STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, Complainant, vs. CITY OF FERNLEY, Respondent.	ITEM NO. 565A CASE NO. A1-045779 **DECISION**

For Complainant: Eleanor I. Morton, Esq.
Leonard Carder, LLP

For Respondent: Paul G. Taggart, Esq.
King & Taggart, Ltd.

On December 1, 2003, Complainant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245 ("IBEW") filed a Complaint with the LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD ("Board") alleging that Respondent CITY OF FERNLEY ("Fernley") violated NRS 288.150 by refusing to bargain over the wages, hours and working conditions of part-time employees. On December 24, 20 , Fernley filed its Answer, denying IBEW's allegations. The Board subsequently scheduled IBEW's Complaint for hearing.

On September 15, 2004, Fernley filed a request for leave to file a motion to dismiss and a motion to dismiss. On October 28, 2004, the Board conducted a hearing, noticed in accordance with Nevada's Open Meeting Law. As a preliminary issue at the hearing, the Board denied Fernley's Motion to Dismiss as untimely. See NAC 288.240(3). After hearing from the parties' witnesses, the Board ordered post-hearing briefs, which the parties filed on December 10, 2004. IBEW filed an erratum to its post-hearing brief on December 27, 2004.

On January 5, 2005, the Board conducted deliberations, noticed in accordance with Nevada's Open Meeting Law. Having now deliberated and considered the testimony of the

witnesses, as well as their physical and verbal reactions while testifying, and having reviewed all evidence in the record and the parties' post-hearing briefs, we find and conclude that IBEW has failed to demonstrate any violation of NRS 288.150 and is entitled to no relief on its claims before this Board.

DISCUSSION

Factual Background Evidence

The evidence presented during the hearing demonstrates that IBEW and the Town of Fernley (currently, the City of Fernley) ("Fernley") have been engaged in collective bargaining since July 2000. During the negotiations leading to the initial collective bargaining agreement ("CBA"), Raymond Thomas, a Senior Business Representative for IBEW, was the lead negotiator for IBEW, and Gary Bacock, former Fernley Town Manager (currently Fernley City Manager), was the lead negotiator for Fernley. The parties could not agree on whether supervisory employees should be included in the bargaining unit to be represented by IBEW. Ultimately, the parties participated in mediation assisted by the Board's former Commissioner. The mediation led to a Mediation Agreement, dated June 23, 1999, which states, in part:

> IBEW agrees to modify the proposed bargaining unit to represent all Non-Supervisory employees employed by the [sic] Fernley. This unit would currently consist of Maintenance Leadworker, Sr. Maintenance Worker, Foreman, Utility Workers, Clerk/Administrative Assistant and Clerk. This unit would exclude the positions of Field Superintendent or [sic] and Office Manager which have been deemed supervisor positions and Administrative Assistant which has been deemed a confidential position.
>
> Fernley agrees to recognize the IBEW as the exclusive bargaining representative for the Non-Supervisory unit after having reviewed the authorization cards submitted by the IBEW reflecting a request for representation by six of the current eight eligible employees.

IBEW Exh. 1. At the time this Mediation Agreement was entered, Fernley employed no regular part-time employees.[1] Subsequently, Larry Beller of Beller & Associates, Inc., prepared a classification study for Fernley. By the time of this study, Fernley employed some regular part-time employees. However, a dispute arose between Bacock and the IBEW with respect to those

[1]According to Fernley's policy manual, a "regular part-time employee" is a "person who has successfully completed an initial probationary period in a budgeted position which requires at least twenty (20) hours per week but less than full-time employment." IBEW Exh. 9.

employees, and to resolve the matter, Fernley converted its regular part-time positions into regular full-time positions.

