

STATE OF NEVADA  
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT  
RELATIONS BOARD

CONSOLIDATED MUNICIPALITY OF  
CARSON CITY,

ITEM NO. 276

Petitioner,

CASE NO. A1-045498

-vs-

DECLARATORY ORDER

CARSON CITY EMPLOYEES ASSOCIATION;  
CARSON CITY FIRE FIGHTERS  
ASSOCIATION, LOCAL #2251; CARSON  
CITY SHERIFF'S PROTECTIVE  
ASSOCIATION; and CARSON CITY  
SHERIFF'S SUPERVISORY ASSOCIATION,

Respondents.

For the Petitioner: Charles P. Cockerill, Esq.  
CARSON CITY DISTRICT ATTORNEY'S OFFICE

For the CCEA: Michael E. Langton, Esq.  
LANGTON & KILBURN

For the CCSSA: Mike Pavlakis, Esq.  
ALLISON, MACKENZIE, HARTMAN,  
SOUMBENIOTIS & RUSSELL, LTD.

For the CC Fire Fighters: Patrick Dolan, Esq.

For the CCSPA: Victor McDonald, Esq.  
DYER AND MCDONALD

For the EMRB: Salvatore C. Gugino, Vice Chairman  
Tamara Barengo, Member

The CONSOLIDATED MUNICIPALITY OF CARSON CITY ("City")  
has petitioned the Local Government Employee-Management  
Relations Board ("Board") for a Declaratory Order "that the  
decision to become a self-insured employer for workmen's  
compensation claims pursuant to NRS 616.291 et seq. and that  
the selection of a private administrator for workmen's  
compensation claims are not subjects of mandatory bargaining

1 pursuant to NRS 288.150(2)(f)."

2 The Respondents ("Associations") filed Oppositions  
3 the aforementioned Petition, the Board entertained oral  
4 argument by the parties pursuant to NAC 288.410 and, following  
5 oral argument the parties filed Post Hearing Briefs. After  
6 due deliberation, the Board has determined that the instant  
7 Petition For Declaratory Order must be affirmatively granted.  
8 The Board bases it's decision on the following:

9 I

10 STATEMENT OF THE CASE

11 Without conceding that "SIIS Benefits" are "insurance  
12 benefits", the City stipulates that "insurance benefits" are  
13 a subject of mandatory bargaining pursuant to NRS  
14 288.150(2)(f). However, the City argues that NRS 616.265  
15 preempts workmen's compensation (SIIS Benefits) as a matter of  
16 State law. NRS 616.265(1) states in pertinent part:

17 (a) A contract of employment, insurance, relief  
18 benefit, indemnity or any other device does not  
19 modify, change or waive any liability created by  
20 this Chapter.

21 (b) A contract of employment, insurance, relief  
22 benefit, indemnity, or any other device, having  
23 for its purpose the waiver or modification of the  
24 terms or liability created by this Chapter is  
25 void.

26 By virtue of these provisions the City contends that the  
27 legislature intended to exclude industrial insurance and/or  
28 workmen's compensation insurance provided by the State or  
self-insured local government employer from collective  
bargaining under NRS 288.150(2).

The City also argues that "SIIS" and/or "SIIS Benefits"

1 are merely acronyms that describe a system that provides  
2 workmen's compensation entitlement; workmen's compensation is  
3 not a "benefit" as this term is commonly used in collective  
4 bargaining, rather it is a statutory entitlement for employees  
5 and a legal obligation for employers, and workmen's  
6 compensation is the same whether provided by SIIS or a  
7 self-insured employer, or whether provided to a union employee  
8 or a non-union employee.

