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STATE OF NEVADA

EMPLOYEE-MANAGEMENT RELATIONS BOARD

NYE COUNTY, Petitioner, vs. NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, Respondent.	Case No.: 2023-033

NYE COUNTY'S PETITION FOR A DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT

Petitioner, Nye County ("County" or "Petitioner"), by and through its counsel of record, Fisher & Phillips, LLP, hereby files this Petition for a Declaratory Order to the Employee Management Relations Board ("Board" or "EMRB") finding that the positions of (1) Director of Natural Resources, (2) Director of Information Technology, (3) Director of Human Services, (4) Director of Planning, (5) Director of Public Works, (6) Director of Facility Operations, and (7) Director of Emergency Management (collectively the "Subject Positions") must be excluded from Respondent's, Nye County Management Employees Association ("NCMEA" or the "Union" or "Respondent") Bargaining Unit as follows:

STATEMENT OF THE NATURE OF THE PETITIONER'S INTEREST

The crux of this matter is the Union's improper attempt to insist on the continued unlawful inclusion of the supervisory classifications of Director of Natural Resources, Director of Information Technology, Director of Human Services, Director of Planning, Director of Public Works, Director of Facility Operations, and Director of Emergency Management ("Subject Positions") in the same collective bargaining unit as those positions whom they directly supervise. Including supervisors in the same unit as those they directly supervise is expressly prohibited by Nevada law. Petitioner, Nye County is a local government employer as defined by NRS § 288.060, and Respondent, Nye County Management Employees Association ("NCMEA") is an employee organization as defined by NRS § 288.040. Pursuant to NRS § 288.140, it is the right of every local government employee, subject to certain limitations, to join any employee organization of the employee's choice or to refrain from joining any employee organization.

However, a key limitation on NRS § 288.140 is found in NRS § 288.170(3) which prohibits supervisory employees from being a member of the same bargaining unit as the employees under the direction of that supervisory employee. NRS § 288.170(3) (". . . a supervisory employee must not be a member of the same bargaining unit as the employees under the direction of that . . . supervisory employee."). A "supervisory employee" has the meaning described in sub-paragraph (a) of subsection 1 of NRS § 288.138. *See* NRS § 288.170(6)(b). A "supervisory employee" also has the alternative definition described in sub-paragraph (b) of subsection 1 of NRS § 288.138. *See* NRS § 288.138(1)(b). As the Subject Positions meet both definitions of "supervisory employee" contained in NRS § 288.138 (formerly NRS § 288.075), it is a violation of Nevada Law for the County to Continue to engage in grievance arbitration with an improper unit. Therefore, the County seeks a declaratory order finding the Subject Positions are supervisory employees and ordering the Subject Positions to be excluded from the NCMEA bargaining unit.

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Additionally, the Petitioner seeks a preliminary injunction order directing that the impasse factfinding proceedings before Arbitrator Gaba be stayed pending the resolution of this petition by the Board.

FACTUAL BACKGROUND

The County and the Union are currently parties to a collective bargaining agreement ("CBA") with the term of July 1, 2019 through June 30, 2022[1]. During the negotiations for the successor agreement, the County initially reached a Tentative Agreement ("TA") on June 13, 2022. However, when the TA'ed agreement was presented to the Board of County Commissioners ("BOCC") on July 25, 2022, the BOCC voted to reject the agreement expressing concerns about the composition of the bargaining unit and whether the bargaining unit contained supervisors together with their direct reports. The parties attempted to negotiate the composition of the bargaining unit but the NCMEA was unwilling to agree to exclude the Subject Positions as supervisory positions, with direct supervisory responsibilities over the positions of Geoscientist III; Database Manager & Network Engineer; Human Services Manager & Program Supervisor; Principal Planner & Assistant Planning Director; Utilities Superintendent & Assistant Public Works Director; and B& G Facility Manager ("Supervised Positions") in the bargaining unit. *See* CBA at Addendum B, p.30. The position of Director of Emergency Management was merged with the Fire Chief position in approximately July of 2018, and now functions as the head of the Pahrump Valley Fire Department.

When the County raised this issue with the Union, the Union refused to agree to exclude the Subject Positions from the Bargaining Unit and continues to demand that the County negotiate a successor CBA without correcting the bargaining unit. Most recently, on September 5, 2023, the NCMEA forced the County to participate in impasse factfinding. Thus, the Union is seeking to illegally represent the supervisory

[1] The Employee Management Relations Board (hereinafter "the Board") may take official notice of the CBA, on file with the Board, pursuant to NAC 288.332.

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classifications of Subject Positions in the same bargaining unit as their direct reports (Supervised Positions).[2]

While the Subject Positions and the Supervised Positions are all purportedly members of an employee association of "management employees," the mere title of the Union does not make the Subject Positions properly included in the bargaining unit. The Subject Positions are supervisory employees pursuant to NRS § 288.138, which prevents them from being members of the same employee organization as those employees they directly supervise. *See* NRS 288.170(3). Thus, under the authority of NRS § 288.170(3), and NRS § 233B.120, the County submits this petition for a declaratory order to the Board. In particular, the County requests a declaratory order stating that the Subject Positions cannot be members of the NCMEA bargaining unit because they are supervisory employees of Supervised Positions under NRS § 288.138.[3]

Further, the County requests a hearing on this petition under NAC 288.400. The matters alleged in the petition and any supporting affidavits or other written evidence in the memorandum of legal authorities do not permit the fair and expeditious disposition of the petition because this Board may require further testimony and supplemental evidence to make an ultimate determination on the merits.

SPECIFIC PROVISIONS AND REGULATIONS IN QUESTION

The specific provisions and regulations in question are the following: NRS § 288.170(3) (prohibiting supervisory employees from being members of the same bargaining unit as the employees under the direction of those supervisory employees).

