

1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD
4

5 POLICE OFFICERS ASSOCIATION OF)
6 THE CLARK COUNTY SCHOOL)
7 DISTRICT,)

8 Complainant,

9 vs.

10 CLARK COUNTY SCHOOL DISTRICT,)

11 Respondent.)

12 ITEM NO. 720

13 CASE NO. A1-045944

14 **ORDER**

15 For Complainant: Richard P. McCann; JD.
16 Nevada Association of Public Safety Officers

17 For Respondents: C.W. Hoffinan, Jr., Esq.
18 Clark County School District

19 This matter came on before the State of Nevada, Local Government Employee-
20 Management Relations Board ("Board"), for consideration and decision pursuant to the
21 provisions of the NRS and NAC chapters 288, NRS chapter 233B, and was properly noticed
22 pursuant to Nevada's open meeting laws. The hearing conducted in this matter took place on
23 October 27, 2009. Following the conclusion of the hearing, the parties submitted post-hearing
24 briefs in lieu of closing arguments.

25 **Summary of Evidence**

26 At the hearing on this matter, Complainant Police Officers Association of the Clark
27 County School District ("the Association") presented two witnesses, Sgt. Phillip Gervasi, and
28 Officer Michael Thomas. Sgt. Gervasi is the former president of the Association (Tr. p. 24), and
Officer Thomas is the current president of the Association. (Tr. p. 84). Respondent Clark
County School District ("the District") presented one witness, Fran Juhasz, who is the director of
employment management relations for the District and the District's chief negotiator. (Tr. p.
120).

1 The testimony and the evidence presented at the hearing showed that the police officers
2 of the Clark County School District Police Department are paid according to a salary schedule,
3 which is the result of a collective bargaining agreement previously negotiated between the
4 Association and the District. The most recent collective bargaining agreement between the
5 parties was effective from December 2003 to June 30, 2007. A copy of this agreement was
6 introduced into evidence as Joint Exhibit 1 at the hearing.

7 The salary schedule included within the collective bargaining agreement identifies 13 pay
8 steps, designated as Steps A through M. (Exhibit 1). Sgt. Gervasi testified that under the
9 agreement newly hired officers would begin at Step A, with successive annual advancements to
10 the next pay step effective upon the anniversary of their hire. (Tr. pp 27-28).

11 On November 13, 2006, while the collective bargaining agreement was still in effect, the
12 parties executed a Memorandum of Understanding ("MOU"), a copy of which was introduced
13 into evidence at the hearing as Joint Exhibit 2. Sgt Gervasi testified that the purpose behind the
14 MOU was to improve recruitment and retention of the Clark County School District Police
15 Officers by increasing the officers' salaries to be more competitive with other local law
16 enforcement agencies. (Tr. pp. 30-32). The MOU advanced all officers who were then being
17 paid at Steps A-D to Step E, resulting in an increase in salary. The MOU also advanced the pay
18 of officers on Steps E through L by moving them forward one step. As for the officers on Step
19 M, the MOU called for an increase in pay of 4%, which is the equivalent of a step increase.
20 (Exhibit 2). The terms of the MOU indicated that it would remain in effect through the end of the
21 2006-2007 school year.

22 Sgt. Gervasi and Ms. Juhasz each testified that the parties entered into negotiations on a
23 new collective bargaining agreement beginning in March of 2007 (Tr. pp. 48-49); (Tr. p. 121),
24 however no new agreement has been reached, and Sgt. Gervasi confirmed that the Association
25 declared an impasse in the negotiations in October of 2007. (Tr. p. 61). Ms. Juhasz testified that
26 the arbitration that resulted from the impasse declaration is still pending. (Tr. p. 121, 127, 134).
27 In the meantime, the District has maintained the terms of 2003-2007 collective bargaining

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1 agreement as the status quo, including the terms of the MOU. (Tr. p. 49);(Tr. pp. 138-139);
2 (Exhibit 1, Art. 38-1).

3 In doing so, the Association asserts that the District has committed two separate
4 prohibited labor practices. The Board will address each allegation in turn.

5 Reduction From 13 Step Pay Scale to 9 Step Pay Scale

6 The first prohibited practice that the Complainant alleges is that the District continues to
7 hire new officers at the Step E level, as required by the MOU, and because the District has
8 retained Steps A-D as vacant steps without placing any officers on those steps, the schedule is, in
9 effect, reduced from the previous 13 step schedule (Steps A-M) to a 9 step schedule (Steps E-M)
10 without first bargaining in good faith for the change in salary structure as required under NRS
11 288.