The first CBA ("the 2000 CBA") was signed by the parties and ratified by the Fernley Town Board in July 2000. The 2000 CBA contains the following especially relevant provisions:

> Recognition of Bargaining Unit Representative
>
> In accordance with the provisions of NRS 288, the Town has recognized and does recognize the Union as the exclusive collective bargaining representative of those employees in the classifications of those set forth below. . . . This recognition does not include temporary seasonal employees (known as Part-time Hourly), temporary part-time employees who have worked less than six (6) consecutive months. . . . .
>
> [T]he Town shall recognize the Union as the exclusive representative of those employees whom the Nevada Revised Statutes (NRS 288.160) establishes as the Exclusive Bargaining Agent for those classifications as covered in the recognition agreement (mediation agreement, dated 6/23/99, which was ratified by the Board on 7/7/99, see Exhibit "A") between Town and Union. *After completion of a classification study, the current positions represented by the Union include all full time employees, excluding supervisory, confidential, and management employees, and the positions are currently Office Assistant I & II, Senior Office Assistant, Maintenance Worker, Utility Worker I & II, Mechanic, and Senior Waste Water Treatment Plant Operator.* These classifications and subsequent eligible positions are considered the "Bargaining Unit", represented by a bargaining unit representative, which is IBEW or the "Union". Classifications applicable to the Bargaining Unit may arise in the future and representation shall be automatic after establishment of the new classification and rate of pay. .l. .
>
> When the words "employee" and "employees" are used in this Agreement they shall be construed to refer only to the employees described above unless otherwise noted.
>
> . . . .
>
> Definitions
>
> For the purpose of the contract, a regular employee is defined as an employee who has completed (6) months of service with the Town.
>
> *The Town's employment of part time employees shall:*
>
> 1. *Not be positions in the bargaining unit* such as Utility Worker I (Part time), unless negotiations have taken place with the Union; and
>
> 2. Not result in the loss of regular employment for regular employees. Part-time employees in the bargaining unit shall be paid the beginning hourly wage rates for the approved position, established in this Agreement for the work performed.

IBEW Exh. 6, at 2, 4 (Emphasis added.)

After Fernley was incorporated, the parties negotiated a second CBA ("the 2002 CBA"). This time, Santiago Salazar was the lead negotiator for IBEW, and Gary Bacock was the lead negotiator for Fernley, with Larry Beller handling the final negotiations on behalf of Fern The 2002 CBA covers the period from July 1, 2002, through June 30, 2005. It was signed by the parties and ratified by the Fernley City Council on October 23, 2002. This CBA contains th following provisions, some of which have been revised from the 2000 CBA as indicated by the emphasis added below.

> Scope of the Bargaining Unit
>
> [T]he *City* shall recognize the Union as the exclusive representative of those employees whom the Nevada Revised Statutes (NRS 288.160) establishes as the Exclusive Bargaining Agent for those classifications as covered in the recognition agreement ("Mediation Agreement dated 6/23/99, which was ratified by the Board on 7/7/99, see Exhibit "A") between *City* and Union. *[Language omitted.] New classifications which are appropriate for inclusion in the* Bargaining Unit may *be established* in the future and representation shall be automatic after establishment of the new classification and rate of pay. . . .
>
> When the words "employee" and "employees" are used in this Agreement they shall be construed to refer only to employees described above, unless otherwise noted.
>
> . . . .
>
> Definitions
>
> For the purpose of the Agreement, a regular full-time employee is defined as an employee who has completed six (6) months of service with the *City*.
>
> The *City's* employment of part-time employees shall:
>
> 1. Not be positions in the Bargaining Unit such as *but not limited to* Utility Worker I (part-time), unless negotiations have taken place with the Union; and
> 2. Not result in the loss of regular *full-time* employment for regular *full-time* employees. Part-time employees in the Bargaining Unit shall be paid the beginning hourly wage rates for the approved position, established in the Agreement for the work performed.

IBEW Exh. 11, at 2-3.

In June 2003, the parties conducted a Labor Management meeting at which a conflict arose over whether regular part-time employees were within the bargaining unit for which IBEW had been recognized as the bargaining agent. Subsequently, the parties exchanged letters bac and forth, and IBEW filed the instant Complaint with the Board.