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[2] Local governments and their employee associations have several times in the past erroneously and improperly included supervisors in the same bargaining unit: *See City of Elko*, EMRB No. 831; *see also Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al.*, Item No. 887, Case No. 2022-009, (July 19, 2023). In fact, in the past two years the Sergeants in the Nye County Sheriff's Office agreed to be removed from the Deputy bargaining unit, and Captains were removed from NCASS (lieutenant's unit) pursuant to EMRB order.

[3] The County anticipates that the NCMEA will argue that the County challenged these same positions 10 years ago in Case No. A1-046095 and then dismissed the petition at that time. However, the decision to dismiss the petition at that time does not mean that the positions are properly included in the bargaining unit in perpetuity. The nature of the positions and responsibilities have changed in the last decade and with the recent decision in the *Nye County v. NCASS, et al.*, Item No. 887, the County is reassessing the composition of all its bargaining units to make sure each bargaining unit is proper.

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and NRS § 288.138(1) (formerly NRS § 288.075) (regarding whether the Subject Positions cannot be members of the NCMEA bargaining unit because the Subject Positions are supervisory employees).

POSITION OF THE PETITIONER

The County maintains the following position: the Subject Positions cannot be members of the NCMEA bargaining unit which represents the Supervised Positions because the Subject Positions (Director of Natural Resources, Director of Information Technology, Director of Human Services, Director of Planning, Director of Public Works, Director of Facility Operations, and Director of Emergency Management) supervise the Supervised Positions (Geoscientist III; Database Manager & Network Engineer; Human Services Manager & Program Supervisor; Principal Planner & Assistant Planning Director; Utilities Superintendent & Assistant Public Works Director; and B& G Facility Manager; respectively). The final Subject Position, the Director of Emergency Management position was merged with the Fire Chief position, which is a contract position and is excluded from all bargaining units with the County (and the Fire Chief supervises all members of the IAFF bargaining unit and is the department head of the Pahrump Valley Fire Department). Thus, the Subject Positions are "supervisory employees" under NRS § 288.138 and are prohibited from being in the same bargaining unit as the positions they supervise pursuant to NRS § 288.170(3).

MEMORANDUM OF LEGAL POINTS AND AUTHORITIES

The Subject Positions Are Supervisory Employees Under NRS § 288.138(1)(a) And Cannot Be Members Of The NCMEA Bargaining Unit With The Positions That They Supervise

The Subject Positions are "supervisory employees" under NRS Chapter 288, thus disqualifying them from being members of NCMEA. Under NRS § 288.170(3), "supervisory employees" are prevented from being in the same bargaining unit as those employees they supervise. "Supervisory employees" has the definition set forth in NRS

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§ 288.138. *See* NRS 288.170(6)(a). NRS § 288.138(1)(a) defines "supervisory employee" as:

> Any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them, to adjust their grievances or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The exercise of such authority shall not be deemed to place the employee in supervisory employee status unless the exercise of such authority occupies a significant portion of the employee's workday. . .

NRS § 288.138(1)(a). This definition is the same as the definition of "supervisory employee" formerly contained in NRS § 288.075(1)(a). In *City of Elko*, the Board consider similar circumstances and found that sergeants were "supervisory employees" under NRS § 288.075(1)(a) and must be excluded from the bargaining unit for the employees under the direction of the sergeants. *See City of Elko v. Elko Police Officers Protective Assoc. Local 9110*, Item No. 831, Case No. 2017-026, at *14 (Aug. 29, 2018). The Board reached the same conclusion in the recent case involving the removal of the captain position from the NCASS bargaining unit. *See Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al.*, Item No. 887, Case No. 2022-009, at *3-6 (July 19, 2023). The Board considered the statutory definition of a "supervisory employee" and found that an employee who satisfied even one of the 12 alternative criteria in the statute, satisfied the definition of a "supervisory employee" and must be excluded from the bargaining unit of employees under that employee's supervision. *City of Elko*, Item No. 831, at *12-13. The presence of a supervisor in the same bargaining unit as his direct reports creates a significant conflict of interest and divided loyalties. *Id.* at *6 ("Finally, the Act recognizes the inherent conflict of interest by bifurcating the supervisors from the employees which they supervise and to avoid these inherent conflicts of interest in having a supervisor that has power and authority over the people they supervise being in the same unit as the employees that are subject to their supervisor.").

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While the Board has provided that "the determination of whether a particular employee or class of employees is a supervisory employee must be made on a case-by-case basis," the facts of this case appear generally undisputed. *See City of Reno v. Reno Firefighters Local 731*, Item No. 777-B, Case No. A1-046049 (2012). In this case it appears undisputed that the Subject Positions have the authority to assign, direct, reward and discipline the Supervised Positions and adjust the grievances of the Supervised Positions, or to effectively recommend such actions. The each of the Subject Positions represents a promotion and at least one level above the respective Supervised Positions in the hierarchy and management structure of the County. The exercise of the foregoing authority is not of a routine, clerical, or temporary nature, as almost every aspect of the Subject Positions' daily job duties require reviewing and directing work of the Supervised Positions and other employees in the County. Rather, the exercise of this authority requires the use of independent judgment and occupies a significant portion of the employee's workday. Unlike the situation in the NCASS Case (exclusion of Captains), the Subject Positions are not part of a "para-military command structure" and thus there is no argument that these positions involve the narrow "acting supervisor" exception to NRS § 288.138(1)(a). Thus, pursuant to NRS § 288.075(1)(a), the Subject Positions are "supervisory employees" and are disqualified from membership in the bargaining unit of the employees that they supervise.