9 The City further states that at the time of the 1975  
10 amendment to NRS Chapter 288 - when "Insurance benefits" were  
11 added as a mandatory subject of bargaining [NRS 288.150(2)(f)]  
12 - employers did not have the option of choosing to go  
13 self-insured (NRS Chapter 616 was amended in 1979 to provide  
14 employers the option of going self-insured), and that the  
15 level of benefits has been fixed by the legislature pursuant  
16 to NRS 616.272, which reads in pertinent part:

17 1. An employer who is certified as a self-insured  
18 employer directly assumes the responsibility for  
19 providing compensation due his employees and their  
20 beneficiaries under this chapter and chapter 617  
21 of NRS.

22 . . . .  
23 3. The claims of employees and their benefici-  
24 aries resulting from injuries while in the  
25 employment of self-insured employers must be  
26 handled in the manner provided by this chapter,  
27 and the self-insured employer is subject to the  
28 regulations of the department with respect  
thereto.

25 The City states that by virtue of these provisions it is  
26 statutorily required to maintain the same level of benefits as  
27 a self-insured employer for workmen's compensation as is  
28

1 provided through the State of Nevada Industrial Insurance  
2 System (SIIS). As a result thereof, the City contends at  
3 the Board's Decision in City of Sparks vs. Operating  
4 Engineers, Local #3, EMRB Item No. 182, Case No. A1-045391  
5 (October 31, 1985); i.e., "Carrier choice is negotiable in  
6 cases where the nature of the benefits is inseparable from the  
7 identity of the carrier", is not applicable to the instant  
8 case.

9 In support of it's position that it is not required to  
10 bargain over the decision to become a self-insured employer  
11 for workmen's compensation and the selection of a private  
12 administrator for workmen's compensation claims, the City also  
13 cites NRS 288.150(5), which provides:

14 5. The provisions of this chapter, including  
15 without limitation the provisions of this section,  
16 recognize and declare the ultimate right and  
17 responsibility of the local government employer to  
manage its operation in the most efficient manner  
consistent with the best interests of all its  
citizens, its taxpayers and its employees.

18 The City indicates that it has petitioned the Board for  
19 a Declaratory Order in this matter in order to resolve the  
20 "tension" that allegedly exists between NRS 288.150(2)(f), NRS  
21 288.150(5) and NRS 616.265, supra. Additionally, the City  
22 states that the reason it initiated the process to qualify  
23 itself as a self-insured employer for workmen's compensation  
24 under NRS Chapter 616 was to "lower costs, improve service to  
25 injured employees and to make the system more responsive to  
26 the employer's needs."

27 The Associations have opposed the order petitioned for  
28

1 by the City not only because they believe that "SIIS Benefits"  
2 are insurance benefits which are a subject of mandatory  
3 bargaining under NRS 288.150(2)(f), but also because the  
4 collective bargaining agreements between the parties contain  
5 provisions alluding specifically to the "State Industrial  
6 Insurance System" and "SIIS Benefits". Additionally,  
7 although the City contends that a change from SIIS to  
8 self-insured status will not adversely affect the employees  
9 they represent, the Associations remain uniformly unconvinced  
10 in that regard. They are concerned about such matters as:

- 11 1. What assurances will there be that another,  
12 less qualified or less responsive administrator  
13 will not be later obtained than that currently  
14 proposed by CITY?
- 15 2. What are the differences in appeal of denial  
16 of a claim?
- 17 3. What control on administrative cost increases  
18 will there be?
- 19 4. What is the response time on claims?
- 20 5. What procedures will be employed for  
21 processing claims?
- 22 6. Will there be counselors available?
- 23 7. To whom will the administrator owe allegiance,  
24 if any? (If the administrator is unilaterally  
25 appointed, it can be unilaterally removed.)
- 26 8. What does the City plan to do with the money  
27 it saves by changing to self-insured? Will the  
28 City's employees receive any of this money?

## 24 II

### 25 STATEMENT OF THE BOARD'S INTERPRETIVE AUTHORITY

26 This Board is vested with the primary authority for  
27 defining the terms of NRS Chapter 288. See NRS 288.110(2).  
28

1 However, in exercising the authority with which we are vested,  
2 this Board does not operate in a vacuum and, on occasion, y  
3 find it necessary to define the terms of NRS Chapter 288 in  
4 the light of other existing and potentially conflicting  
5 statutory authority.

