

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NANCY LEE PROKOP,
Complainant,

vs.

WASHOE COUNTY SCHOOL DISTRICT,
Respondent.

ITEM NO. 642B

CASE NO. A1-045890

FINDINGS OF FACT CONCLUSIONS
OF LAW, AND ORDER

For Complainant: Brent H. Harsh, Esq.
Watson Rounds

For Respondents: Christopher B. Reich
Washoe County School District

On August 30, 2006, a complaint was filed with the Local Government Employee Management Relations Board ("Board"). A Motion to Dismiss was filed on September 20, 2006. The Board entered an order denying the same on December 8, 2006. The parties filed hearing statements; and a pre-hearing conference was held on April 16, 2007.

This matter was noticed for hearing pursuant to NRS and NAC chapters 288, 1 and 2, chapter 233B, and Nevada's open meeting laws.

The matter came on for hearing before the Board on May 1, 2007. One (1) witness was called, i.e., petitioner Nancy Lee Prokop ("Prokop"), a former teacher for the Washoe County School District ("School District" or "Respondent"). Brent Harsh, Esq., appeared for petitioner (Tr. p. 4) and Christopher Reich, Esq., is the representative for the respondent, Washoe County School District (Tr. p. 5). Although originally a party to this matter, the Washoe Employee Association ("WEA" or "Association") represents the teachers employed by the School District; however, WEA was dismissed as a Respondent by stipulation of the parties.

Petitioner and Respondent entered into a Stipulated Statement of Facts. Joint exhibits were admitted. Tr. p. 5.

1 Prior to the start of the hearing, the School District renewed its motion to dismiss based
2 on Prokop's alleged lack of standing and statute of limitations. The Board indicated that when it
3 denied the motion originally, it had reviewed the issues of whether petitioner was an employee
4 that would have standing under NRS chapter 288 to bring the complaint and whether the
5 complaint was timely filed. The School District argued in support of the renewal of the motion
6 that Ms. Prokop resigned approximately 2 months before filing her complaint, and the Board's
7 prior decisions indicate that the complaint must be filed by a petitioner who is currently
8 employed as a public employee. (Tr. p. 11). Prokop argued that the prior Board decisions are not
9 binding and the Board has the authority to disregard its prior orders; however, she admits the
10 Board is bound by actual case law from the Nevada Supreme Court. The applicable statute to
11 this case is NRS 288.110, i.e., a person employed by a local government employer has standing
12 to file a complaint with this Board.

13 Additionally, NRS 288.110(4) states the Board may not consider a complaint filed more
14 than 6 months after the occurrence. Prokop alleges that the last denial letter from the School
15 District is dated February 28, 2006, and the complaint was filed on August 30, 2006, i.e., within
16 the 6 month period plus add three days allowed for mailing. Tr. p. 14.

17 The motion was taken under advisement; and the matter proceeded to hearing. Tr. p. 16-
18 7. Prior to the limited testimony of Ms. Prokop, the Board allowed additional argument by the
19 parties in support of their respective positions, including but not limited to the collective
20 bargaining agreement ("CBA"), past practices of the School District, and the Early Separation
21 Incentive Program ("ESIP"). ESIP was described as a "pool of money to act as an incentive to
22 teachers to retire so that Washoe County School District can recoup salary savings." Tr. p. 1
23 The problem with ESIP is when you have more applicants for the pool of money than money
24 within the pool. Id. CBA paragraph 24.13.2.2 pertains to ESIP and states that it shall be applied
25 to the teachers with the "most number of years." Tr. p. 20. For the year in question, there was
26 only "\$1,038,000 in the ESIP for teachers, certified employees." Tr. p. 37. Testimony was
27 presented that ESIP has been in existence for at least 5 years. Tr. p. 58.

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1 Testimony was offered that the CBA states that "teachers with 20 years of continuous
2 years [of service] and 50 years or older may apply for ESIP." Tr. p. 20. A cut-off may also be
3 established based upon the hire date if too many teachers apply for ESIP. Id. Prokop argued
4 that, in contract law, any ambiguity in a document is construed against the drafters, i.e., the
5 School District and the employee bargaining association. Id. Prokop continued to argue that
6 "Washoe County School District and WEA have always applied to the cap on to people with
7 continuous amount of years." Tr. p. 22. Because the CBA was recently renegotiated to change
8 15 years of service to 20 years, past practices no longer exists. Tr. p. 22. Had the parties
9 intended it to be continuous years of service, the CBA could have been renegotiated-rewritten to
10 reflect that requirement. Prokop, through counsel, continued that "to have a contract, you have
11 [to have] an offer, acceptance, and consideration," and no additional consideration was given to
12 the teachers. Tr. p. 23.

