

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

4 WASHOE EDUCATION ASSOCIATION,)

5 Petitioner,)

6 vs.)

7 WASHOE COUNTY SCHOOL DISTRICT,)

8 Respondent.)

ITEM NO. 575A

CASE NO. A1-045792

DECLARATORY ORDER

9
10 For Petitioner: Thomas J. Donaldson, Esq.
Dyer, Lawrence, Penrose, Flaherty & Donaldson

11 For Respondent: C. Robert Cox, Esq.
12 Walther, Key, Maupin, Oats, Cox & LeGoy

13 **STATEMENT OF THE CASE**

14 On March 24, 2004, the Washoe Education Association ("the Association") filed,
15 pursuant to NAC 288.100, a Petition for Declaratory Order with the Local Government
16 Employee-Management Relations Board ("the Board"), seeking a determination that the subject
17 of teacher evaluations and the procedure for such evaluations are within the scope of mandatory
18 bargaining. Thereafter, the Washoe County School District ("the District") filed a response to
19 the petition. On April 27, 2004, the Board entered its order concluding that testimony would not
20 be required at the hearing on the petition and ordering the parties to brief the issues for hearing.
21 The parties filed their respective briefs, and on August 4, 2004, this Board conducted
22 deliberations, noticed in accordance with Nevada's Open Meeting Law.

23 **DISCUSSION**

24 On or before February 1, 2003, the Association, as the duly recognized bargaining agent
25 for licensed employees, i.e., teachers and counselors, employed by the District, sent written
26 notification to the District that it wished to negotiate a successor collective bargaining
27 agreement, the parties' previous agreement expiring on June 30, 2003. The Association
28 specifically requested to negotiate the procedure for teacher performance evaluations. On

1 October 10, 2003, the District notified the Association that it would not negotiate the requested
2 subject matter because it was the District's position that the topic of teacher performance
3 evaluations was not within the scope of mandatory bargaining, but was instead a matter of
4 management prerogative pursuant to NRS 288.150(3). Thereafter, the parties agreed upon the
5 terms of a successive collective bargaining agreement, which contained no provision relating to
6 teacher evaluations, and the Association submitted to this Board the issue of whether negotiation
7 of teacher evaluations is mandatory. The Association contends that teacher performance
8 evaluations are significantly related to discharge and disciplinary procedures, and thus are within
9 the scope of mandatory bargaining pursuant to NRS 288.150(2)(i). We agree.

10 The District is a local government employer, and the Association is a recognized
11 employee organization within the meaning of NRS Chapter 288. Every local government
12 employer is required to negotiate in good faith with designated representatives of recognized
13 employee organizations concerning the mandatory subjects of bargaining. NRS 288.150(1).

14 Prior to 1975, this Board held that any topic significantly related to wages, hours, and
15 conditions of employment was within the scope of mandatory bargaining under NRS 288.150,
16 regardless of whether the topic also related to subjects within employers' prerogatives. The
17 Board specifically held that teacher evaluations are a topic of mandatory bargaining under NRS
18 288.150 because they affect transfer, retention, promotion and the compensation scale of
19 teachers and therefore significantly relate to teachers' wages and working conditions. Washoe
20 County Sch. Dist. v. Washoe County Teachers Ass'n, EMRB Item No. 3 (1971), at 3-3. The
21 Nevada Supreme Court upheld this approach in Clark County Sch. Dist. v. Local Gov't
22 Employee-Management Relations Bd. and Washoe County Teachers Ass'n v. Washoe County
23 Sch. Dist., 90 Nev. 442, 448-49, 530 P.2d 114, 118-19 (1974).

24 In 1975, the Legislature amended NRS 288.150, which formerly imposed a general duty
25 of negotiation with specific exceptions. 1975 Nev. Stat., ch. 539, § 15, at 919-20. The amended
26 statute enumerates specific topics that are mandatory subjects of negotiation, including
27 "[d]ischarge and disciplinary procedures." NRS 288.150(2)(i).

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1 Following the 1975 amendments, this Board concluded that teacher evaluations were not
2 within NRS 288.150(2)(i)'s provision requiring that discharge and disciplinary procedures be
3 negotiated and were not a subject of mandatory negotiation. See Washoe County Teachers
4 Ass'n v. Washoe County Sch. Dist. and the Bd. of Trustees of the Washoe County Sch. Dist.
5 Case No. A1-045297, Item No. 56 (1976), at 4; see also Nevada Classified Sch. Employees
6 Ass'n v. Clark County Sch. Dist., Case No. A1-045345, Item No. 111 (1981), at 2-3.