6 In the instant matter, the Board is being asked to  
7 determine whether "workmen's compensation benefits", entitled  
8 "Industrial Insurance" benefits pursuant to NRS Chapter 616  
9 and 617 are the equivalent of "Insurance benefits" under the  
10 provisions of NRS 288.150(2)(f). For the reasons stated  
11 below, the Board has concluded that they are not.

12 III

13 WORKMEN'S COMPENSATION IS NOT AN "INSURANCE BENEFIT"  
14 TO BE NEGOTIATED UNDER NRS CHAPTER 288

15 Respondents would have the Board conclude that  
16 Petitioner cannot unilaterally go "self-insured" on the basis  
17 that the collective bargaining agreement regulates certain  
18 "SIIS" benefits to be provided as well as certain "excess"  
19 benefits above the minimum levels, all of which, according to  
20 the Respondents, are subject to mandatory negotiation as  
21 "insurance benefits" under NRS 288.150(2)(f). Historically,  
22 however, workmen's compensation benefits have never been  
23 considered the same thing as an "insurance benefit" under a  
24 collective bargaining agreement.

25 A. By Definition, "Insurance Benefits" Are Not the Same Thing  
26 As "Workmen's Compensation" or "Industrial Insurance".

27 Around the nation, dissatisfaction with the level of  
28 benefits afforded by statute has led to the appearance of a

1 number of collectively bargained contracts under which the  
2 employer agrees to supplement compensation benefits and bring  
3 them up to an agreed level. 4 A. Larson, Workmen's  
4 Compensation Law, section 97.52 (1989). This type of  
5 contractual arrangement has caused numerous philosophical and  
6 legal questions to arise concerning the classification of both  
7 the minimum and excess benefits being provided. There is no  
8 dispute that the basic benefits in such agreements are  
9 classified as being "workmen's compensation". Considerable  
10 confusion, however, surrounds the nature of the excess  
11 benefits which are paid over and above the minimum industrial  
12 insurance levels.

13 The Board takes note of the language found in section  
14 97.53 of Volume 4 A. Larson, Workmen's Compensation Law, which  
15 discusses this issue and which states:

16 One cardinal principle, however, should  
17 ordinarily settle most such questions. That  
18 principle is the simple proposition that the  
19 contractual excess is not workmen's compensation.  
20 It performs the same functions, and is payable  
under the same general conditions, but legally it  
is nothing more than the fruit of a private  
agreement to pay a sum of money on specified  
conditions.

21 (emphasis added). See also, Segura v. Molycorp, 97 N.M. 13,  
22 636 P.2d 284 (1981); Nelson v. Victory Electric Works, Inc.,  
23 227 F.Supp. 404 (D.C. Md. 1964); City council of Augusta v.  
24 Young, 281 Ga. 346, 127 S.E.2d 904 (1962); Board of Ed., etc.  
25 v. Chicago Teachers Union, 82 Ill.App.3d 354, 37 Ill.Dec. 639,  
26 402 N.E.2d 641 (1980) and Heck v. Geo. A. Hormel Co., 260  
27 N.W.2d 421 (Iowa, 1977).

1           Thus, from the above, the Board concludes that the  
2 minimum benefits provided under NRS Chapters 616 and 617 are  
3 not "insurance benefits" subject to mandatory bargaining under  
4 the provisions of NRS 288.150(2)(f), nor does the character of  
5 their non-negotiability change by virtue of the fact that said  
6 minimum benefits are referred to in a collective bargaining  
7 agreement.

