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MAY 06 2016

STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

BRAMBY TOLLEN,

Complainant,

vs.

CLARK COUNTY ASSOCIATION OF
SCHOOL ADMINISTRATORS AND
PROFESSIONAL-TECHNICAL
EMPLOYEES,

Respondent.

CASE NO. 2015-001

ORDER

ITEM NO. 814

Ms. Bramby Tollen, Complainant, filed a Complaint before the Local Government Employee-Management Relations Board alleging the Clark County Association of School Administrators and Professional-Technical Employees (CCASAPE) failed in its duty of fair representation in her dispute with the Clark County School District.

This matter came on before the State of Nevada, Local Government Employee-Management Relations Board (the "Board") for decision on April 12, 2016, pursuant to the provisions of the Local Government Employee-Management Relations Act (the "Act"); NAC chapter 288 and NRS chapter 233B. The Board held an evidentiary hearing on the matter on February 9 & 10, 2016. The parties and the public were duly noticed of the hearing. The parties, represented by counsel, attended the hearing and presented testimony, evidence and argument. The parties submitted closing arguments in the form of written briefs.

Based upon the testimony, evidence and argument presented by the parties, and for the reasons outlines below, the Board finds the Complaint is not well taken and finds in favor of CCASAPE on all the allegations made by Ms. Tollen.

SUMMARY OF THE CASE

Prior to 2014 Ms. Bramby Tollen, Complainant, was a CCSD employee for approximately 17 years. In late 2013 she was Director of Purchasing in CCSD. In September

1 2013 Ms. Tollen alleges she upset a Trustee by giving frank advice on an insurance issue. Ms.
2 Tollen alleges this incident caused her to be a target of bullying, retaliation and harassment by
3 CCSD. On March 31, 2014, she was transferred to a supervisory position in the CCSD Human
4 Resources department. Ms. Tollen was unhappy about the transfer and initially sought the help
5 of CCASAPE, to reverse CCSD's action. Within days of the transfer, CCASAPE notified Ms.
6 Tollen that it would not grieve her transfer.

7 Ms. Tollen claimed medical problems which prevented her from performing her duties.
8 In May and June Ms. Tollen requested paid sick and medical leave. CCSD granted her requests
9 based on her representations. In May 2014, Ms. Tollen also notified CCASAPE of alleged
10 bullying, retaliation and harassment by CCSD. CCASAPE indicated it would not grieve these
11 allegations. Ms. Tollen instead notified CCSD of the claim by a June 9, 2014, letter. The CCSD
12 issued an unfavorable response on June 20, 2014.

13 Meanwhile, Ms. Tollen's displeasure with her transfer and working conditions appears to
14 have prompted her to seek employment elsewhere. On April 3, 2014, Ms. Tollen sent a resume
15 to Snohomish County, WA. Ultimately, she obtained a position there and by June 13, 2014,
16 while still receiving paid leave from CCSD, Ms. Tollen began working for Snohomish County,
17 WA. She continued drawing pay from CCSD until August 29, 2014. On August 28, 2014 Ms.
18 Tollen was directed to meet with CCSD representative Dr. Staci Vesneske on September 2, 2014
19 to discuss CCSD's concerns that Ms. Tollen was misusing her leave of absence and her sick
20 leave.

21 On August 29, 2014, Ms. Tollen contacted CCASAPE, who initially agreed to represent
22 her at the September 2, 2014, meeting. Ultimately, after a lengthy discussion with CCASAPE
23 which included calls made to CCSD on Ms. Tollen's behalf, Ms. Tollen agreed to retire from
24 CCSD. The September 2, 2014, meeting was cancelled as a result.

25 Despite this, Ms. Tollen received word that CCSD was still investigating her. The
26 investigation was not related to discipline, but rather to determine the amount of Ms. Tollen's
27 final paycheck. On September 11, 2014, CCSD sent Ms. Tollen a breakdown of how the amount
28 of her final paycheck was determined.

1 Ms. Tollen filed her Complaint with the Local Government Employee-Management
2 Relations Board on January 4, 2015.

3 Ms. Tollen's Complaint contains a single cause of action: failure of CCASAPE to fairly
4 represent her. Ms. Tollen alleges four instances of the failure to fairly represent her. These are:

- 5 1) That CCASAPE did not represent her at the September 2, 2014, hearing.
- 6 2) That a CCASAPE representative made disparaging comments of Ms. Tollen to the
7 press after August 29, 2014.
- 8 3) That CCASAPE failed to grieve her March 31, 2014, involuntary transfer from
9 Purchasing to Human Resources.
- 10 4) That CCASAPE failed to grieve her allegations of bullying, retaliation and
11 harassment by CCSD which began in September 2013.