12 Before the Board can reach the substance of the allegations, we must first address the
13 statute of limitations motion that was renewed by the District in its post-hearing brief. Our
14 statute of limitations is found in NRS 288.110(4) which states that “[t]he Board may not consider
15 any complaint or appeal filed more than 6 months after the occurrence which is the subject of the
16 complaint or appeal.”

17 This statute of limitations “is triggered when the complainant has reason to believe that
18 an unfair labor practice has actually occurred.” *Cone v. Nevada Service Employees Union*, 116
19 Nev. 473, 477, 998 P.2d 1178, n.2 (2000). The occurrence which is the subject of the complaint
20 in this case is the District’s decision to maintain the status quo after the expiration of the MOU
21 and the refusal to negotiate in good faith regarding the elimination of Steps A-D. As noted
22 above, the negotiations on this issue occurred from March through October of 2007, at which
23 time the Association declared impasse, and throughout that same time through the present the
24 District has adhered to the terms of the MOU. The District argues that the Association should
25 have known of these occurrences no later than October of 2007, when the Association declared
26 impasse. As the complaint was filed on December 31, 2008, this would render the complaint
27 untimely under NRS 288.110(4). The Association asserts that the complaint is timely because
28

1 the District's refusal to negotiate and ongoing practice to pay officers according to the MOU
2 constitutes a "continuing violation."

3 The "continuing violation" doctrine is recognized in the federal courts and before the
4 National Labor Relations Board. The leading case concerning the "continuing violation" doctrine
5 is *Local Lodge No. 1424, Int'l Assn. Of Machinists v. NLRB*, 362 U.S. 411 (1960) ("commonly
6 referred to as Bryan Manufacturing").

7 In Bryan Manufacturing, the Court's majority emphasized that there are two different
8 situations in which the "continuing violation" doctrine might arise, and that these situations must
9 be distinguished in order to properly apply the doctrine:

10 The first is one where occurrences within the . . . limitations period in and of
11 themselves may constitute, as a substantive matter, unfair labor practices. There,
12 earlier events may be utilized to shed light on the true character of matters
13 occurring within the limitations period; and for that purpose [the statute of
14 limitation] ordinarily does not bar such evidentiary use of anterior events. The
15 second situation is that where conduct occurring within the limitations period can
16 be charged to be an unfair labor practice only through reliance on an earlier unfair
17 labor practice. Rather, it serves to cloak with illegality that which was otherwise
18 lawful. And where a complaint based upon that earlier event is time-barred, to
19 permit the event itself to be so used in effect results in reviving a legally defunct
20 unfair labor practice.

17
18 *Id.* at 362 U.S. 416-417.

19 Consequently, under any application of the "continuing violation" doctrine, it is
20 necessary to examine what events are alleged to have occurred within the limitations period to
21 ascertain whether such events, in and of themselves, may constitute a prohibited practice or
22 whether such events may be viewed as a prohibited practice only through reliance on earlier
23 events that occurred outside the limitation period.

24 In this case, the alleged prohibited practice falls within the second situation set out in
25 *Bryan Manufacturing*. The credible evidence presented to the Board indicates that the District
26 has continued to honor the terms of the MOU from its execution to the present time. The
27 Association declared an impasse in the negotiations during October of 2007, and thus moved the
28 negotiations into the arbitration process that is specifically set forth in Chapter 288. There was

1 no evidence presented to the Board that the Association ever requested negotiations under NRS
2 288.180(1) after impasse had been declared. The only way that the District's more recent or
3 continuing actions can be characterized as an unfair labor practice would be through reliance
4 upon the District's prior actions that occurred no later than October of 2007. In such situations
5 the "continuing violation" doctrine will not create an exception to the six-month statute of
6 limitations, as set forth in *Bryan Manufacturing*.

7 Accordingly, the Association should have known of the alleged failure to negotiate the
8 change in pay steps no later than October of 2007 when it declared impasse. Because the
9 complaint was filed more than six months after October 2007, the complaint is untimely as to the
10 Association's claims that the District failed to negotiate in good faith regarding the change in pay
11 steps.

12 The Creation of "Step N"

13 The second allegation raised by the Association is that the District implemented a new
14 step to the higher end of the pay schedule by creating "Step N" without first negotiating in good
15 faith.