8           The Board's position on this issue conforms with the  
9 provisions of NRS 616.265 and the case law interpreting it.  
10 As pointed out by the Nevada Supreme Court in MGM Grand Hotel  
11 v. Insley, 102 Nev. 513, 728 P.2d 821 (1986), "Indeed, a  
12 contract of employment which would waive or modify the terms  
13 or liability created by NRS 616 would be void." (emphasis  
14 added) (Id. at 518). See also, American Federal Savings  
15 Washoe County, 106 Nev. 869, 802 P.2d 1270 (1990).

16 **B. Excess Insurance Benefits Above The Minimum SIIS Levels**  
17 **Are Subjects of Mandatory Bargaining.**

18           With regard to any health or insurance benefits provided  
19 in excess of the mandatory minimums required by NRS Chapters  
20 616 and 617, these are "nothing more than the fruit of a  
21 private agreement to pay a sum of money on specified  
22 conditions." Volume 4 A. Larson, Workmen's Compensation Law,  
23 Section 97.53. Thus, such benefits come within the purview of  
24 subsection (2) of NRS 288.150 and are subject to mandatory  
25 bargaining between the parties.

26           / / /  
27           / / /  
28           / / /

THE DECISION TO BECOME A SELF-INSURED EMPLOYER  
UNDER NRS 616 IS A MANAGEMENT PREROGATIVE

The provisions covering self-insured employers and third party administrators are found in NRS Chapter 616 and NAC Chapter 616. In particular, NRS 616.272 states requirements and obligations of self-insured employer, while NRS 616.291 lists the qualifications which are necessary to become self-insured under the system. The procedure for certification as a self-insured is provided for in NAC 616.136 et seq., while the procedure for selecting an administrator of a self-insured program is found in NAC 616.166.

The Board must observe that, in none of these statutes or regulations, is there a requirement that an employer negotiate its decision to become self-insured, nor is there a further requirement that an employer negotiate its selection of a third party administrator. To the contrary, the statutes and regulations appear to indicate that an employer must merely meet the requirements stated therein in order to become self-insured or to select an administrator.

Likewise, under NRS Chapter 288, it is provided under NRS 288.150(2) that "The scope of mandatory bargaining is limited to..." those items (a) through (v). In the past, we have held that any subject is a mandatory subject of bargaining if it is directly and significantly related to the compensation or working conditions of current employees and/or any one of the subjects specifically enumerated in NRS 288.150(2)(a) through (v) under a broad construction of the

1 particular listed subject. See Washoe County Sheriff's  
2 Deputies Association Inc., et al. and IAFF, Local 2487  
3 County of Washoe, EMRB Item No. 271 (July 25, 1991). Under  
4 our stated policy, it would not have been unreasonable to  
5 conclude that Petitioner's attempt to go "self-insured" might  
6 have a significant effect upon the employees' workmen's  
7 compensation benefits; that such benefits are a form of health  
8 or disability insurance; and that, therefore, any effect upon  
9 such benefits must be negotiated since it "reasonably relates"  
10 to "insurance benefits" under NRS 288.150(2)(f).

11         Unfortunately, under the great weight of authority,  
12 workmen's compensation benefits are not equated with  
13 "insurance benefits". 4 A. Larson, Workmen's Compensation  
14 Law, section 97.53 (1989). More importantly, NRS 616.2  
15 specifically makes any "contract of employment" which waives  
16 or modifies the terms and conditions created by NRS Chapter  
17 616 "void" ab initio. Thus, the Board is effectively barred  
18 from construing such benefits as "insurance benefits" and from  
19 considering what effect the decision to go "self-insured"  
20 might have upon said benefits.

21         If the Board were to require the parties to negotiate  
22 the selection of an administrator or the decision to become  
23 self-insured, it would be imposing a preconditioned  
24 requirement or duty upon the employer which is not provided  
25 for in NRS 616.272, NRS 616.291 or in any of the regulations  
26 involving certification under NAC 616.136 et seq.