At the hearing, IBEW presented testimony from Thomas and Salazar, who each testified as to his belief that, during the negotiations in which he participated, it was understood between IBEW and Fernley that the bargaining unit represented by IBEW included regular part-time employees. According to Thomas, prior to the parties entering the 2000 CBA, he wanted to negotiate over issues affecting part-time employees, including how benefits would be triggered and calculated and what actually constituted a "part-time employee." However, his desire for negotiation was not "received all that well." Thomas testified,

> [W]e ended up agreeing that they would not part time those classifications. . . . [W]e had been at it quite awhile, over maybe a year and a half, maybe a year by then, I'm not sure. Anyway, we got off of it, and figured we would just come back to the table if they wanted to introduce part-time employee in our classifications. . . .
>
> [W]hen we got the agreement to get off this part-timing issue, they converted all part-time employees to full time.

Tr. at 36-37.

Thomas testified that under the 2000 CBA, Fernley would have had to request negotiations if it wanted to introduce part-time employees into any classifications within the bargaining unit, which consisted of all non-supervisory employees.

Salazar testified that at the time of the negotiations for the 2002 CBA, Fernley had two permanent or "regular" types of positions, i.e., regular full-time and regular part-time. Further, Bacock did not attend every negotiation session for the 2002 CBA, and toward the end of negotiations, Larry Beller negotiated on behalf of Fernley. During these latter negotiation sessions, Beller deleted the language referring to "full-time" from the 2000 CBA's recognition clause. According to Salazar, this was done to make less ambiguous the fact that regular part-time employees were covered by the 2002 CBA. However, Salazar acknowledged that this revision left the 2002 CBA referring only to the Mediation Agreement to show bargaining-unit composition, and the classifications set forth in the Mediation Agreement had been altered as indicated in the recognition clause of the 2000 CBA. Salazar also testified that he believed that under the 2000 and 2002 CBAs, Fernley must negotiate with IBEW before it may create regular part-time positions. Even though Fernley had not so negotiated, it had hired regular part-time

non-supervisory employees during the terms of the CBAs, and at the time of the hearing Fernley continued to employ one such regular part-time employee. Salazar did not know whether this employee wanted to be in the bargaining unit.

In addition to the aforementioned CBAs and Mediation Agreement, IBEW also presented at the hearing various other documentary exhibits, including proposals exchanged by negotiators during the negotiations on each CBA (IBEW Exh. 2, 3, 5, and 9), excerpts from Fernley's policy manual showing its definitions for types of employees and its provisions for benefits to part-time employees (IBEW Exh. 10 and 12), the classification study prepared by Larry Beller in March 2000 (IBEW Exh. 4), and the letters exchanged between the parties over the instant dispute (IBEW Exh. 7, and 8).

Gary Bacock testified for Fernley. He explained that, before the parties entered the 2000 CBA, IBEW had proposed that it would represent a bargaining unit which included supervisory employees. Therefore, the Mediation Agreement was not entered to address the part-time issue, but instead was intended to address only the limited issue of whether supervisory employees were in the unit. The 2000 CBA covered a bargaining unit consisting of the specific positions identified in that document, and the 2002 CBA covered a unit including the positions identified in the Mediation Agreement as modified by Fernley's subsequent recognition that other full-time positions were also in the unit. All of the positions identified in the CBAs, or subsequently included in the unit by Fernley, are regular full-time positions; thus, only regular full-time employees are in the unit represented by IBEW.

