondent, ESMERALDA COUNTY SCHOOL
20 DISTRICT and the ESMERALDA COUNTY BOARD OF
21 SCHOOL TRUSTEES ("District") is a local
22 government employer as defined by NRS
23 288.060.

24 3. Respondent, HAROLD TOKERUD, is
25 employed by the District in the capacity of
26 Superintendent of the ESMERALDA COUNTY SCHOOL
27 DISTRICT.

28 4. Ms. Mary Jane Fulgham, is a teacher
employed by the District at Dyer Elementary
School in Dyer, Nevada.

 5. In the Fall of 1990, Ms. Fulgham
testified at an arbitration hearing on a
grievance filed by Ms. Rusty Johnson against
the District.

 6. The Association began its first
collective bargaining negotiations with the
District in 1988 and entered into an
agreement in June, 1988. A second negotiated
agreement was entered into on August 23, 1989
to be effective through June 30, 1991. In
January, 1991, the Association gave notice to
the District of its intent to bargain a
contract to be effective for the 1991-1992
school year. This is the third year the
parties have bargained. A bargaining team

1 was selected and Ms. Fulgham was nominated
2 chairman of the bargaining team. The first
3 negotiation session occurred on March 11,
4 1991. The parties have not reached an
5 agreement for the 1991-92 school year and
6 negotiations are continuing.

7 7. On or about May 1, 1991, the
8 District issued a Contract Between Employee
9 and Trustees to Ms. Fulgham. The contract
10 was executed by Brad Mettam and Leila Shrider
11 respectively, the President and Clerk of the
12 Esmeralda County Board of School Trustees and
13 was given to Ms. Fulgham for her signature.
14 Ms. Fulgham signed the contract and returned
15 the contract to the District on Monday, May
16 13, 1991.

17 8. On Monday, May 13, 1991, Respondent
18 HAROLD TOKERUD informed Ms. Fulgham that in
19 his view by failing to turn in the contract
20 by May 10, pursuant to NRS 391.3196, she had
21 declined employment with the District. Ms.
22 Fulgham immediately wrote to Respondent
23 TOKERUD and the President of the Board of
24 School Trustees that it was not her intent to
25 resign.

26 9. On June 11, 1991, the Board of
27 School Trustees voted that Ms. Fulgham's
28 failure to return her contract by May 10 was
a rejection of their offer of employment. On
June 11, 1991, Ms. Fulgham filed a grievance
against the District as a result of the
District's termination of Ms. Fulgham's
employment without just cause.

On August 23, 1991, the LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD ("EMRB" and "Board") conducted a
hearing on the instant Complaint. The Board's Discussion,
Conclusions of Law, Decision and Order are set forth below.

DISCUSSION

The parties have stipulated to the fact that a grievance
(Respondent's Exhibit "4") has been filed under the grievance
procedures of their labor agreement regarding the same subject
or cause of action which forms the basis of the instant

1 Complaint.

2 The Board has held that it has exclusive jurisdiction
3 concerning unfair labor practices and/or the resolution of
4 charges alleging prohibited practices, and the requirement
5 that it interpret contractual provisions in order to determine
6 whether or not a prohibited practice was involved in a
7 particular case does not deprive the Board of jurisdiction
8 over such matters. See Nevada Classified School Employees
9 Association, Chapter 1, Clark County vs. Clark County School
10 District, EMRB Item No. 105, Case No. A1-045336 (November 21,
11 1980). In so holding, the Board has adopted a "limited
12 deferral doctrine" with regard to disputes arising under labor
13 agreements. I.A.F.F. #731 vs. City of Reno, EMRB Item No.
14 257, Case No. A1-045466 (February 15, 1991). Under said
15 limited deferral doctrine in order for the Board to consider
16 complaint involving an alleged contractual violation, the
17 Complainant must establish, at least prima facie, that the
18 alleged contractual violation constituted a prohibited
19 practice (or failure to bargain in good faith) under NRS
20 Chapter 288. In the instant case, the Board finds that the
21 Association has met its requisite burden of proof.

22 The testimony and evidence of record is sufficient to
23 find that protected activity was a motivating factor in the
24 District's decision to consider Ms. Fulgham's failure to
25 return the contract within ten (10) days as a rejection of
26 said contract.

27 The Board is concerned with the chilling effect which
28

1 the District's decision may have had on rights of the
2 employees which are guaranteed under NRS Chapter 288. NRS
3 288.270 provides in part:

4 1. It is a prohibited practice for a local
5 government employer or its designated representa-
6 tive willfully to:

7 (a) Interfere, restrain or coerce any employee
8 in the exercise of any right guaranteed under this
9 chapter.

10 (b) Dominate, interfere or assist in the
11 formation or administration of any employee
12 organization.

