

1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD

4 ORMSBY COUNTY EDUCATION)
ASSOCIATION,)

ITEM NO. 311

5 Complainant,)

CASE NO. A1-045527

6 -vs-)

DECISION

7 CARSON CITY SCHOOL DISTRICT, and)
8 the BOARD OF TRUSTEES OF THE CARSON)
CITY SCHOOL DISTRICT,)

9 Respondents.)
10

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

12 For the Respondents: James Todd Russell, Esq.
13 ALLISON, MACKENZIE, HARTMAN,
SOUMBENIOTIS & RUSSELL, LTD.

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

16 STATEMENT OF THE CASE

17 In a pre-hearing conference held on February 8, 1993,
18 the Complainant, ORMSBY COUNTY EDUCATION ASSOCIATION
19 (hereinafter referred to as "Association") and Respondents,
20 CARSON CITY SCHOOL DISTRICT and the BOARD OF TRUSTEES OF THE
21 CARSON CITY SCHOOL DISTRICT (hereinafter referred to as
22 "District"), narrowed the issues to the following:

23 1. Whether a past practice existed between
24 the Ormsby County Education Association ("OCEA")
25 and the Carson City School District (the
26 "District") whereby the District adopted the
calendar plan voted on by the majority of teachers
employed by the District.

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Board will reserve the right to determine all other aspects of the school calendar. For purposes of this Article, variety is defined as two (2) or more plans. (Emphasis added.)

The Association alleges, in effect, that by virtue of said past practice the District waived its right to determine "all other aspects of the school calendar" and conferred a benefit to its teachers (the right to determine all aspects of the school calendar); therefore, the District was required to adopt the school calendar for 1992-93 voted on by the majority of teachers. In the instant case, the school calendar adopted by the District was not the one voted on by the majority of teachers. The Association, therefore, contends that the District violated the past practice and unilaterally altered a benefit or condition of employment, actions allegedly prohibited by NRS 288.270(1)(e), when it (the District) refused to adopt the school calendar voted on by the majority of teachers.

From the testimony of witnesses and other evidence of record the Board finds as follows:

I.

**THE PAST PRACTICE DID NOT CREATE A TERM OR CONDITION OF EMPLOYMENT WHICH THE SCHOOL BOARD WAS OBLIGATED TO CONTINUE, SUBJECT TO NEGOTIATION.
(Issue Nos. 1 and 2)**

In the Matter of The Washoe County School District and The Washoe County Teachers Association, EMRB Item No. 3 (October 9, 1971), the EMRB held that the subject of the school calendar is "negotiable". However, the Board stated "In making this determination, the Board recognizes that

1 members of the community, other than teachers and the School
2 District, including parents, business community, the State
3 University system, students themselves, and other public
4 service agencies have an interest in the matter of a school
5 calendar." EMRB's decision in the matter was appealed
6 whereupon the Supreme Court of Nevada upheld the EMRB's
7 findings, stating that discussion alone does not guarantee
8 adoption. Washoe County Teachers Association vs. Washoe
9 County School District, 90 Nev. 442, 449 (1974). As
10 originally enacted, NRS 288.150 provided that mandatory
11 bargaining encompassed "wages, hours, and conditions of
12 employment". Statutes of Nevada, 1969, 1377. This Board, in
13 the case of In the Matter of the Clark County Teachers
14 Association's Complaint Regarding the Clark County School
15 District's Interpretation of NRS 288.150 Concerning the
16 Negotiation of Preparation Time, EMRB Item No. 5 (March 22,
17 1972), held that application of the significant relation test
18 compelled the conclusion that the scope of mandatory
19 bargaining under "conditions of employment" was extremely
20 broad. Our decision was confirmed by the Nevada Supreme Court
21 on appeal. Clark County School District vs. Local Government
22 Employee-Management Relations Board, 90 Nev. 442 (1974).

23 In response to the Supreme Court's decision, the
24 Legislature, by Statutes of Nevada, 1975, 919, amended NRS
25 288.150 by specifically delineating the "subjects" of
26 mandatory bargaining that were within the "scope" of mandatory
27 bargaining. By so doing, the Legislature expressed its intent
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1 that no "subjects", other than those specified, were within
2 the realm of mandatory bargaining. Although "holidays" and
3 "total number of days' work required in a work year" are
4 listed as mandatory subjects of bargaining, the adoption of a
5 school calendar is not. (The Association has conceded that it
6 is not a subject of mandatory bargaining.) Accordingly, in
7 order to find that the District was required to adopt the
8 school calendar voted on by the majority of teachers, we must
9 find that by virtue of the past practice the School Board
10 waived its statutory and contractual right to determine the
11 school calendar (except for Christmas and Easter vacations)
12 and created a term or condition of employment which it is
13 obligated to continue, subject to negotiation [Washoe County
14 Sheriff's Deputies Association, Inc., et. al. vs. County of
15 Washoe, Case No. A1-045479, EMRB Item No. 271 (July 1991)];
16 i.e., giving teachers the right to determine the school
17 calendar. Such a finding is not supported by the facts,
18 testimony and evidence of record in the instant case.