According to Bacock's testimony, the parties never contemplated that the unit represented by IBEW would include regular part-time employees, and Bacock never agreed to a composition of the unit that included such employees. Bacock had always maintained that part-time employees were not in the unit, and he never understood that Fernley was precluded from hiring new part-time employees unless it first negotiated with IBEW. The only part-time issue addressed by the parties during negotiations involved whether Fernley's employment of part-time employees would result in the loss of employment for regular full-time employees and thereby diminish the actual size of the bargaining unit. For that reason, IBEW wanted Fernley to

negotiate if it was going to reduce a bargaining unit position to a part-time position. According to Bacock, under both CBAs, if IBEW wanted a position in the unit, they needed to request this and negotiate it with Fernley. Bacock also explained that subsections 2 of the 2000 and 2 2 CBAs' "definitions" sections, as set forth above, were included in order to specify an hourly rate for part-time employees in the event that negotiations had occurred and part-time employees became part of the unit.

Bacock further testified that the bargaining-unit status of regular part-time employees was not brought up during the 2002 negotiations. Although Larry Beller finished up the negotiations for the 2002 CBA, Beller was not authorized to change the bargaining-unit composition. Beller indicated that he had only made some minor clean-up revisions to the language from the 2000 CBA, and Bacock did not believe that Beller ever advised the City Council of any substantive alterations to the bargaining-unit composition. However, Bacock admitted on cross-examination that a form Fernley submitted to the EMRB in 2003 identified the bargaining unit in question as consisting of "non-supervisory city employees."

Fernley also presented evidence of the proposals exchanged by the parties prior to the time that Beller took over the negotiations, and these do not reflect that the issue of whether part-time employees were included in the bargaining unit was a point of negotiation between the parties. Fernley Exh. A.

Legal Analysis

IBEW claims that Fernley's refusal to recognize and negotiate with IBEW as the bargaining agent for regular part-time employees violates NRS 288.150. We conclude that IBEW has failed to prove a violation of NRS 288.150.

Although IBEW does not bother to specify any specific provision of NRS 288.150 upon which IBEW relies, we note that NRS 288.150 provides that, except for certain circumstances not relevant here, "every local government employer shall negotiate in good faith . . . concerning the mandatory subjects of bargaining" and that the scope of mandatory bargaining includes certain topics affecting wages, hours and working conditions, as well as "[r]ecognition clause[s]." NRS 288.150(1), (2)(j). Additionally, NRS 288.270(1)(e) provides that "[i]t is a

prohibited labor practice for a local government employer or its designated representative willfully to . . . [r]efuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. . 1 ." As the Complainant, IBEW bears the burden of proving a prohibited labor practice under NRS 288.150 and NRS 288.270(1)(e). See Washoe County Sch. Dist. Nurses Ass'n and Nevada Nurses Ass'n v. Washoe County Sch. Dist., et al., Item No. 109, EMRB Case No. A1-045329, at 3 (1981).

Unilateral changes by an employer during the course of a collective bargaining relationship affecting matters which are mandatory subjects of bargaining are regarded as *per e* refusals to bargain. Las Vegas Police Protective Ass'n Metro, Inc. v. City of Las Vegas, Item No. 248, EMRB Case No. A1-045461, at 7-8 (1990). This includes an employer's unilateral removal, without negotiation, of a position within the bargaining unit covered by the terms of a contract. See, e.g., Operating Engineers, Local 3 v. County of Lander, Item No. 346, EMRB Case No. A1-045553, at 4-7 (1994) (recognizing that unilateral removal of position from bargaining unit and change of pay grade for same position, without negotiation, violates NRS 288.150 and NRS 288.270(1)(e)).

Here, the evidence does not support IBEW's prohibited labor practice charge. We find the testimony of Gary Bacock on the bargaining history between the parties and the reasons for the language used in the 2002 CBA to be especially credible and persuasive. The testimony of Thomas as to Bacock's unwillingness[1] to negotiate for part-time employees in the year 2000 supports Bacock's assertions. The testimony given at the hearing, along with the evidence of the recognition clauses and definitions contained in the 2000 and 2002 CBAs, convinces us that Fernley recognized IBEW as the bargaining unit for regular full-time employees only and that part-time employees were excluded from this unit, absent Fernley's consent to further negotiation.[2]

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[2]We note that the 2002 CBA provides that the parties "mutually waive the right to negotiate upon any further subject during the term of the agreement without the specific written consent of both parties." IBEW Exh. 11, p. 9.