12 CCASAPE timely answered and substantively denied the allegations in Ms. Tollen's Complaint.

13 To resolve the dispute, pursuant to NRS 288.110 the Board held an evidentiary hearing
14 on the matter on February 9 & 10, 2016. Based upon the pleadings, testimony, evidence,
15 argument and briefing submitted by the parties, the Board makes the following Findings of Fact
16 and Conclusions of Law:

17 **FINDINGS OF FACT**

18 1. Ms. Tollen contacted Mr. Bill Garis, the Deputy Executive Director of the
19 CCASAPE multiple times regarding the alleged bullying, retaliation and harassment by the
20 CCSD in May 2014. Hearing Transcript, pp. 104-105.

21 2. Rather than file a grievance on her behalf, Mr. Garis referred Ms. Tollen to the
22 Affirmative Action Office of the CCSD in May of 2014. As it was the policy of CCASAPE to
23 refer all such claims to that office. Hearing Transcript 104-105.

24 3. Ms. Tollen wrote a letter to CCSD on the issue on June 9, 2014. Exhibit 27.

25 4. CCSD responded to Ms. Tollen's letter on June 20, 2014. Exhibit 28.

26 5. Ms. Tollen does not recall whether she spoke with a CCASAPE representative
27 between May and the end of August 2014. Hearing Transcript, p. 148.

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1 6. CCASAPE refused to grieve the alleged instances of bullying, retaliation and
2 harassment prior to July 4, 2014.

3 7. Ms. Tollen knew or should have known CCASAPE refused to grieve the alleged
4 instances of bullying, retaliation and harassment prior to July 4, 2014.

5 8. Ms. Tollen was transferred from Purchasing to Human Resources on March 31,
6 2014. Exhibit 11.

7 9. Ms. Tollen testified she called Mr. Steve Augspurger, Executive Director of
8 CCASAPE, the day after she was transferred for assistance in being transferred back to
9 Purchasing. Hearing Transcript p. 185.

10 10. CCASAPE told Ms. Tollen they would not file a grievance regarding her transfer
11 as the transfer did not violate the collective bargaining agreement. Hearing Transcript p. 186, p.
12 367.

13 11. CCASAPE refused to grieve the transfer prior to July 4, 2014.

14 12. Ms. Tollen knew or should have known CCASAPE refused to grieve the transfer
15 prior to July 4, 2014.

16 13. On or about August 28, 2014, Ms. Tollen received a letter requiring her to appear
17 to meet with CCSD representative Dr. Staci Vesneske on September 2, 2014 to discuss CCSD's
18 concerns that Ms. Tollen was misusing her leave of absence and her sick leave. Exhibit 39.

19 14. The August 28, 2014, letter noted that the concerns could constitute acts of
20 misconduct that could result in discipline, including dismissal. Exhibit 39.

21 15. On August 29, 2014, Ms. Tollen contacted a CCASAPE representative, Mr.
22 Garis, who initially agreed to represent her at the September 2, 2014, meeting. Hearing
23 Transcript, pp. 193-194.

24 16. Ms. Tollen then discussed the option of retiring at length with Mr. Garis. Hearing
25 Transcript, pp. 194-195.

26 17. Mr. Garis inquired of CCSD representative Dr. Staci Vesneske whether the
27 September 2, 2014, investigation would continue if Ms. Tollen resigned and Mr. Garis was told
28 the meeting would be cancelled if Ms. Tollen retired. Hearing Transcript, pp. 106-107.

1 18. Ms. Tollen retired from the CCSD on August 29, 2014. Exhibit 1.

2 19. Ms. Tollen retired because "it would all go away and maybe it would be easier for
3 me because I wouldn't have to keep dealing with the District." Hearing Transcript, p. 194. Ms.
4 Tollen explained: "I was feeling better in Washington, but any -- any CCSD stuff just was
5 causing things to flare up." Hearing Transcript, p. 195.