7 This Board subsequently considered the amended statute in Douglas County Professional
8 Educ. Ass'n v. Douglas County Sch. Dist. Case No. A1-045380, Item No. 168 (1984). There
9 the Board recognized that "the 'subjects' specified by the Legislature are couched in terms which
10 lead to the inescapable conclusion that such 'subjects' are the specified areas of bargaining and
11 the extent of topics encompassed within such areas is subject to interpretation and limitation o
12 definition by this Board." Id. at 3. The same year, we decided County of Washoe v. Washoe
13 County Employees' Ass'n, Case No. A1-045365, Item No. 159 (1984). In doing so, we stated:

14 [I]t appears that decisions of this Board subsequent to the 1975 legislative
15 amendments have approached analysis of negotiability under NRS 288.150(2) . . .
16 as being whether or not from the facts presented, the subject matter involved is
17 directly and significantly related to any one of the subjects specifically
enumerated in NRS 288.150(2) . . . under a broad construction of the particular
listed subject.

18 Id. at 8 (citing Henderson Police Officers Ass'n v. City of Henderson, Case No. A1-045314,
19 Item No. 83 (1978) (holding that physical agility testing is a mandatory subject of negotiations
20 pursuant to NRS 288.150(2)(r), which lists "[s]afety of the employee" as a mandatory bargaining
21 subject); International Ass'n of Fire Fighters, Local 1908 v. Clark County, Nevada, Case N
22 A1-045357, Item No. 146 (1982) (recognizing that if rules and regulations relate to a mandatory
23 subject of bargaining, then they are negotiable)).

24 Finally, in 1988, this Board again addressed whether teacher evaluations are a topic of
25 mandatory negotiation. In Pershing County Classroom Teachers Ass'n v. Pershing County Sch.
26 Dist., Case No. A1-045416, Item No. 212 (1988), this Board noted that NRS Chapter 391, which
27 pertains to employment of teachers, was amended in 1985 to specifically make evaluations part
28 of the "discharge" process for dismissal of teachers. Id. at 5. The Board stated:

1 Statutory language existed prior to 1985 which called for each school
2 district to develop a "uniform system" for the "objective evaluation of teacher
3 personnel." See 1973 Nev. Stats. 790. District policy concerning evaluations was
4 to be developed "following consultation and involvement of elected
5 representatives of teacher personnel or their designees." *Id.* at 790. Reports of
6 such evaluations, however, were simply a matter for "consideration" in
7 determining whether or not a teacher was performing adequately. *Id.* at 792.
8 With some minor changes, this language still exists.

9 However, in a significant move, the 1985 Nevada legislature amended
10 NRS 391 to provide that any certificated employee who becomes a post
11 probationary employee after June 30, 1985, is subject to dismissal from
12 employment, if he or she receives three (3) overall unsatisfactory evaluations
13 within the immediately preceding five (5) or fewer years. 1985 Nev. Stats. 1082.
14 According to the 1985 statute, by offering the three overall unsatisfactory
15 evaluations at the hearing, a presumption arose that just cause existed to dismiss
16 the teacher; and the burden of proof then shifted to the employee to offer proof to
17 rebut the presumption. *Id.* at 1082.

18 NRS 391.31963 has since been amended by the 1987 legislature to
19 eliminate that portion of the 1985 statute which shifted the burden of proof in a
20 teacher dismissal hearing to the employee but has preserved that portion
21 significantly relating teacher evaluations to the discharge procedure. NRS
22 391.31963(d).²

23 The Board agrees with the Association's contention that the statutory
24 "tying" of evaluation to the formal statutory dismissal process, a situation unique
25 to teachers, has moved evaluation into an area significantly and directly related to
26 the subject area of "discharge" pursuant to NRS 288.150(2)(i). . . . Since the 1985
27 legislative changes in NRS 391, evaluations now play an integral statutory role in
28 the teacher discharge process. The Board concludes that teacher evaluations are
significantly related to and are a part of "discharge and disciplinary procedures"
pursuant to NRS 288.150(2)(i) and are, therefore, within the scope of mandatory
bargaining. In so deciding, the Board overrules its holdings in [Nevada Classified
Sch. Employees Ass'n.] Case No. A1-045435, Item No. 111, and [Washoe
County Teachers Ass'n.] Case No. A1-045297, Item No. 56.

¹NRS 391.3125 currently states, in pertinent part:

1. It is the intent of the Legislature that a uniform system be developed for objective
evaluation of teachers and other licensed personnel in each school district.

2. Each board, following consultation with and involvement of elected representatives of
the teachers or their designees, shall develop a policy for objective evaluations in narrative form.
The policy must set forth a means according to which an employee's overall performance may be
determined to be satisfactory or unsatisfactory. . . . Evaluations, while not the sole criterion, must
be used in the dismissal process.