19 Testimony and evidence of record established that during
20 negotiations of the 1989-90 collective bargaining agreement
21 the Association proposed amending Article 18, supra, to
22 provide that the school year would begin on the Tuesday
23 following the last Monday of August and end no later than the
24 second Friday in June. If adopted, this proposed amendment
25 would have effectively removed the District's right to
26 determine all aspects of the school calendar (except Christmas
27 and Easter vacations). The fact that the Association made
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1 this proposal is tantamount to an admission that the
2 Association was aware that the District had not waived its
3 right to determine all aspects of the school calendar (except
4 Christmas and Easter vacations).

5 The testimony also established that in adopting a school
6 calendar each year the District considers three calendars
7 prepared and submitted by the teachers, as well as input from
8 parents, classified employees and perhaps others in the
9 community. (See testimony of Association's witness Warren
10 Wish and School District's witnesses Stephanie Miles, Betty
11 Thoreson and Robert Scott.) Also, the collective bargaining
12 agreement in effect between the Carson City School District
13 and the Nevada Classified School Employees Association now
14 contains a provision (Article 16 - Calendar), reading
15 "Classified employees will be invited to provide input to the
16 formulation of the Christmas and Easter vacations into the
17 school calendar.", and it was the school calendar submitted by
18 the classified employees which was adopted, in lieu of any
19 submitted by the teachers, for the current school year
20 1992-93. Accordingly, to contend (as does the Association)
21 that the District's practice, prior to 1992, of adopting the
22 school calendar voted on by a majority of teachers required
23 that the District continue to adopt said calendar in
24 perpetuity, suggests that the District's practice of
25 considering other school calendars, as well as the input of
26 classified employees and other members of the community, prior
27 to adopting a school calendar, was a charade; i.e., that the
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1 school calendar voted on by the majority of teachers must be
2 adopted by the District, irrespective of any other
3 consideration or input. This premise simply will not stand
4 the tests of reason and logic.

5 It is evident from the past practice that the desires of
6 the teachers concerning the school calendar are given a very
7 high priority among the many factors which must be considered
8 by the District in determining a school calendar. (The school
9 calendar voted on by the majority of teachers was adopted by
10 the district every year from at least 1981 until 1992, and
11 might have been adopted in 1992, if it had not been for
12 construction and safety considerations mandating a later start
13 in the school year, and a problem with one holiday; i.e., the
14 school calendar voted on by the majority of teachers
15 contemplated that the day to be observed as Nevada Day, a
16 holiday for classified employees, would be a work/school day.
17 However, the desires of the teachers are clearly not the
18 District's only consideration in making said determination.
19 The Board is convinced that it was merely by coincidence that
20 other considerations did not prevent the District from
21 adopting a different school calendar than the one voted on by
22 the majority of teachers for the years 1981 through 1991.

23 In view of the foregoing, the Board finds that the
24 evidence as to past practice is insufficient to support the
25 conclusion that the District waived its right to determine all
26 aspects of the school calendar (except Christmas and Easter
27 vacations). Consistent with the traditional common law view
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1 of waiver, the National Labor Relations Board ("NLRB") and the
2 courts have construed the waiver doctrine strictly and have
3 been reluctant to infer a waiver. New York Mirror, 151 NLRB
4 834, 58 LRRM 1465 (1965). Where such an assertion is raised,
5 the test applied has been whether the waiver is "clear and
6 unmistakable". New York Mirror, *supra*, and Norris Industries,
7 231 NLRB 50, 96 LRRM 1078 (1977). In the instant case, the
8 alleged or implied waiver is not clear and unmistakable. The
9 Association, therefore, has failed to meet its burden of proof
10 to establish that, by virtue of the past practice, the
11 District waived its right to determine all aspects of the
12 school calendar (except Christmas and Easter vacations) and
13 created a term or condition of employment which it was
14 obligated to continue, subject to negotiation; i.e., the
15 premise on which the Complaint is based.

16 II.

17 **THE BOARD'S DETERMINATION AS TO THE**
18 **EXISTENCE OF A PAST PRACTICE IS NOT**
19 **PRECLUDED BY THE COLLECTIVE BARGAINING**
20 **AGREEMENT. (Issue No. 3)**

21 The Board has previously held that an employer may
22 create, by practice over a substantial period of time, a term
23 or condition of employment which it is obligated to continue,
24 subject to negotiation. Washoe county Sheriff's Deputies
25 Association, Inc., et. al. vs. County of Washoe, Case No.
26 A1-045479, EMRB Item No. 271 (July, 1991). This notwith-
27 standing the clear and unambiguous terms of the collective
28 bargaining agreement.