27         As pointed out in Allied Chem. & Alkali Wkrs. v.  
28

1 Pittsburgh Plate Glass Co., 404 U.S. 157, 30 L.Ed.2d 341, 92  
2 S.Ct. 383 (1971), even if the Board were to find that this was  
3 a "modification" of the terms and conditions of the contract,  
4 a unilateral decision to become self-insured or to select an  
5 administrator would not be a prohibited unfair labor practice  
6 unless it "changed a term that is a mandatory rather than a  
7 permissive subject of bargaining." (emphasis added) (Id. at  
8 400).

9 In this regard, it must be noted that the Petitioner  
10 does not seek to modify or change any of the benefits it is  
11 currently providing in the collective bargaining agreement  
12 which are in excess of the minimum benefits mandated by NRS  
13 Chapter 616 and 617. Those benefits are currently being paid  
14 and administered directly by the employer, not by SIIS. If  
15 unilateral changes in these benefits occur, this Board will  
16 have jurisdiction to consider an unfair labor practice claim.  
17 However, the only change the employer is currently proposing  
18 is to become a self-insured employer under NRS Chapter 616.  
19 This clearly appears to be within the "ultimate right and  
20 responsibility of the local government employer to manage its  
21 operation in the most efficient manner consistent with the  
22 best interests of all its citizens, its taxpayers and its  
23 employees."

24 V

25 THE EMPLOYER IS OBLIGATED TO DISCUSS ITS DECISION  
26 TO BECOME SELF-INSURED WITH ITS EMPLOYEES

27 In spite of the legal constraints placed upon it, the  
28 Board is not unmindful of the fact that there may be great

1 differences between the way workmen's compensation benefits  
2 are administered under a self-insured employer and s  
3 administrator, and the way they are handled under the State  
4 Industrial Insurance System. Some of these differences in the  
5 practical handling of claims may not prove beneficial to  
6 employees, and the Board does not support nor approve of any  
7 result which has the unwanted effect of preventing or denying  
8 workmen's compensation benefits, which are to be liberally  
9 construed under the statute.

10 While the Board is mindful of NRS 616.370, which states  
11 that the rights and remedies for such concerns are provided  
12 for within the provisions of Chapter 616, it also notes that  
13 subsection (6) of NRS 288.150 mandates that the local  
14 government employer shall discuss subject matters outside  
15 scope of mandatory bargaining but is not required to negotiate  
16 those matters. In light of the potential effects which might  
17 occur if the employer does become self-insured, the Board  
18 hereby finds that there is good cause for the parties to meet  
19 and confer regarding the effects of the employer's decision.

20 For the reasons set forth herein the Board

21 HEREBY DECLARES AND ORDERS that:

22 1. The City's decision, pursuant to NRS 288.150(5), to  
23 become a self-insured employer for workmen's compensation  
24 claims, pursuant to NRS 616.291 et seq., is not a subject of  
25 mandatory bargaining pursuant to NRS 288.150(2)(f);

26 2. The City's selection, pursuant to NRS 288.150(5)  
27 of a private administrator for workmen's compensation claims,  
28

1 pursuant to NRS Chapter 616, is not a subject of mandatory  
2 bargaining pursuant to NRS 288.150(2)(f);

3 3. The City is obligated, pursuant to NRS 288.150(6),  
4 to discuss the selection of a private administrator for  
5 workmen's compensation claims with the Associations and  
6 attempt to address and/or alleviate any concerns they may have  
7 with respect to said selection, to the extent practicable; and

8 4. Each party shall bear its own attorney's fees and  
9 costs in the above-captioned matter.

10 DATED this 23rd day of March, 1992.

11 LOCAL GOVERNMENT EMPLOYEE-  
12 MANAGEMENT RELATIONS BOARD

13 By *Salvatore C. Gucino*  
14 SALVATORE C. GUCINO, Vice Chairman

15 By *Tamara Barengo*  
16 TAMARA BARENGO, Member

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28