CONCLUSION

Based on the foregoing, the County requests a declaratory order stating that the Subject Positions must be excluded from the NCMEA bargaining unit because they are

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supervisory employees (as defined by NRS § 288.138) of the Supervised Positions and thus cannot be in the same bargaining unit as the employees whom they directly supervise.

DATED this 27th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2023, I filed by electronic means the foregoing **NYE COUNTY'S PETITION FOR A DECLARATORY ORDER**, as follows:

Employee-Management Relations Board
3300 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89102
emrb*at* business.nv.gov

I also mailed one copy of the foregoing, certified mail, return receipt requested prepaid postage, with an electronic copy addressed to the following:

Daniel Marks, Esq.
Adam Levin, Esq.
Law Office of Daniel Marks
530 South Las Vegas Boulevard, Suite 300
Las Vegas, Nevada 89101
Attorneys for Respondent,
Nye County Management Employees Association

By: */s/ Susan Owens*
An employee of Fisher & Phillips LLP

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STATE OF NEVADA

EMPLOYEE-MANAGEMENT RELATIONS BOARD

NYE COUNTY, Petitioner, vs. NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, Respondent.	Case No.: 2023-033

ACCEPTANCE OF SERVICE OF NYE COUNTY'S PETITION FOR A DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT

The undersigned hereby accepts service of Nye County's Petition for a Declaratory Order Clarifying the Bargaining Unit on behalf of the Respondent in the above-captioned matter. Respondent shall have an additional thirty (30) days beyond the twenty-one (21) days provided for under NAC 288.390, from the date of the filling of the Acceptance of Service to respond to the Petition.

DATED this 11th day of December, 2023.

LAW OFFICE OF DANIEL MARKS

By: */s/ Adam Levine, Esq.*
Daniel Marks, Esq.
Adam Levine, Esq.
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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NYE COUNTY,

Petitioner,

vs.

NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION,

Respondent.

Case No.: 2023-033

ANSWER TO PETITION FOR DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT

COMES NOW Respondent Nye County Management Employees Association ("NCMEA") by and through undersigned counsel Adam Levine, Esq. of the Law Office of Daniel Marks and submits its Answer to the Petition as follows:

I. NAMES AND ADDRESSES OF THE PARTIES

The Petitioner is Nye, County. For purposes of this Petition its address should be considered that of its counsel, Fisher and Phillips, LLP 300 S. 4th St., Suite 1500 Las Vegas, NV 89101.

The Respondent is the Nye County Management Employee Association ("NCMEA"). For purposes of this Petition its address should be considered that of its counsel, Adam Levine, Esquire at 610 S. 9th St., Las Vegas, NV 89101.

II. STATEMENT OF FACTS

In the 2007 through 2010 collective bargaining agreement between Nye County and the NCMEA certain Director positions were included within the bargaining unit. NCMEA sought to negotiate a successor bargaining agreement. Nye County refused to negotiate any such agreement including the Director positions, and offered the Directors who were part of the bargaining unit separate and individualized contracts in 2013. This resulted in the filing of a Complaint and Petition for Declaratory Order in EMRB Case No. A1-046095 on June 18, 2013. (Exhibit "A").

NCMEA asserted that the unilateral removal of the Director positions and its refusal to bargain with NCMEA was a prohibited labor practice. (See NCMEA Pre-Hearing Statement filed August 8, 2013 attached as Exhibit "B"). Nye County argued that the affected Director positions did not belong in the bargaining unit. (See Nye County Pre-Hearing Statement filed August 19, 2023 attached as Exhibit "C").

Rather than proceed to hearing, the parties met in May of 2014 and entered into a Settlement Agreement. (Exhibit "D"). Under Paragraph 2 of the Settlement Agreement Nye County agreed to recognize all positions in the last ratified agreement (i.e. 2007-2010) "as properly within the NCMEA excepting the position of Chief Juvenile Probation Officer, which shall be maintained in the NCMEA until such time as transfer to another appropriate employee organization consistent with the requirements of NRS 288.140(3) can be made." (Exhibit "D"). Under paragraph 4 the parties agreed that Case No. A1-046095 would be dismissed *with prejudice*. (Exhibit "D").

Most significantly for purposes of the current Petition Nye County agreed to forever waive any claims that the Directors should not be in the NCMEA bargaining unit. Paragraph 6 of the Settlement Agreement states:

> Upon fulfillment of the Terms of this Agreement, the Parties hereby forever release and discharge each other and their past and present employees, agents, attorneys, representatives, insurance carriers and other related parties **from any and all claims**, demands, debts, liabilities, damages, causes of action **of whatever kind or nature**, whether presently known or unknown arising out of or **relating to the Action**, including, without any limitation any claims that **have been or could have been asserted in the Action**.

(Exhibit "D" **emphasis added**). The claim that the identified Director positions included in the Complaint in Case No. A1-046095 should not be in the NCMEA was in fact asserted by Nye County in that case as evidenced by its Pre-Hearing Statement, and Nye County could have asserted any Counterclaim or brought a Counter Petition for Declaratory Judgment in 2013 asserting the positions in its current Petition for Declaratory Order. However, such claims were "hereby *forever*" released and discharged with regard to the NCMEA.

Given that such claims were waived almost a decade ago, the Board may be wondering why this matter is again coming before the Board. The answer lies in connection with Nye County's attempts to frustrate the statutory impasse procedures under NRS 288.200. Following the Settlement Agreement and consistent with its terms, NCMEA and Nye County entered into a collective bargaining agreements including the Director positions. The most recent was the July 1, 2019 through June 30, 2022 collective bargaining agreement.[1]

In negotiations for a successor agreement, the Parties reached Tentative Agreements and the contract was submitted to the Nye County Board of County Commissioners ("BOCC") on July 5, 2022.