16 The District also asserted a statute of limitations defense as to the creation of the "Step
17 N" claim. The District contends that the Association should have known of "Step N" in August
18 of 2007 because it was discussed during the negotiations that were on-going at the time.
19 Although the district presented documentary evidence that a Step N was discussed during
20 negotiations in August of 2007 (Exhibit B), it did not present any credible evidence that "Step
21 N" was anything more than a proposal or had actually been implemented at that time. When
22 questioned on this issue at the hearing, Ms. Juhasz could not recall whether "Step N" had been
23 implemented or was merely proposed at the time of the August 2007 negotiations. (Tr. pp. 146-
24 147).

25 At the hearing, the parties presented conflicting testimony as to when the Association
26 first knew that the District had implemented "Step N." On this question, the Board finds the
27 testimony of Officer Thomas to be credible. Officer Thomas testified that the Association first
28 became aware of "Step N" in August of 2008, when the designation "Step N" first appeared on

1 the paychecks of some of the police officers. Officer Thomas testified that he was in a training
2 session when "Step N" was first brought to his attention. (Tr. pp. 91-92); (Tr. p. 104). Therefore
3 the Board finds that the Association first had reason to believe that the District had created "Step
4 N" in August of 2008. The complaint is timely filed as to the allegations that the District
5 unilaterally created "Step N."

6 On the merits of the allegation, the District contends that it did not unilaterally enact a
7 change to the salary schedule and that the resulting "Step N" is part of the negotiated MOU
8 agreement which required those officers who were previously at Step M to receive a 4% salary
9 increase. (Exhibit 2). The District also correctly asserts that it is required to maintain the *status*
10 *quo* until a successor agreement is ratified. (Exhibit 1; Art. 38-1). See also *Clear Field*
11 *Mouldings, Inc. v. N.L.R.B.*, 632 F.2d 721, 729 (9th Cir. 1980). The District argues that there is
12 no difference in salary between the "M+4%" pay grade called for in the MOU and "Step N," and
13 that the designation of the M+4% pay grade as "Step N" is simply an administrative
14 "bookkeeping label." This contention is supported by substantial evidence provided to the
15 Board.

16 Ms. Juhasz provided credible testimony that the District labeled the "M+4%" pay grade
17 which was required by the MOU, as "Step N" because maintaining two Step M's, each with a
18 different pay rate, became difficult for the bookkeeping staff. (Tr. pp. 122-123, 132). Ms. Juhasz
19 provided credible testimony that labeling Step M+4% as "Step N" did not substantively affect
20 the rate of pay or salary being paid to any police officer. (Tr. p. 123). The Association did not
21 present any credible evidence showing that "Step N" was substantively different than the 4%
22 raise that the MOU required be added to Step M. Thus, the creation of "Step N" was simply a
23 matter of affixing a new label to an already existing pay rate for bookkeeping purposes, per
24 credible testimony of Ms. Juhasz. (Tr. pp. 122-123). The District argues that NRS 288.150(2)
25 protects the rights of the local government employer to "manage its operation in the most
26 efficient manner" and that the creation of the "Step N" label is permitted under this provision.

27 The Board agrees with the District. Under NRS 288.150(2), the parties negotiated
28 salaries and pay rates in the MOU, which included a negotiated change to add a 4% stipend to

1 officers that would otherwise be topped out at Step M. Labeling this change as “Step N” did not
2 materially change the salary or wage rate negotiated in the MOU. This labeling change falls
3 within the District’s rights and responsibilities to manage its own operation “in the most efficient
4 manner consistent with the best interests of all its citizens, its taxpayers and its employees” under
5 NRS 288.150(5). Because the supposed creation of “Step N” did not substantively affect any
6 officers’ salary, we conclude that it was not a prohibited practice for the District to re-label Step
7 “M+4%” as “Step N.”

8 Having considered the above, the Board makes the following findings of fact and
9 conclusions of law:

10 **FINDINGS OF THE FACTS**

- 11 1. The parties negotiated a change in the salaries and wages when executing the MOU.
- 12 2. The District has continued to maintain the status quo, in the absence of a new collective
13 bargaining agreement, from July 1, 2007 through the present time, including paying
14 newly-hired officers at Step E and maintaining Steps A-D as vacant steps.
- 15 3. The parties began negotiating a new collective bargaining agreement in March of 2007.
16 The Association declared impasse in these negotiations in October of 2007.
- 17 4. The Association had reason to believe that the District was preserving the *status quo* and
18 was not negotiating in good faith regarding the effective reduction of the pay scale from
19 13 steps to 9 steps no later than October of 2007.
- 20 5. The MOU between the parties required the District to increase the pay rate of officers at
21 the Step M level by 4%.
- 22 6. The Association first had reason to believe that the District had labeled the 4% pay
23 increase to Step M by the MOU as “Step N” in August of 2008 per the testimony of
24 Officer Thomas, which testimony the Board finds to be credible on this point.
- 25 7. “Step N” is substantively equal to the 4% pay increase which the MOU required to be
26 added to Step M. The creation of “Step N” did not materially change the salary or wage
27 rate that was negotiated in the MOU.