As indicated previously, in the instant case the

1 testimony and evidence of record is insufficient to support
2 the contentions of the Association as to the District's waiver
3 of its right to determine all aspects of school calendar
4 (except Christmas and Easter vacations) and creation of a term
5 or condition of employment by virtue of the past practice.
6 Absent the existence of other overriding factors or
7 considerations, if the Association had met its burden of proof
8 in this regard, it would have been entirely appropriate for
9 the Board to hold that the District was required to continue
10 the practice, subject to negotiation. Under such
11 circumstances, a unilateral change from the practice could be
12 considered a violation of NRS 288.270(1)(a) and (e).

13 **III.**

14 **INTERPRETATION OF THE COLLECTIVE BARGAINING**
15 **AGREEMENT DOES NOT PRECLUDE THE BOARD FROM**
16 **RENDERING A DETERMINATION AS TO THE**
EXISTENCE OF A PROHIBITED LABOR PRACTICE.
(Issue No. 4)

17 Under NRS 288.110(2), the Board is permitted to hear and
18 determine any complaint arising out of the interpretation of,
19 or performance under, the provisions of NRS Chapter 288. This
20 includes the jurisdiction to adjudicate unfair labor practices
21 as enumerated under NRS 288.270 even when the resolution of
22 such a charge requires the interpretation of a contractual
23 provision. See Nevada Classified School Employees
24 Association, Chapter One, Clark County vs. Clark County School
25 District, Case No. A1-045336, EMRB Item No. 105 (November 21,
26 1980).

27 Notwithstanding that stated above, in the instant case
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1 the issue is moot; i.e., it is not necessary for the Board to
2 interpret any contractual provision, inasmuch as the
3 contractual provision in question is clear and unambiguous and
4 there is no dispute as to its meaning or intent.

5 **FINDINGS OF FACT**

6 1. That the Complainant, Ormsby County Education
7 Association, is a local government employee organization.

8 2. That the Respondents, Carson City School District
9 and the Board of Trustees of the Carson City School District,
10 is (are) local government employers.

11 3. That the collective bargaining agreement in effect
12 between the parties, specifically Article 18 thereof, reserves
13 the right to determine all aspects of the school calendar
14 (except Christmas and Easter vacations) to the School Board.

15 4. That each year since at least 1981, the Association
16 has prepared and submitted three (3) school calendars for
17 consideration by the School Board.

18 5. That during negotiation of the 1989-90 collective
19 bargaining agreement the Association proposed revising Article
20 18 thereof to provide for an agreed-to school calendar, which
21 would be the same each year.

22 6. That until 1992, the School Board adopted the school
23 calendar preferred by the majority of teachers, after
24 receiving input from classified employees and other members of
25 the community.

26 7. That the school calendar for 1992-93 voted on by the
27 majority of teachers was not adopted by the School Board
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1 primarily because (1) it conflicted with a construction
2 schedule; (2) because of safety considerations involved in
3 having children begin school at temporary locations; and (3)
4 because of a conflict with a holiday to be observed by
5 classified employees.

6 8. That in 1992, the Nevada Classified School Employees
7 Association submitted a school calendar for consideration,
8 pursuant to Article 16 of its collective bargaining agreement,
9 and said calendar was adopted by the School Board, in lieu of
10 any of the three calendars prepared and submitted by the
11 Association.

12 CONCLUSIONS OF LAW

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

17 2. That the Complainant, Ormsby County Education
18 Association, is a recognized employee organization as defined
19 by NRS 288.040.

20 3. That the Respondents, Carson City School District
21 and the Board of Trustees of the Carson City School District,
22 is (are) a recognized local government employer as defined by
23 NRS 288.060.

24 4. That, under the circumstances of this particular
25 case, the past practice in determining the school calendar did
26 not constitute a waiver of the District's right and
27 responsibility under the collective bargaining agreement and
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1 NRS 288.150(5) and (6) to determine all aspects of the school
2 calendar (except Christmas and Easter vacations) and "manage
3 its operation in the most efficient manner consistent with the
4 best interests of all its citizens, its taxpayers and its
5 employees."

6 5. That, under the circumstances of this particular
7 case, the past practice in determining the school calendar did
8 not create or confer a benefit of condition of employment
9 which the District was required to continue, subject to
10 negotiation. Accordingly, when the District adopted a school
11 calendar for 1992-93 which did not conform with the school
12 calendar voted on by the majority of teachers, it (the
13 District) did not violate NRS 288.270(1)(e).

14 **DECISION AND ORDER**

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

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1 The Association's Complaint is denied, without
2 prejudice, with each side to bear its own costs and attorney's
3 fees.

4 DATED this 15 day of April 1993.

5 LOCAL GOVERNMENT EMPLOYEE-
6 MANAGEMENT RELATIONS BOARD

7 By Salvatore C. Gugno
8 SALVATORE C. GUGINO, Chairman

9 By Tamara Barengo
10 TAMARA BARENGO, Vice Chairman

11 By Howard Ecker
12 HOWARD ECKER, Member

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