13 Prokop claims to have "29 years of total work with the school district, 27 of those were
14 continuous." Tr. p. 24. Exhibit 7 is the list of employees possibly at issue in this matter. This
15 list shows Prokop has 29 years of service. Tr. p. 24. Her first hire date is August 1973, thus,
16 "Ms. Prokop would actually be 28 on the list." Tr. p. 24. She was rehired by the School District
17 on March 29, 1979. Tr. p. 25. The time off was not a "leave of absence." Tr. p. 27. In
18 summary, Prokop's counsel offered, that "it really doesn't matter which hire date you look at,
19 because you first have to look at the cap, and you need to look at the most amount of years." Tr.
20 p. 25.

21 The School District described past practices as:

22 [A]n operation that the parties, through their manner of dealings, in this case with
23 the ESIP provision, under article 44 of how the parties interpret the language
24 that's within the agreement. And over a number of years, if both parties continue
25 the same course of dealings with regard to that particular language, and there's a
tacit agreement about that's what that agreement means, then a past practice can
be used to interpret what that language, indeed, means to the parties of the
agreement. Tr. p. 28.

26 The School District also argued that NRS chapter 288 does not allow the Board to
27 interpret CBAs. Tr. p. 29. The School District claims that this is a contractual issue, and Prokop
28 admitted the same by bringing forth contract doctrines. It continued that by the lack of asserting

1 a proper prohibited labor practice claim, this Board is barred from hearing contractual issues
2 relating to the CBA. Tr. p. 30. In closing, the School District claimed that in reviewing:

3 Exhibit 7, there is no indication whatsoever that the complainant was singled out
4 or somehow treated differently out of some approximately 95 individuals, 64 of
5 whom were not able to receive ESIP because there is only so much money that
6 the [School District] has. Tr. p. 31.

7 Exhibit 4 contained the minutes of the School Board which indicated that "ESIP in the
8 2005 and 2006 year would [have a cut-off of] February 1st, 1978," and Prokop's hire date of
9 1979 did not fall within that time frame. Tr. p. 31. The School District stated that Prokop "c
10 have stayed on with the district for another year and hoped she received ESIP" the follow
11 year; however, "she chose not to. She resigned on June 30th, 2006." Tr. p. 31. In response
12 question by Board Member Wilkerson, the School District stated that all teachers who rece
13 ESIP for the year in question had worked "continuously," not "total years." Tr. p. 36.

14 In rebuttal, Prokop claimed that the School District is interfering, restraining, or coercing
15 her, as a public employee, from exercising a right guaranteed under NRS chapter 288. Tr. p
16 She further repeated that "past practice" is simply not applicable to the present contract as the
17 parties did not include the word or concept "continuous" to the term "years of service." Tr. p.
18 34. Thus, based upon the above, Prokop believes she is entitled to ESIP in the amount of
19 \$17,747. Tr. p. 35.

20 In response to questions from the Board, Prokop stated:

21 What you have here is you are not allowed to - - what this is, is they are
22 interfering with the contractual right with how they are interpreting the contract.
23 With them interpreting it with WEA, they are actually interfering with her
24 contractual rights, and that is clearly within this Board's purview. . e.

25 What it did is it interfered with her collecting \$17,000, which was a right
26 that she was entitled to through the contract or the collective bargaining
27 agreement, which was created through 288 between WEA and Washoe County
28 School District. Tr. p. 40.

29 Ms. Prokop then testified that she started with the School District in 1973; and she has
30 been continuously licensed since that time. Tr. p. 44. The Board further questioned her
31 concerning sick time, vacation time, and PERS (Public Employees Retirement System). Tr. p.

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1 46-7. Prokop testified that she did buy some years with PERS. Tr. p. 48. It was further
2 indicated that:

3 Once they entered into that collective bargaining agreement, which was
4 allowed under [NRS chapter] 288, both Washoe County School District, WEA,
5 WEA and its members, by ratifying that collective bargaining agreement, actually
6 created the right. . . .

7 What they are now doing is, they are unilaterally modifying a contract by adding
8 a term, and that term being continuous. Tr. p. 50-51.

9 The School District claims it is in a "precarious situation." More specifically, it alleges:

10 If we were to amend the practice that we have been doing for many years
11 regarding ESIP with the WEA, and the County continues to use the service for
12 purposes of the cap and extend it to Ms. Prokop, then we would be in violation of
13 that practice that we didn't negotiate with the WEA to change that practice. . . .

14 We would be giving benefit to somebody without negotiating. And we
15 would be here with the WEA as the complainant against the District for changing
16 a term and condition of employment under the agreement without negotiating,
17 because the past practice under Ormsby and many other cases that the EMRB has
18 decided, past practice, once found, can't be changed unless it's negotiated.