6 20. Ms. Tollen's resignation prevented the possibility of discipline at the hands of
7 CCSD, but there was no indication that the pay issues would simply disappear or that CCASAP
8 would represent her in dealing with those issues.

9 21. Ms. Tollen claims that the CCASAP agreed to represent her after her resignation
10 from CCSD. The Board does not find this allegation credible.¹

11 22. If any of the foregoing findings is more appropriately construed as a conclusion of
12 law, it may be so corrected.

13 CONCLUSIONS OF LAW

14 1. The Board has exclusive jurisdiction over unfair labor practice issues, including
15 claims against a union for breach of the duty of fair representation. *Rosequist v. International*
16 *Ass'n of Firefighters Local 1908*, 118 Nev. 444, 49 P.3d 651 (2002); *see also* NRS 288.110.

17 2. NRS 288.110(4) provides:

18 The Board may not consider any complaint or appeal filed more
19 than 6 months after the occurrence which is the subject of the
20 complaint or appeal.

21 3. A complainant bears the burden of proof to show that a violation has occurred.
22 *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. Adv. Op. 27, 327 P.3d 487 (2014).

23 4. "When a collective bargaining agreement is in place, the union and its bargaining
24 representatives owe a duty of fair representation to its members. The duty of fair representation
25 requires that when the union represents or negotiates on behalf of a union member, it must

26
27 ¹ Even if such an arrangement were made, it would be outside of the Collective Bargaining
28 Agreement and post-retirement representation of a former member is certainly not a subject of
mandatory bargaining. The Board would not have jurisdiction over enforcement of such an
agreement.

1 conduct itself in a manner that is not 'arbitrary, discriminatory, or in bad faith.'" *Weiner v.*
2 *Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 832-33 (2005).

3 5. The duty of fair representation is typically construed narrowly in order to allow a
4 union the discretion to act in what it perceives to be the best interests of those whom it
5 represents. *Galindo v. Stooddy Co.*, 793 F.2d 1502, 1514 (9th Cir.1986).

6 6. A union's actions are arbitrary only if the union's conduct can be fairly
7 characterized as so far outside a "wide range of reasonableness that it is wholly "irrational."
8 *Bybee & Gingell v. White Pine County School Dist.*, Item No. 724B (2011).

9 7. Discriminatory action is action that is: (1) intentional, (2) severe; and (3)
10 unrelated to legitimate union objectives. *Crom v. Las Vegas-Clark County Library District*, Item
11 No. 752E (2013); *Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Emp. of America v.*
12 *Lockridge*, 403 U.S. 274, 301 (1971).

13 8. Bad faith occurs when there is evidence of fraud, deceitful action or dishonest
14 conduct. *Crom v. Las Vegas-Clark County Library District*, Item No. 752E (2013).

15 9. The duty of fair representation does not extend to workers who have retired.
16 *Mansfield v. Air Line Pilots Ass'n Int'l*, No. 06 C 6869, 2007 WL 2903074, at *3 (N.D. Ill. Oct.
17 1, 2007) citing *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S.
18 157, 166, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971); see also *Navlet v. Port of Seattle*, 164 Wash. 2d
19 818, 840, 194 P.3d 221, 233 (2008)(explaining the union's duty of fair representation for each
20 employee terminates once the employee retires).

21 10. Retirees are not members of the bargaining unit, so the bargaining agent is under
22 no statutory duty to represent them in negotiations with the employer. *Allied Chemical, supra.*,
23 404 U.S. at 182 n. 20.

24 11. That Ms. Tollen's complaint is not well-taken.

25 12. That an award of costs or fees pursuant to NRS 288.110(6) is not warranted in this
26 case.

27 13. If any of the foregoing conclusions is more appropriately construed as a finding of
28 fact, it may be so corrected.

1 DISCUSSION

2 While the Board has exclusive jurisdiction on unfair labor practice issues, including
3 claims against a union for breach of the duty of fair representation, *Rosequist v. International*
4 *Ass'n of Firefighters Local 1908*, 118 Nev. 444, 49 P.3d 651 (2002), it may not consider any
5 complaint filed more than 6 months after the occurrence which is the subject of the complaint.
6 NRS 288.110(4).

7 The third allegation of Ms. Tollen, the failure of CCASAPE to grieve her March 31, 2014
8 involuntary transfer, occurred no later than April 2014. This was more than six (6) months
9 before she filed her Complaint. The Board finds this allegation is time-barred. As such, it makes
10 no ruling on whether a grievance should have been filed or whether a failure to do so constitutes
11 a failure of the duty to fairly represent.