²We note that in 1987, the Legislature also amended NRS 391.312(1)-(2), addressing teacher suspension, dismissal,
demotion and non-reemployment for reasons including "[i]nadequate performance," as follows: "2. In determining
whether the professional performance of a [certified] *licensed* employee is inadequate, consideration [shall] *must* be
given to the regular and special evaluation reports prepared in accordance with the policy of the employing school
district and to any written standards of performance which may have been adopted by the board." 1987 Nev. Stat.,
ch. 433, § 38, at 1004-05 (bold emphasis added).

1 Pershing County Classroom Teachers Ass'n, Item No. 212, at 5-6.

2 However, on judicial review from this decision, the District Court entered an order
3 concluding that:

4 The clear intention of NRS 288.150 is to limit the scope of bargaining between
5 local government employers and recognized employee organizations. A list of
6 mandatory subjects limiting the scope of bargaining is contained within that
7 statute. The statute was designed to be all inclusive. Therefore, when a subject is
8 not enumerated within this statute, the legislature intended for the subject not to
9 be negotiable.

10 The language contained in NRS 288.150(2) and NRS 391.3125 is precise and
11 narrowly drawn. In NRS 391.3125, teacher evaluations must be developed by
12 school districts after consultation with and involvement of elected representatives
13 of teachers. This process of "conferring" with teachers has a special narrow
14 meaning and intent under the statute in labor relations and does not encompass
15 "bargaining" within the meaning of NRS 288.150(2).

16 Pershing County Sch. Dist. v. Pershing County Classroom Teachers Ass'n, Case No. 88-01309A
17 (Order, May 16, 1990), at 2-3 (emphasis added). The District Court found that based on this
18 analysis, as a matter of law, teacher evaluations are not subject to mandatory bargaining. Id. at 3.
19 On remand, this Board ordered that "teacher evaluations in this particular case, and in this case
20 alone, were not the subject of mandatory bargaining." Pershing County Classroom Teachers
21 Ass'n v. Pershing County Sch. Dist., Case No. A1-045416, Item. No. 212-A (1991) (emphasis
22 added).

23 The Board now rejects and disavows reliance on the District Court's reasoning in the
24 Pershing County Sch. Dist. here. Indeed, we reaffirm our previous conclusions that because
25 teacher evaluations are statutorily tied to, and thus relate directly and significantly to, discipline
26 and discharge for teachers, the topic is a mandatory subject of negotiation pursuant to NRS
27 288.150(2)(i).

28 The District Court's analysis in Pershing County Sch. Dist. ignored the fact that NRS
391.3125's requirements of "consultation" and "involvement of elected representatives of
teachers" has remained unchanged since its enactment in 1973. See 1973 Nev. Stat., ch. 512, §
4, at 790. These requirements were in effect when the Nevada Supreme Court upheld this
Board's decision that teacher evaluations are a subject of mandatory bargaining. See Clark C
Sch. Dist., 90 Nev. 442, 530 P.2d 114 (1974). Moreover, the NRS Chapter 391's requirements

1 are not inconsistent with requiring negotiations on the topic of teacher evaluations. Cf. Lyon
2 County Educ. Ass'n v. Lyon County Sch. Dist., Case No. A1-045717, Item No. 510 (200)
3 (addressing NRS 358.347(1)'s requirements that school districts "cooperat[e]" and "consult
4 with" employee associations in adopting programs, and concluding that school district w s
5 nevertheless required to negotiate certain provisions of program and thereby could have fulfilled
6 the statutory requirements of cooperation and consultation). Requiring good faith negotiations
7 "does not require that an agreement be reached. It does, however, provide a process whereby
8 employees will be consulted about decisions which have profound impact on them and thus,
9 industrial peace will be preserved and promoted." Truckee Meadows Fire Protection Dist. v.
10 International Ass'n of Fire Fighters, Local 2487, 109 Nev. 367, 376-77, 849 P.2d 343, 350
11 (1993) (quoting Lorain City Sch. Dist. Bd. of Educ. v. State Employment Relations Bd., 533
12 N.E.2d 264, 269 (Ohio 1988)). Furthermore, such negotiation may fulfill the District's
13 obligation pursuant to NRS Chapter 391 to consult with and involve elected representatives of
14 teachers. Cf. Lyon County Educ. Ass'n, Item No. 510.

15 Moreover, although NRS 391.31963 has been repealed, see 1989 Nev. Stat., ch. 624, § 6,
16 at 1429, the 1989 Legislature also added to NRS 391.3125(2) the language that "[e]valuations,
17 while not the sole criteria, must be used in the dismissal process." Id., § 1, at 1426. Thus,
18 teacher evaluations remain directly tied to and play an integral role in the discipline and
19 discharge process.