19 And it's stipulated in the facts that the District and the WEA have a past
20 practice of continuous years of service approached as a cap. Tr. p. 51-2.

21 Upon further questioning by the Board, Ms. Prokop stated that the School District did not
22 adjust her hire date back to when she was originally hired by the School District. Tr. p. 55.

23 FINDINGS OF FACT

24 1. Prokop is a public employee entitled to file a complaint with this Board if the
25 allegations are violations of NRS chapter 288.

26 2. The School District is a government employer pursuant to the provisions of NRS
27 chapter 288.

28 3. WEA is an employee organization pursuant to the provisions of NRS chapter 288.

 4. Prokop retired from the School District on June 30, 2006; with her first hire date being
August 1973. Prokop took time off to raise a family and submitted a letter of resignation. The
next hire date is March 29, 1979.

 5. Prokop was a member of WEA during her employment with the School District.

 6. WEA and the School District have negotiated a CBA; and the current one was ratified
by the members and became effectively July 1, 2005.

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1 7. The WEA and the School District bargained for the ESIP and for the time period P
2 question, the amount in that program was \$1,038,000.00.

3 8. The CBA, Article 24.13.1, states that the "bargaining unit members must be at least .0
4 years old and have completed 20 years of continuous service with the District in order to e
5 eligible for ESIP.

6 9. The CBA, Article 24.13.2, allows a cap, i.e., the sum of \$1,038,000 for the time period
7 in question.

8 10. Prokop was eligible for ESIP as she was at least 50 years of age and had worked
9 continuously with the School District for over 20 continuous years; and she has since retired.

10 11. Pursuant to Article 24.13.2.3 of the CBA, the ESIP will be governed by
11 Administrative Regulation 4148 which states that should the costs of the program exceed the
12 funds available, the distribution will be prioritized based on the hire date.

13 12. The parties further stipulated that the parties "have [a] past practice of using
14 continuous years of service based on hire date in order to calculate which bargaining unit
15 members will receive the ESIP in order to remain" within the funds available.

16 13. Because of the funds available, the School District's trustees determined that ESIP
17 benefits would be given to those teachers who were hired on or before February 1, 1978; and
18 because Prokop's last hire date was 1979, she was not entitled to ESIP benefits.

19 14. NRS 288.270 sets forth the prohibited practices for which complaints can be brought
20 before the Board; and the School District has argued that the issues between the parties are
21 contractual in nature rather than the enumerated prohibited practices.

22 15. The Board finds that Prokop did timely file her complaint in this matter, i.e., within
23 six months from the actual occurrence, plus three days mailing time.

24 16. Should any finding of fact be deemed more appropriately a conclusion of law, may it
25 be so deemed.

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1 CONCLUSIONS OF LAW

2 1. This Board has jurisdiction over parties and subject matters set forth in NRS chapter
3 288.

4 2. In this instant matter, the Board has jurisdiction over Prokop, a public employee, 1 r
5 employee Association ("WEA"), and her employer, the School District, pursuant to NRS chap er
6 288.

7 3. The Board concludes that the acts and/or choices of the School District and WEA,
8 with respect to the distribution of specific ESIP benefits at issue in this matter, were not taken or
9 selected for purposes of discrimination of Prokop, nor did such acts or selections arise to a
10 violation of NRS 288.270, but that such appear to be merely a structure for the distribution of
11 ESIP benefits as negotiated between the School District and WEA.

12 4. Should any conclusion of law be deemed more appropriate a finding of fact, may it be
13 so deemed.

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1 **ORDER**

2 BASED UPON the weight of the evidence offered at the administrative hearing, e
3 credibility of witnesses, and the interpretation of the statutes at issue in this matter, I S
4 **HEREBY ORDERED** that:

5 The renewed Motion to Dismiss based on Prokop's lack of standing is denied as she es
6 have standing to bring a proper complaint before this Board.

7 The renewed Motion to Dismiss based on alleged statute of limitations problems is so
8 denied.

9 The complaint against the School District, is **HEREBY DISMISSED** as Prokop faile o
10 meet her burden of proof that the acts alleged were prohibited practice.

11 **IT IS FURTHER ORDERED** that no fees or costs will be awarded to either party to this
12 action.

13 **DATED** this 31st day of May, 2007.

14 **LOCAL GOVERNMENT EMPLOYEE-**
15 **MANAGEMENT RELATIONS BOARD**

16 BY: 

17 JOHN E. DICKS, ESQ., Chairman

18 BY: 

19 JANET TROST, ESQ., Vice-Chairman

20 BY: 

21 JAMES E. WILKERSON, SR., Board Member
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