[1] The Board can take judicial notice of these bargaining agreements, including the Director positions, as these agreements are on file with the Board.

The BOCC *rejected* the proposed agreement in its entirety.[2] After a return to the bargaining table was entirely fruitless, the NCMEA declared impasse pursuant to NRS 288.200. The parties mutually selected arbitrator David Gaba to serve as the Fact Finder under NRS 288.200.

The Fact-Finding Hearing was scheduled for September 5, 2023. On September 1, 2023 Nye County moved to postpone the Hearing raising concerns regarding Directors in the bargaining unit. (Exhibit "E"). NCMEA opposed to the postponement based upon of the release of all claims contained within the 2014 Agreement. (Exhibit "F"). Fact Finder Gaba denied the request to postpone. (Exhibit "G").

Following the Fact-Finding Hearing on September 5, 2023, Gaba issued his Findings and Recommendations. (Exhibit "H"). In it he recounts how Nye County sought to *again* delay the Fact-Finding by filing its instant Petition before this Board on the day that its Post-Hearing Brief was due, and using that filing as a basis to again request a stay of the Fact-Finding. (Exhibit "H" at pp. 3-4). Fact-Finder Gaba again rejected Nye County's attempts to delay the proceedings, rejected its arguments that it was privileged to do so based upon this Board's decision in *Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al*, Item No. 887, Case No. 2022-009, (July 19, 2023), and noted that Nye County had likely violated its obligation to bargain in good faith. (Exhibit "H" at pp. 44-50).[3]

Notwithstanding Nye County's abuse of the Fact-Finding process, at the end of the day this matter is governed by the parties' 2014 Settlement Agreement. If Nye County believed that Directors should not be in the bargaining unit, it was obligated to assert this in defense of the NCMEA's

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[2] The BOCC's reasons are addressed in the Report and Recommendation of Fact Finder David Gaba.

[3] Fact-Finder Gaba charitably states that Nye County's violation of NRS 288.270(1)(e) may have been "inadvertent". However, the fact that Nye County knew it had entered into the Settlement Agreement, and had bargained multiple agreements since the Settlement Agreement, and only sought to utilize the previously resolved dispute at the 11th hour to avoid Fact Finding suggests otherwise.

Complaint and Petition for Declaratory Order in Case No. A1-046095 and see the matter through to conclusion. Instead, it decided to settle the dispute wherein it "forever" released and discharged the NCMEA from any and all claims which were, or could have been asserted in Case No. A1-046095. The fact that a new BOCC, or County Manager, does not like the decision made by their predecessors is not grounds to revisit that which was "forever" settled in 2014.

Must be emphasized that this is not the first time that a resolution of a prior dispute has resulted in an outcome that this Board might not otherwise have reached. In *Washoe County Public Attorney's Association v. Washoe County*, EMRB Case No. A1-046001 Item No. 750A (July 15, 2011) the Washoe County Public Attorney's Association sought to bargain over the issue of discharge and disciplinary procedure which is a subject of mandatory bargaining under NRS 288.150(2)(i). Washoe County refused to bargain on the subject based upon a declaratory judgment entered by the Second Judicial District Court nineteen (19) years earlier which (incorrectly) determined that the attorneys in the bargaining unit were at-will employees. The Board ruled in favor of Washoe County based upon the doctrine of issue preclusion.

However, Board Members Phillip Larson and Sandy Masters felt compelled to issue a "Statement in Concurrence" expressing how they felt compelled to reach the outcome in favor of Washoe County notwithstanding the fact that the prior district court decision "seems to run in direct opposition to the plain language of NRS 288.150 which imposes on every local government employer the duty to negotiate over the mandatory subjects of bargaining, including but not limited to Discipline and Discharge Procedures", and limited its holding only to Washoe County and its bargaining relationship with the Washoe County Public Attorney's Association. The Statement in Concurrence concludes that the outcome in the case arose only "because of the unique circumstances" attaching to the 1992 district court decision.

There was a good faith dispute in 2013 regarding whether Directors belong to the bargaining unit. Those Directors were prepared to assert that they were not "appointed", and disputed whether their exercise of the statutory authority in NRS 288.075 (now recodified at NRS 288.138) occupied "a significant portion of the employee's workday". Ultimately, Nye County elected not to go to hearing on these issues and to settle the dispute with the NCMEA. That Settlement Agreement remains binding on Nye County to this day.

For all of the reasons set forth above, Nye County's Petition for Declaratory Order should be denied and the matter dismissed.

DATED the 9th day of January 2024.

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Attorneys for Respondent

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and that on the 9th day of January 2024, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with first class postage fully prepaid thereon, a true and correct copy of the above and foregoing ANSWER TO PETITION FOR DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT, to the address as follows:

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EXHIBIT A

EXHIBIT A

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STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NYE COUNTY MANAGEMENT
EMPLOYEES ASSOCIATION,

Case No.: A1-046095

Petitioner,

v.

NYE COUNTY,

Respondent.

COMPLAINT AND PETITION FOR DECLARATORY ORDER

COMES NOW the Nye County Management Employees Association (hereafter "NCMEA") by and through undersigned counsel and for their Complaint and Petition for Declaratory Order alleges follows:

1. At all times material hereto Petitioner NCMEA was an employee organization within the meaning of NRS Chapter 288.040 whose current address is 3920 S. Unicorn Pahrump, NV 89048.

2. At times material hereto Respondent Nye County was a political subdivision of the State of Nevada and a local government employer within the meaning of NRS 288.160 whose address is P.O. Box 153 101 Radar Road Tonopah, NV 89049 and/or 2100 E. Walt Williams Drive Pahrump, NV 89048.