13 (c) Discriminate in regard to hiring, tenure or
14 any term or condition of employment to encourage
15 or discourage membership in any employee
16 organization.

17 This Board outlined the legal standards governing an
18 employer's discriminatory conduct in Valdemar Arredondo, et.
19 al. v. Clark County School District, et. al., Item No. 102,
20 Case No. A1-045337 (April 22, 1981) citing the U.S. Supreme
21 Court decision National Labor Relations Board v. Great Dane
22 Trailers, 388 U.S. 26, 34; 87 S.Ct. 1792, 1798, 18 Lawyers
23 Edition 2nd 1027, 1032 (1967):

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

1 burden is upon the employer to establish that he
2 was motivated by legitimate objectives since proof
3 of motivation is most accessible to him."
 (italics in original)

4 In a more recent decision of Transportation Management
5 Corp., the U.S. Supreme Court supported the framework for
6 allocating burden of proof established in the Wright Line
7 case. Under Wright Line, the union must establish that
8 protected employee conduct was a motivating factor in the
9 decision to terminate; the burden then shifts to the employer
10 to prove it would have taken the same action regardless of the
11 employee's protected activity. NLRB v. Transportation
12 Management Corp., 462 U.S. 393, 113 LRRM 2857 (1983); NLRB v.
13 Wright Line, 662 F.2d 899, 108 LRRM 2513 (CA 1981) cert
14 denied, 455 U.S. 989, 109 LRRM 2779 (1982).

15 The Board believes that in the instant case the evidence
16 is sufficient to establish that Ms. Fulgham's involvement in
17 various protected activities was a motivating factor in the
18 District's decision to consider her contract as rejected.

19 The testimony developed that Ms. Fulgham was involved in
20 contentious negotiations on a new labor agreement at the time
21 of the District's decision. The Board believes that the
22 District's aforementioned decision was driven, in large part,
23 by Ms. Fulgham's above-described protected activities. Also,
24 it is clear that said decision could not help but be
25 inherently destructive to the employees' right to freely
26 organize and bargain collectively, and most certainly had a
27 chilling effect on the other employees.

28 It is further apparent that the decision of the District

1 to deny Ms. Fulgham's application for re-employment was also
2 based upon a personal animus by Superintendent Harold Tokerud
3 against Ms. Fulgham. At the hearing, Mr. Tokerud's dislike
4 for Ms. Fulgham was apparent in his statements about her to
5 the Board and it was clear from said statements that he was
6 attempting to take advantage of a perceived "technicality" to
7 eliminate a post-probationary teacher from the staff whom he
8 did not approve of and who was obviously viewed by him as a
9 troublemaker. Such an action is a prohibited practice
10 pursuant to NRS 288.270(1)(f).

11 The testimony also developed that:

12 1. Ms. Fulgham had been given good work
13 performance evaluations during her tenure with the
14 District;

15 2. Based on her work performance evaluations
16 above, Ms. Fulgham was considered a good teacher;

17 3. Ms. Fulgham had filed a grievance against
18 the wishes of Superintendent Harold Tokerud, which
19 upset Mr. Tokerud; and

20 4. Ms. Fulgham immediately applied for
21 re-employment following the District's afore-
22 mentioned decision; and

23 5. Subsequent to the District's afore-
24 mentioned decision and after Ms. Fulgham's
25 application for re-employment, the District not
26 only told her she didn't have to interview for the
27 job, but it also attempted to hire two individuals
28

1 unknown to the District to replace Ms. Fulgham;
2 the first individual was passing through town when
3 hired by the District for said vacancy and
4 subsequently resigned.

5 The Board believes these facts further evidence that the
6 motivation for the District's decision was related to Ms.
7 Fulgham's protected activity. Retaliation for such protected
8 activity is an unfair labor practice. NLRB vs. Ford Motor
9 Co., 683 F.2d 156, 110 LRRM 3202 (CA 6 1982); American Steel
10 Works, 263 NLRB 826, 111 LRRM 1136 (1982), and Teamsters,
11 Chauffeurs, Warehousemen & Helpers, and Professional,
12 Clerical, Public and Miscellaneous Employees, Local Union No.
13 533 vs. Humboldt General Hospital, EMRB Item No. 246, Case
14 Nos. A1-045459 and A1-045460 (June 11, 1990).

15 FINDINGS OF FACT

16 After hearing the testimony, considering the evidence
17 and due deliberation, the Board finds the facts are as
18 follows:

19 1. That Ms. Fulgham was a licensed employee of the
20 District.

21 2. That Ms. Fulgham was member of a recognized employee
22 organization.

23 3. That negotiations had commenced between the
24 Association and the District.