In particular, the recognition clause of the 2000 CBA states, "the current positions represented by the Union include *all full time employees*, excluding supervisory, confidential, and management employees, and the positions are currently Office Assistant 1 & II, Senior Office Assistant, Maintenance Worker, Utility Worker I & II, Mechanic, and Senior Waste Water Treatment Plant Operator." (Emphasis added.) Further, although this language was deleted from the 2002 CBA, the 2002 CBA identifies the unit by reference to the Mediation Agreement, which itself only identifies full-time employees. We think the language from the 2002 CBA's definitions, i.e., "The City's employment of part-time employees shall . . . *[n]ot be positions in the Bargaining Unit* such as but not limited to Utility Worker I (part-time), unless negotiations have taken place with the Union." (emphasis added), like that of the 2000 CBA's definitions, indicates that part-time employees are not included in the bargaining unit, absent Fernley's agreement to modify the recognized unit, and that Fernley has merely agreed that it will not diminish the size of the unit by converting full-time non-supervisory positions into part-time positions. Finally, we do not find the evidence presented by IBEW to be sufficiently reliable to persuade the Board on any point in dispute. In sum, Fernley had no obligation to bargain with IBEW over the wages, hours and working conditions of regular part-time employees, as IBEW is not the recognized bargaining agent for such employees.

Moreover, it is the employer's prerogative pursuant to NRS 288.170(1) to determine an appropriate bargaining unit, and this determination must precede the recognition of an employee organization as the exclusive bargaining representative for the unit. In the Matter of Operating Engineers Local 501 v. Las Vegas Convention/Visitors Auth., Item No. 96, EMRB Case No. A1-045323, at 3-4, 7 (1980). If an employee organization is aggrieved by the employer's determination of the unit, it may appeal to this Board pursuant to NRS 288.170. Id. at 3, 7. See also NAC 288.130.

This Board has recognized that, in enacting the provisions at NRS 288.150(j) to include recognition clauses as a subject for which bargaining is mandatory, the Legislature did not intend to undermine the employer's right to determine an appropriate bargaining unit and that an "employer has no duty to bargain with the employee organization as to what classifications of

employees will be included in the bargaining unit." In the Matter of International Ass'n of Fire Fighters, Local 1265 v. City of Sparks, Item No. 136, EMRB Case No. A1-045362, at 4, 8 (1982). Therefore, a charge of failure to bargain over the non-mandatory subject of an appropriate bargaining unit under NRS 288.150 is invalid. Id. at 4-5, 8; Nevada Classified Sch. Employees Ass'n, Chapter 6 v. Douglas County Sch. Dist., Item No. 339, EMRB Case No. A1-045551, at 6-7 (1994).

We conclude that IBEW failed to meet its burden of demonstrating a prohibited labor practice related to Fernley's failure to bargain over the composition of the bargaining unit. Furthermore, because IBEW does not currently represent Fernley's part-time employees, if IBEW wants to pursue representation of these employees, it must follow the procedures set forth in NRS Chapter 288 and NAC Chapter 288, and, specifically, at NRS 288.160, NRS 288.170 and NAC 288.143. If IBEW is ultimately recognized as the bargaining agent for this new group of local government employees, and any dispute arises thereafter from Fernley's determination of an appropriate bargaining unit, such dispute would be ripe for appeal to this Board pursuant to NRS 288.170 and NAC 288.130. However, we note that the resolution of such an appeal would involve consideration of evidence, showing various factors affecting the determination of an appropriate unit, which has yet to be presented to this Board. See In the Matter of Operating Engineers Local 501 v. Las Vegas Convention/Visitors Auth., Item No. 96, EMRB Case No. A1-045323, at 3-4 (1980) (listing factors relevant to determination of appropriate bargaining unit).