3. The NCMEA is the exclusive bargaining representative for management employees of Nye County.

COUNT ONE

(Complaint For Prohibited Practices In Violation Of NRS 288.270)

4. Pursuant to the most recent collective bargaining agreement between the NCMEA and Nye County for the dates July 1, 2007 through June 30, 2010 the following positions were included within the NCMEA bargaining unit:

Director, Emergency Management Services

Director, Health and Human Services

Director, Management Information Systems

Director, Planning

Director, Public Works

Director, N.W.R.P.O.

Manager, Facilities Operations

Chief Juvenile Probation Officer

Veterans Service Officer

5. Nye County attempted to negotiate a new collective bargaining agreement with the NCMEA after the expiration of the previous agreement. Nye County refuses to recognize the above-referenced positions as being within the bargaining unit asserting that such positions were "Supervisory employees" within the meaning of NRS 288.075. The NCMEA has rejected a new proposed contract excluding the above-referenced positions.

6. As recently as on or about April 2, 2013 the NCMEA requested to meet to discuss and bargain over the inclusion of the above referenced positions with the bargaining unit. Nye County refuses to do so. The Recognition clause of a bargaining agreement is a subject of mandatory bargaining under NRS 288.150 (2) (j).

7. On April 24, 2013 the NCMEA asked for information regarding the method utilized by Nye County to exclude the above-referenced possessions from the bargaining unit. (Exhibit "1"). On May 1, 2013 Nye County responded and refuses to provide any information as to how it determined that the above-referenced positions should be excluded from the bargaining unit. (Exhibit "2"). The "method used to classify employees in the bargaining unit" is the subject of mandatory bargaining under NRS 288.150 (2) (k).

8. On or about April 30, 2013 the Nye County Board of County Commissioners offered to one or more of the persons filling the above-referenced positions individual "Employment Agreements" which would have had the employee occupying the above-referenced positions acknowledge that their position was not eligible for representation by the NCMEA pursuant to NRS 288.150. A copy of one of the proposed Employment Agreement is attached hereto as Exhibit "3".

9. The individualized Employment Agreements would make the affected employees terminable on thirty (30) day notice. Discharge and disciplinary procedure is a subject of mandatory bargaining under NRS 288.150 (2) (i).

10. The actions of Nye County as set forth above interfere, restrain and/or coerce those employees filling the position set forth above in violation of NRS 288.270(1)(a); constitute interference in the administration of the NCMEA in violation of NRS 288.270(1)(b); constitute unilateral changes to subjects of mandatory bargaining in violation of NRS 288.270(1)(a) and (e); unlawful direct dealing in violation of NRS 288.270 (1)(a) and (e); and a refusal to bargain in good faith in violation of NRS 288.270(e).

COUNT TWO

(Petition For Declaratory Order Under 288.380)

11. Petitioner restates the allegations of paragraphs 1-10 and incorporates them herein by reference.

12. Petitioner as the bargaining unit for the above-referenced positions has an interest in keeping such positions within the bargaining unit.

13. In City of Reno v. Reno Firefighters Local 731, International Association of Firefighters, EMRB Case No. A1-046049 the Board interpreted the criteria which would bring an employee within the scope of the definition of "supervisory employee" within the meaning of NRS 288.075 and NRS 288.140(4)(a).

14. It is the position of Petitioner that the above-referenced positions do not meet all of the criteria of NRS 288.075, and therefore those positions are not properly excluded from the bargaining unit pursuant to NRS 288.140(4)(a) as the employees holding such positions are either not appointed and/or do not have the authority to perform all of the functions described in NRS 288.075(1)(b)(1) through(3).

15. Pursuant to NAC 288.380 the Board is empowered to issue a declaratory order regarding the applicability of NRS 288.075 and/or NRS 288.140(4)(a) to the above-referenced positions.

WHEREFORE, Petitioner requests that the Board issued the following relief:

1. For a finding that Respondent has engaged in a prohibited labor practices in violation of NRS 288.270(1)(a), (b) and (e);
2. For an order pursuant to NRS 280.110(2) directing Responded to refrain from any further violations of 288.270(1)(a), (b) and (c) with regard to the inclusion of the above-referenced positions within the bargaining unit;
3. For an order declaring any individualized Employment Agreements in connection with the above-referenced positions to be the product of unlawful direct dealing and therefore null and void;
4. For an order requiring Respondent to collectively bargain with regard to the provisions of mandatory bargaining under NRS 288.150 in connection with the above-referenced positions;

5. For a declaratory order confirming that the above-referenced positions are not supervisory employees within the meaning of NRS 288.075;

6. For attorney's fees and costs; and

7. For such other relief as the Board deems appropriate under the facts of the case.

DATED this 17 day of June, 2013

LAW OFFICE OF DANIEL MARKS

DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
530 South Las Vegas Blvd., Suite 300
Las Vegas, Nevada 89101
Attorney for Petitioners

VERIFICATION

STATE OF NEVADA)
) ss
COUNTY OF ~~CLARK~~ Nye)

ROBERT JONES, being first duly sworn upon his oath, deposes and says:

1. I am the Complainant in the above-entitled matter;

2. That I have read the above and foregoing COMPLAINT and know the contents thereof, and that the same are true of my knowledge except for those matters stated upon information and belief, and as to those matters, I believe them to be true.