12 The fourth allegation of Ms. Tollen, the failure of CCASAPE to grieve her allegations of
13 bullying, retaliation and harassment by CCSD, occurred no later than May 2014. This was more
14 than six (6) months before she filed her Complaint. The Board finds this allegation is time-
15 barred. As such, it makes no ruling whether a grievance should have been filed or whether a
16 failure to do so constitutes a failure of the duty to fairly represent.

17 Ms. Tollen could not testify as to whether she ever discussed or requested anything from
18 CCASAPE between May and August of 2014. Thus, there was no evidence that CCASAPE
19 failed in its duties to fairly represent between July 4² and August 29, 2014.

20 As to Ms. Tollen's first two allegations, that the CCASAPE did not represent her at the
21 September 2, 2014 hearing and, that a CCASAPE representative made disparaging comments of
22 Ms. Tollen to the press after August 29, 2014, these are not well taken because Ms. Tollen
23 retired from the CCSD prior to these occurrences. After her retirement, by law, the CCASAPE
24 no longer had a duty of fair representation towards her.

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² Or the period which constituted six (6) months before the filing of the Complaint.

1 On August 28, 2014, the CCSD sent Ms. Tollen a letter demanding her appearance at a
2 meeting to discuss her alleged misuse of paid leave and sick time. After discussing the matter
3 with a CCASAPE representative, she elected to retire.

4 Unlike the circumstances in *City of N. Las Vegas v. State Local Gov't Employee-Mgmt.*
5 *Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071, 1080 (2011) there is insufficient evidence
6 to suggest that Ms. Tollen was effectively forced to resign before receiving discipline. Instead, it
7 appears that retirement was a voluntary election made after a lengthy discussion with a
8 CCASAPE representative. Ms. Tollen made the decision for reasons of health, avoidance of
9 possible discipline, a desire to get the matter resolved, and so she would no longer have to deal
10 with CCSD.³ The Board finds no credible evidence that Ms. Tollen was forced to resign, that
11 she was promised representation by CCASAPE after her retirement,⁴ or that any representations
12 were made to her by CCASAPE regarding her final paycheck.

13 Once Ms. Tollen retired, CCASAPE no longer had a duty to fairly represent her. The
14 alleged instances of failure to fairly represent her occurred after the effective date of her
15 retirement. Regardless, the Board finds that Ms. Tollen did not meet her burden to show that the
16 CCASAPE's actions under the circumstances were arbitrary, discriminatory, or made in bad
17 faith. This is especially true given the duty is construed narrowly in order to allow a union the
18 discretion to act in what it perceives to be the best interests of those whom it represents.

19 As such, Ms. Tollen's claims that CCASAPE failed in its duty to represent her fairly are
20 not well taken.

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26 ³ Her contact with CCSD post September 11, 2014, was her own election to continue with the
27 matter.

28 ⁴ Other than relaying her retirement paperwork to CCSD. Even if CCASAPE failed to deliver
that timely, it had no effect on the ultimate outcome.

1 **ORDER**

2 Based on the foregoing and as stated above, it is hereby ordered that Complainant take
3 nothing by way of her Complaint, each party to bear their own fees and costs.

4 DATED this 6th day of May, 2016.

5
6 LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

7
8 BY:



9 PHILIP E. LARSON, Chairman

10
11 BY:



12 BRENT C. ECKERSLEY, Vice-Chairman

13
14 BY:



15 SANDRA MASTERS, Board Member
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STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

BRAMBY TOLLEN,
Complainant,

vs.

CLARK COUNTY ASSOCIATION OF
SCHOOL ADMINISTRATORS AND
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EMPLOYEES,

Respondent.

CASE NO. 2015-001

NOTICE OF ENTRY OF ORDER

To: Bramby Tollen, in proper person;

To: Clark County Association of School Administrators and Professional-Technical Employees and their attorneys of record, Adam Segal and Christopher Humes, Esq. and Brownstein Hyatt Farber Schreck, LLP

PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on May 6, 2016.

A copy of said order is attached hereto.

DATED this 6th day of May, 2016.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY


MARISU ROMUALDEZ ABELLAR
Executive Assistant

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MARISU ROMUALDEZ ABELLAR
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