20 Next, since the District Court's Pershing County Sch. Dist. decision, the Nevada Supreme
21 Court has upheld, as within this Board's authority, our continuing use of the "significantly
22 related" test, thus proving to be erroneous the District Court's narrow reasoning in Pershing
23 County Sch. Dist. that did not consider whether a proposed subject of bargaining was
24 significantly related to a mandatory subject specified at NRS 288.150(2). See Truckee Meadows
25 Fire Protection Dist., 109 Nev. at 372-73 & n.1, 849 P.2d at 347 & n.1 (despite statutory
26 delineation of mandatory subjects of bargaining, the Court quoted with approval this Board's
27 determination that "the extent of topics encompassed within [specified areas of bargaining under
28 NRS 288.150(2)] is subject to interpretation and limitation or definition by this Board." (quoting

1 Douglas County Professional Educ. Ass'n, Item No. 168, and citing Henderson Police Officers
2 Ass'n, Item No. 83)).

3 We also reject the District's contention that the matter of teacher evaluations must be
4 reserved to the District pursuant to NRS 288.160(3)(c)(1), which reserves to local government
5 employers the right to determine "work performance standards." However, the District has not
6 shown that work performance standards (how well a teacher should perform) must encompass
7 evaluation methods (how to measure that performance). Because teacher evaluations serve only
8 as a means to determine whether work performance standards are met, bargaining over such
9 evaluations would not intrude on an area reserved to the employer.

10 Accordingly, we determine that teacher evaluations and the process pertaining thereto are
11 mandatory subjects of bargaining because they are directly and significantly related to the
12 subject of discipline and dismissal.

13 FINDINGS OF FACT

14 1. The Association is an employee organization within the meaning of NRS 288.040
15 and is the duly recognized bargaining agent for the licensed employees, i.e., teachers and
16 counselors, employed by the District.

17 2. The District is a local government employer within the meaning of NRS 288.060.

18 3. The parties have engaged in collective bargaining in the past and have entered
19 into a succession of negotiated agreements, the parties' previous agreement expiring on June 30,
20 2003.

21 4. On or before February 1, 2003, the Association sent written notification to the
22 District that it intended to negotiate a successor Agreement, and requested negotiation of the
23 procedure for conducting teacher performance evaluations.

24 5. On October 10, 2003, the District notified the Association that it would not
25 negotiate the requested subject matter because it was the District's position that the topic of
26 teacher performance evaluations was outside the scope of mandatory bargaining, but was instead
27 a matter of management prerogative pursuant to NRS 288.160(3).

28 ///

1 6. On March 24, 2004, the Association filed a Petition for Declaratory Order seeking
2 a determination that the subject of teacher evaluations was within the scope of mandatory
3 bargaining.

4 7. NRS Chapter 391, and specifically NRS 391.312(2) and NRS 391.3125(2),
5 directly ties and significantly relates teacher evaluations to "[d]ischarge and disciplinary
6 procedures" at NRS 288.150(2)(i).

7 8. Should any finding of fact be more properly construed as a conclusion of law, it
8 may be so deemed.

9 **CONCLUSIONS OF LAW**

10 1. The Local Government Employee-Management Relations Board has jurisdiction
11 over the parties and the subject matters of the complaint on file herein pursuant to the provisions
12 of NRS Chapter 288.

13 2. The District is a local government employer as defined in NRS 288.060.

14 3. The Association is a recognized employee organization as defined by NRS
15 288.040.

16 4. NRS 288.150(2) lists the mandatory subjects of bargaining and, in particular,
17 "[d]ischarge and disciplinary procedures" are mandatory subjects of bargaining.

18 5. Matters "significantly related" to mandatory bargaining subjects are likewise
19 mandatory subjects of bargaining. Clark County Sch. Dist., 90 Nev. 442, 530 P.2d 114; Truckee
20 Meadows Fire Protection Dist., 109 Nev. 367, 849 P.2d 343.

21 6. NRS Chapter 391, and specifically NRS 391.312(2) and NRS 391.3125(2),
22 directly ties and significantly relates teacher evaluations to "[d]ischarge and disciplinary
23 procedures" at NRS 288.150(2)(i), and therefore teacher evaluations and the procedures
24 pertaining thereto are within the scope of mandatory negotiation.

25 7. Should any conclusion of law be more properly construed as a finding of fact, it
26 may be so deemed.

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1 **ORDER**

2 For the reasons set forth herein and based on the above findings of fact and conclusions
3 of law, the Board hereby ORDERS AND DECLARES that the topics of teacher evaluations and
4 the procedures pertaining thereto are subjects of mandatory bargaining.

5 IT IS FURTHER ORDERED that each party shall bear its own costs and attorneys' fees
6 in the above-captioned matter.

7 DATED this 22nd day of September, 2004.

8 LOCAL GOVERNMENT EMPLOYEE-
9 MANAGEMENT RELATIONS BOARD

10 BY: 
11

JANET TROST, ESQ., Chairman

12
13 BY: 
14

TAMARA E. BARENGO, Vice-Chairman

15
16 BY: 
17

JOHN E. DICKS, ESQ., Board Member