ROBERT JONES
as President of the Nye County Management Employees Association

SUBSCRIBED AND SWORN to before me
This 12 day of June, 2013

NOTARY PUBLIC STATE OF NEVADA
County of Nye
EUGENIE R. WALKER
No: 93-3635-14
My Appointment Expires May 4, 2015

NOTARY PUBLIC in and for said
COUNTY and STATE

April 24, 2013

Pam Webster
County Manager
Nye County, Nevada
2100 East Walt Williams Drive
Suite 100
Pahrump, Nevada 89048

RE: Public Records Request

Dear Pam:

Nye County and specifically District Attorney Kunzi have determined that all Nye County Department Heads meet the definition of Supervisory Employee as defined in NRS 288.075(1)(b). The Nye County Department Heads affected by this decision have never been provided with an explanation of how that determination was made. As a direct result Nye County no longer recognizes the Department Heads as members of the Nye County Management Employees Association (NCMEA).

The State of Nevada Local Government Employee Management Relations Board (EMRB) in the Order from Case # A1-046049 has stated that "the determination of whether a particular employee or class of employees is a supervisory employee must be made on a case-by-case basis". The Order further states that "any party that claims the supervisory exception has the burden to establish that it applies".

Based on Nye County actions and policies we must conclude that this determination has already been made for all Department Heads on a case-by-case basis.

The letter shall serve as Public Records Request for all documents, correspondence and supporting materials describing the analysis that has been completed for each Department Head and as a direct result of that analysis all materials supporting the conclusion that each Department Head meets the definition of Supervisory Employee as defined in NRS 288.075(1)(b). Given the policy implemented by Nye County we must conclude that such material is readily available.

Per NRS 239.0107 please provide copies of documents, correspondence and supporting materials detailing this analysis by the end of business Thursday May 2, 2013. We request photocopies of all documents and printed copies of all e-mail correspondence.

The request is specific. All documents, correspondence and supporting materials detailing Nye County's decision to classify all Department Heads as Supervisory Employees under NRS 288.075(1)(b) as required by the EMRB Order.

If you have any questions or need additional information do not hesitate to contact me.

Sincerely,

_____

Bob Jones
President, Nye County Management Employees Association (NCMEA)

Mailing Address:

Nye County Management Employees Association (NCMEA)
P.O. Box 953
Pahrump, Nevada 89041

Office of the County Manager
Administration Department
Pahrump, Nevada

Pahrump Office
2100 E. Walt Williams Drive
Pahrump, NV 89048
Phone (775) 751-7075
Fax (775) 751-7093

May 1, 2013

Robert Jones, Facilities Manager
Nye County Buildings & Grounds
871 E. Buothill Dr.
Pahrump, NV 89060

Dear Bob:

No document exists that provides an explanation as to how the determinations were made regarding the applicability of NRS 288.075. In consultation with the District Attorney we analyzed the job responsibilities in relation to the factors cited in NRS 288.075. The analysis was done on a case by case basis, which has been thoroughly discussed with you personally and during the last negotiation sessions in which we identified those positions we believe fall within the definition of a supervisory employee. The content of those discussions and communications are privileged and will not be disclosed or produced.

I understand your desire to be provided with attorney work product and to gain insight into our mental impressions, however, the Nevada Public Records Law does not require the creation of a document that does not exist nor to disclose material that is clearly privileged. As we have consistently maintained, we have no control over the payment of dues to an employee organization. You have been advised that we maintain you are a supervisory employee and we will not recognize your purported role as President of the NCMEA. We will deal with any affected employee on a case by case basis. Any employee that believes he or she has been aggrieved can file an appropriate action at which time we will be prepared to support our determinations.

Sincerely,

Pam Webster
Nye County Manager

PW/

EMPLOYMENT AGREEMENT

This Employment Agreement (Agreement) is made and entered into this 2nd day of April, 2013, by and between Robert Jones (hereinafter referred to as "Department Head") and the County of Nye, Nevada (hereinafter referred to as "County").

In consideration of the mutual covenants set forth herein, the undersigned parties agree as follows:

1. EMPLOYMENT AND DUTIES. County hereby agrees to employ Robert Jones, as Manager Facilities Operations (Department Head) to perform functions and duties as set forth on the job description attached hereto and by reference made a part hereof and as may be amended from time to time by the Board of County Commissioners.

2. PERIOD OF EMPLOYMENT. Department Head shall commence services hereunder on the date of this agreement and shall be effective until terminated as set forth herein.

3. DISCIPLINE AND DISCHARGE. The parties acknowledge the position of Department Head has been removed from the positions eligible for representation by the Nye County Management Employee Association (NCMEA) by application of NRS 288.150. Irrespective of the law preventing Department Head from being a member of an employee organization the parties agree to be bound by the provisions in Articles 10 and 11 in the agreement negotiated by and between the County and the NCMEA as pertain to the relationship, rights and obligations between the County and the employee. The parties further agree to be bound by any changes made to these provisions through negotiations conducted through the NCMEA. Nothing herein contained shall be construed as creating any rights for the benefit of the NCMEA.

4. TERMINATION. This Agreement may be terminated by the Department Head, upon written notice to the County, which termination shall be effective thirty (30) days after receipt of said notification of termination. Upon termination of this Agreement Department Head shall not be entitled to any compensation or other employment benefit provided by Nye County except as otherwise specifically provided in this Agreement or such benefits as have vested as of the effective date of termination.

5. COMPENSATION. In consideration of and as compensation for the duties assigned, Department Head shall receive in equal increments, on the dates normally established as regular dates of pay, an amount of direct salary as provided for Grade 21, and from which the usual and assigned reductions and deductions shall be taken and forwarded on Department Head's behalf. The parties agree the salary provided for in this Agreement shall be increased or decreased in the same manner

as shall be applied to those managerial positions covered by the labor agreement with the NCMEA.

6. LEAVE AND BENEFITS. Department Head shall be entitled to continue to receive all the benefits and entitlements applicable to the direct salary stated above, for which Department Head is otherwise eligible pursuant to the labor agreement with the NCMEA, including any and all increases in benefits incorporated and scheduled therein or as may be changed from time to time.