- 1 8. The creation of "Step N" was a bookkeeping change by the District in order to improve
2 its bookkeeping functions. In creating "Step N," the District merely re-labeled the 4
3 increase that was added to Step M as "Step N."
- 4 9. If any of the foregoing findings is more appropriately construed a conclusion of law, it
5 may be so construed.

6 CONCLUSIONS OF LAW

- 7 1. The EMRB has exclusive jurisdiction over claims for unfair labor practices arising under
8 NRS Chapter 288.
- 9 2. NRS 288.110(4) contains a six-month statute of limitations. By this statute, the Board
10 may not decide claims which are filed outside of this statute of limitations.
- 11 3. The first claim asserted by the Association in the complaint is that that the District failed
12 to negotiate in good faith regarding an effective change from a 13 step pay schedule to a
13 9 step pay schedule by retaining Steps A-D as vacant steps (the "first claim").
- 14 4. Because the Association knew of the occurrence which forms the basis of the first claim
15 no later than October of 2007, the six month statute of limitations of NRS 288.110(4)
16 began to run in October of 2007.
- 17 5. The Association's Complaint, filed on December 31, 2008, was untimely under NRS
18 288.110(4) as to the first claim because the Association had declared impasse and moved
19 the negotiations into the arbitration process in October of 2007. There was no evidence
20 presented to the board that the Association requested negotiations under NRS 288.110(4)
21 after it declared impasse.
- 22 6. The "continuing violation" doctrine would not apply in this case, as the District's actions
23 cannot be charged to be an unfair labor practice without relying upon earlier actions
24 which occurred more than six months prior to the date upon which the complaint was
25 filed.
- 26 7. The 4% increase in pay to Step M was negotiated between the parties when the parties
27 executed the MOU.

- 1 8. NRS 288.150(5) recognizes the right and responsibility of the local government employee
2 "to manage its operation in the most efficient manner consistent with the best interests of
3 all its citizens, its taxpayers and its employees."
4 9. The District's actions in re-labeling the negotiated 4% increase to Step M as "Step N" is
5 consistent with NRS 288.150(5) and is not an unfair labor practice.
6 10. If any of the foregoing conclusions is more appropriately construed a finding of fact, it
7 may be so construed.

8 **ORDER**

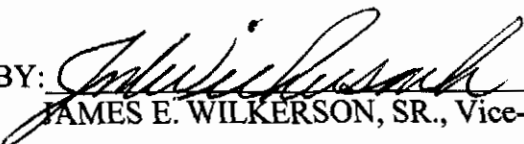
9 It is hereby ordered that Complainant's claims regarding the steps in the pay scale are
10 dismissed with prejudice pursuant to NRS 288.110(4).

11 It is further ordered that the Board finds in favor of Respondent Clark County School
12 District on the remaining claims asserted in the complaint.

13 DATED this 18th day of March, 2010.

14 LOCAL GOVERNMENT EMPLOYEE-
15 MANAGEMENT RELATIONS BOARD

16 BY: 
17 SEATON J. CURRAN, ESQ., Chairman

18 BY: 
19 JAMES E. WILKERSON, SR., Vice-Chairman

20 BY: 
21 SANORA MASTERS, Board Member
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7 Complainant,

8 vs.

NOTICE OF ENTRY OF ORDER

9 CLARK COUNTY SCHOOL DISTRICT,)

10 Respondent.)

11 To: Richard P. McCann, JD.
12 Nevada Association of Public Safety Officers

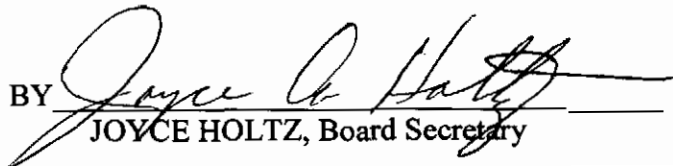
13 To: C.W. Hoffman, Jr., Esq.
14 Clark County School District

15 PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on
16 March 17, 2010.

17 A copy of said order is attached hereto.

18 DATED this 19th day of March, 2010.

19 LOCAL GOVERNMENT EMPLOYEE-
20 MANAGEMENT RELATIONS BOARD

21 BY 
22 JOYCE HOLTZ, Board Secretary

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