FINDINGS OF FACT

1. IBEW is an "employee organization" as defined by NRS 288.040.

2. Fernley is a "local government employer" as defined by NRS 288.060, and its employees are "local government employees" as defined by NRS 288.050.

3. IBEW and Fernley have engaged in collective bargaining since July 2000, with the current CBA being in effect from July 1, 2002, through June 30, 2005.

4. During the collective bargaining relationship between these parties, Fernley recognized IBEW as the bargaining agent for Fernley's regular full-time non-supervisory employees, and for these employees only.

5. Fernley never recognized IBEW as being the bargaining agent for regular part-time non-supervisory employees, and such employees are not and have not been covered in the successive CBAs entered between the parties.

6. Gary Bacock, the City Manager for Fernley, testified credibly as to the intent of the language used in the successive CBAs concerning the bargaining-unit composition, and we accept his assertions as to the parties' intent in entering these CBAs.

7. The language used in the 2000 and 2002 CBAs and in the Mediation Agreement is reasonably construed to cover only Fernley's regular full-time non-supervisory employees as employees in the bargaining unit represented by IBEW.

8. IBEW failed to present sufficiently reliable evidence to persuade this Board that Fernley has recognized IBEW as the bargaining agent for Fernley's regular part-time non-supervisory employees.

9. Fernley did not unilaterally change the composition of the recognized bargaining unit covered by the CBAs between these parties.

10. Fernley was within its rights in refusing to negotiate the issue of expanding the bargaining unit.

11. IBEW failed to demonstrate that Fernley violated NRS 288.150 by failing to bargain in good faith with IBEW over the inclusion of regular part-time employees in the bargaining unit or by failing to bargain in good faith over the wages, hours and working conditions of these employees.

12. To the extent that any factual determination in the preceding discussion section of this Decision is not separately set forth in this section, it is hereby incorporated as a finding of fact.

13. To the extent that any of these findings of fact might be more properly stated as conclusions of law, they should be considered as such.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter addressed by this Decision, pursuant to the provisions of NRS Chapter 288.

2. Determination of an appropriate bargaining unit is a matter reserved to the employer, pursuant to NRS 288.170, and is not a subject of mandatory bargaining pursuant to NRS 288.150.

3. IBEW has failed to prove that Fernley violated NRS 288.150 by failing to bargain in good faith over the inclusion of regular part-time employees in the bargaining unit represented by IBEW or by failing to bargain in good faith over the wages, hours and working conditions for such employees.

4. If IBEW wants to pursue representation of regular part-time employees, it must follow the procedures set forth in NRS Chapter 288 and NAC Chapter 288, and, specifically, at NRS 288.160, NRS 288.170 and NAC 288.143.

5. If IBEW is ultimately recognized as the bargaining agent for regular part-time employees, and any dispute arises thereafter from Fernley's determination of an appropriate bargaining unit, such dispute would be ripe for appeal to this Board pursuant to NRS 288.170 and NAC 288.130.

6. To the extent that any legal conclusion in the preceding discussion section of this Decision is not separately set forth in this section, it is hereby incorporated as a conclusion of law.

7. To the extent that any of these conclusions of law might be more properly stated as findings of fact, they should be considered as such.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT for the above-stated reasons, the City of Fernley is entitled to judgment in its favor.

IT IS FURTHER ORDERED that, for the benefit of employee-management relations, the City of Fernley shall post copies of this Decision at conspicuous locations, which are accessible to its employees, for a period of thirty (30) days.

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IT IS FURTHER ORDERED that each party shall bear its own attorney's fees and costs in this matter.

DATED this 30th day of March, 2005.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
JANET TROST, ESQ., Chairman

BY: _____
TAMARA E BARENGO, Vice-Chairman

BY: _____
JOHN E. DICKS, ESQ., Board Member