7. RETIREMENT. Department Head shall be provided all benefits and entitlements related to retirement including payment for post-retirement medical, dental and vision health insurance premium paid by the County for its employees.

8. GENERAL PROVISIONS.
   a. This Agreement and any attendant provisions may not be altered, amended, supplemented, changed, effectively reduced or improved without the written, mutual consent of the parties as identified above, however, the provisions of this Agreement are subject to re-negotiation at any time with the mutual consent of both parties.

   b. No waiver by either party of a breach of any covenant, term, or condition of this Agreement shall be deemed to be a waiver of any other or subsequent breach of the same or any other covenant, term, or condition or waiver of the covenant, term or condition itself except as specifically noted.

   c. In the event that any provision of this Agreement is or shall be rendered invalid by applicable legislation or be declared invalid by any court or regulatory agency of competent jurisdiction, such action shall invalidate only that provision of this Agreement and all other provisions not rendered invalid shall remain in full force and effect and the parties shall promptly enter into negotiations to bring the invalid provision into compliance.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement:

For the COUNTY OF NYE

By: _____
Andrew Borasky, Chairman

Date: _____

Department Head

By: _____
Robert Jones,
Manager Facility Operations

Date: _____

EXHIBIT B

EXHIBIT B

ORIGINAL

LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
530 South Las Vegas Blvd., Suite 300
Las Vegas, Nevada 89101
(702) 386-0536; FAX (702) 386-6812
Attorneys for Petitioners

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E.M.R.B.

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NYE COUNTY MANAGEMENT
EMPLOYEES ASSOCIATION,

Case No.: A1-046095

Petitioner,

v.

NYE COUNTY,

Respondent.

/

PRE-HEARING STATEMENT

I. **STATEMENT OF ISSUES OF FACT AND LAW TO BE DETERMINED**

This action before the Board is brought to determine whether certain Nye County department heads historically represented by the Nye County Management Employee's Association were supervisory employees within the meaning of NRS 288.075(1)(b), and whether Respondent Nye County committed prohibited labor practices when it unilaterally excluded such employees from the collective-bargaining process. Those employees held the following positions:

Director, Emergency Management Services

Director, Health and Human Services

Director, Management Information Systems

Director, Planning

Director, Public Works

Director, Nuclear Waste Repository Project Office

Manager, Facilities Operations

Chief Juvenile Probation Officer

Veterans Service Officer

The Nye County Manager and Nye County District Attorney determined that the above-referenced positions were supervisory employees within the meaning of NRS 288.075(1)(b) and have refused to permit the individuals occupying such positions to be represented by the NCMEA for purposes of collective bargaining. The NCMEA disputes that the employees meet the requirements of the statute. Nye County has offered the employees occupying such positions individual employment contracts outside of the collective bargaining process.

Nye County made the determination unilaterally without seeking any input from the NCMEA as to whether it even agreed as to whether the above referenced positions fell within NRS 288.075(1)(b). Nye County has further rejected all requests for information as to how it concluded that the affected employees fell within the statute.

II. POINTS AND AUTHORITIES

In *City of Reno v. Reno Firefighters Local 731 et al.*, EMRB Case No. A1-046049 this Board analyzed the changes to the Local Government Employee-Management Relations Act ("the Act") made by the 76th Legislature in 2011. Pursuant to this Board's ruling in *City of Reno*, the determination of whether a particular employee or class of employees is a supervisory employee must be made on a case-by-case basis. Furthermore, it is the burden of the Nye County to prove that the supervisory exception applies. Nye County must demonstrate that the employee was "appointed" and that there has been an authentic grant of authority to perform the functions listed in subsections (1), (2), and (3) of NRS 288.075(1)(b) by considering the exercise of that authority.

Nye County's unilateral determination that the positions set forth above constitute supervisory employees, coupled with its refusal to provide any information as to how it made such determinations, compelled the filing of this action. By making such a unilateral declaration, refusing to bargain with

the NCMEA, and by offering individualized employment contracts for the above-referenced positions, Nye County has interfered, restrained and/or coerced the employees filling such positions in violation of NRS 288.270(1)(a); interfered in the administration of the NCMEA in violation of NRS 288.270(1)(b); unilateral changed subjects of mandatory bargaining in violation of NRS 288.270(1)(a) and (e); engaged in unlawful direct dealing in violation of NRS 288.270 (1)(a) and (e); and a refused to bargain in good faith in violation of NRS 288.270(e).

III. LIST OF WITNESSES

1. Robert Jones. Mr. Jones is the current Facilities Operations Manager and the current President of the NCMEA. He will be testifying regarding his failure to meet the criteria under NRS 288.075(1)(b) and Nye County's refusal to bargain. He will further be testifying regarding individualized employment contracts which were offered to persons occupying positions which had historically been in the bargaining unit.
2. Brent Jones. Mr. Jones is the former Director of Emergency Management Services and the former President of the NCMEA. Mr. Jones will testify regarding how he was excluded from negotiations by Nye County, how he was terminated without cause in May 2012 after Nye County unilaterally withdrew its recognition of him as an NCMEA covered employee and labeled him "at will", the historical inclusion of his position within the bargaining unit, and how his position did not meet the criteria under NRS 288.075(1)(b).
3. Vance Payne. Mr. Payne is the current Director of Emergency Management Services and will be testifying regarding his failure to meet the criteria under NRS 288.075(1)(b).
4. Mark Hatfield. Mr. Hatfield is the former Director of Management Information Systems and former Secretary of the NCMEA. He will be testifying regarding his failure to meet the criteria under NRS 288.075(1)(b) and Nye County's refusal to bargain.
5. Milan Dimic. Mr. Dimic is the current Director of Management Information Systems and will be testifying regarding his failure to meet the criteria under NRS 288.075(1)(b).