25 4. That, on April 30, 1991, the District provided Ms.
26 Fulgham with a form entitled "CONTRACT BETWEEN EMPLOYEE AND
27 TRUSTEES" (Petitioner's Exhibit "B").
28

1 5. That the aforementioned form was in error from the
2 standpoint that the salary shown was incorrect and it was in
3 the form of a final, binding contract.

4 6. That, at the time the aforementioned form was given
5 to Ms. Fulgham, she advised the Superintendent, Harold
6 Tokerud, that the salary shown was erroneous and expressed her
7 concern with respect to said error.

8 7. That there was conflicting testimony as to whether
9 or not Superintendent Harold Tokerud refused to correct the
10 salary.

11 8. That Ms. Fulgham did not sign the form on April 30,
12 1991, due to the aforementioned error in the salary shown
13 thereon.

14 9. That Ms. Fulgham subsequently talked to her union
15 representative and he instructed her as to how to deal with
16 the erroneous salary, i.e., make a notation on the form and
17 initial same.

18 10. That Ms. Fulgham then became involved in other
19 activities and did not return the form within ten (10) days.

20 11. That Ms. Fulgham had no intention to resign and
21 never communicated a rejection of the aforementioned "CONTRACT
22 BETWEEN EMPLOYEE AND TRUSTEES".

23 12. That, at the time Ms. Fulgham was given the
24 contract she orally indicated her intention and desire to
25 continue her employment with the District.

26 13. That, on May 13, 1991, less than one business day
27 after the aforementioned 10-day period had expired,
28

1 Superintendent Harold Tokerud learned of Ms. Fulgham's failure
2 to return the contract approximately one (1) hour before
3 returned the signed contract.

4 14. That Ms. Fulgham communicated her intent and desire
5 to accept the aforementioned "CONTRACT BETWEEN EMPLOYEE AND
6 TRUSTEES", and she signed and returned this document to
7 Superintendent Harold Tokerud on May 13, 1991.

8 15. That, on May 13, 1991, Ms. Fulgham wrote
9 Superintendent Harold Tokerud and Mr. Brad Mettam, President
10 of the Board of Trustees for the District, confirming her
11 discussion with Superintendent Harold Tokerud and reiterating
12 that it was not her intention to resign.

13 16. That Ms. Fulgham was involved in union activities;
14 i.e., she was in contentious negotiations with the District
15 regarding a new labor agreement.

16 17. That Ms. Fulgham had filed a grievance against
17 Superintendent Harold Tokerud's wishes regarding a letter of
18 reprimand which he had issued her.

19 18. That the testimony of Superintendent Harold Tokerud
20 evidenced personal animus toward Ms. Fulgham because of her
21 union activities.

22 CONCLUSIONS OF LAW

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

26 2. That the Complainant, ESMERALDA COUNTY CLASSROOM
27 TEACHERS ASSOCIATION, is a recognized employee organization as

1 defined by NRS 288.040.

2 3. That Respondent, ESMERALDA COUNTY SCHOOL DISTRICT,
3 is a local government employer as defined by NRS 288.060.

4 4. That Respondents, ESMERALDA COUNTY BOARD OF SCHOOL
5 TRUSTEES and HAROLD TOKERUD, were acting in their official
6 capacity as agents for the ESMERALDA COUNTY SCHOOL DISTRICT.

7 5. That the District committed an unfair labor practice
8 under NRS 288.270(1) by discriminating against Ms. Mary Jane
9 Fulgham for personal reasons and because of her union
10 affiliation.

11 6. That due to Ms. Fulgham's union activities and the
12 personal animus against her, and considering the totality of
13 the circumstances, the return of Ms. Fulgham's signed contract
14 in an untimely fashion was wrongfully deemed to be a rejection
15 of her contract, in violation of NRS 288.270(1).

16 7. That the filing of a grievance under the labor
17 agreement in effect between the parties does not preclude this
18 Board from going forward with this action, as contemplated by
19 NRS 288.110(2), pending resolution of the grievance through
20 binding arbitration.

21 DECISION AND ORDER

22 Upon decision rendered by this Board at its meeting on
23 August 23, 1991, it is hereby,

24 ORDERED, ADJUDGED AND DECREED as follows:

25 1. That Ms. Fulgham be reinstated to her position
26 within the District forthwith; and

27 / / /

28

1 2. That each party is to bear its own attorney's fees
2 and costs.

September

3 DATED this 23rd day of ~~August~~, 1991.

4 LOCAL GOVERNMENT EMPLOYEE-
5 MANAGEMENT RELATIONS BOARD

6 By 
7 HOWARD ECKER, Chairman

8 By 
9 SALVATORE GUGINO, Vice Chairman

10 By 
11 TAMARA BARENGO, Member
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