6. Shirley Trummell. Ms. Trummell is the current Director of Health and Human Services, and will be testifying regarding her failure to meet the criteria under NRS 288.075(1)(b) and Nye County's refusal to bargain.

7. Steve Osborne. Mr. Osbourne is the former Director of Planning and will testify regarding his failure to meet the criteria under NRS 288.075(1)(b).

8. Dave Fanning. Mr. Fanning is the Director of Public Works and will testify regarding his failure to meet the criteria under NRS 288.075(1)(b).

9. Darryl Lacy. Mr. Lacy is the Director of the Nuclear Waste Repository and Planning Office and will testify regarding his failure to meet the criteria under NRS 288.075(1)(b).

10. Tom Metcher. Mr. Metcher is the Chief Juvenile Probation Officer and will testify regarding his failure to meet the criteria under NRS 288.075(1)(b).

11. Ken Shockley. Mr. Shockley is the former Veterans Service Officer and will testify regarding his failure to meet the criteria under NRS 288.075(1)(b).

12. Brian Kunzi. Mr. Kunzi is the District Attorney for Nye County and responsible for collective bargaining on behalf of the County. Mr. Kunzi is believed to be knowledgeable regarding the manner in which Nye County excluded the above-referenced positions from the NCMEA, the County's failure to bargain, and individualized employment contracts offered to the occupants of the above-referenced positions.

13. Pam Webster. Ms. Webster is the County Manager and is believed to be knowledgeable regarding the manner in which Nye County excluded the above-referenced positions from the NCMEA, the County's failure to bargain, and individualized employment contracts offered to the occupants of the above-referenced positions.

14. Richard Osborne. Mr. Osborne is the former County Manager and is believed to be knowledgeable regarding the manner in which Nye County excluded the above-referenced positions from the NCMEA and the County's failure to bargain.

15. Danelle Shamrell. Ms. Shamrell is the Nye County Human Resources Manager and is believed to be knowledgeable regarding the individualized employment agreements offered to certain Nye County employees for positions previously covered under the NCMEA Agreement.

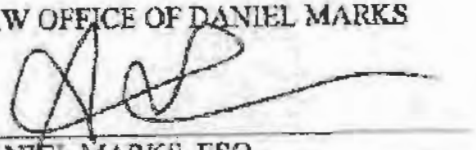
Petitioner reserves the right to supplement this Pre-Hearing Statement with additional witnesses.

V. ESTIMATED TIME FOR HEARING

It is anticipated that the Petitioner's case will take about seven (7) hours.

DATED this 6th day of August, 2013

LAW OFFICE OF DANIEL MARKS



DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
530 South Las Vegas Blvd., Suite 300
Las Vegas, Nevada 89101
Attorney for Petitioners

CERTIFICATE OF SERVICE BY CERTIFIED AND RETURN RECEIPT REQUESTED MAIL

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS and that on the 6th day of August, 2013 I did serve by depositing in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with first class, certified and return receipt postage fully prepaid thereon, a true and correct copy of the **PRE-HEARING STATMENT**, to the address as follows:

Brian T. Kunzi, Esq.
Nye County District Attorney's Office
1520 E. Basin Ave., Ste. 107
Pahrump, Nevada 89060
Attorney for Respondent

An employee of the
LAW OFFICE OF DANIEL MARKS

EXHIBIT C

EXHIBIT C

BRIAN T. KUNZI
NYE COUNTY DISTRICT ATTORNEY
State Bar No. 2173
1520 East Basin Avenue, Suite 107
Pahrump, Nevada 89060
(775) 751-7080
(775) 751-4229 (fax)
Attorneys for Respondent

RECEIVED
AUG 19 2013
STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NYE COUNTY MANAGEMENT EMPLOYEE'S ASSOCIATION Petitioner, vs. NYE COUNTY Respondent.	CASE NO. A1-046095 PREHEARING STATEMENT

Nye County, by and through Brian T. Kunzi, Nye County District Attorney, pursuant to NAC 288.260, hereby submits the following prehearing statement:

I. ISSUES OF FACT AND LAW

The issues of fact involve an analysis of the powers and duties of certain identified administrative department heads and whether such powers and duties make these department heads "supervisory" employees as defined by NRS 288.075(1)(b). The legal issues appear to concern whether the process of determining if an employee meets the statutory definition that precludes participation in collective bargaining with the County is a matter that is the subject of mandatory bargaining.

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

Nye County submits that matters of statutory construction are not appropriate for resolution through the collective bargaining process in that such questions would result in vagaries between how the various local government interpret this provision and defeat the underlying public policy behind the legislative enactment. Nye County believes the listed department heads "are primarily responsible for formulating and administering management, policy and programs" as articulated in NRS 288.140(4). Nye County understands the import of the *City of Reno v. Reno Firefighters Local 731 et al.* EMRB Case No. A1-046049 in that the employer must demonstrate that the supervisory requirements are met, however, this prior decision did not address or intimate that this process is to be accomplished through the collective bargaining process.

II. MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF FACTS

Nye County and the Nye County Management Employees Association (NCMEA) began negotiations on a new collective bargaining agreement in the early spring of 2011. The previous agreement had expired on June 30, 2010. Negotiations became problematic with the passage of the legislation that created the exclusion for certain supervisory personnel from participating in collective bargaining activities. An agreement could not be reached because there was an impasse on the issue of how to resolve the question surrounding the supervisory personnel.

Negotiations were re-initiated in early 2012 with a group from the NCMEA that excluded supervisory employees. Nye County refused to negotiate in violation of NRS 288.140(4)(a) with those employees believed to meet the definition of a supervisory employee. Those positions were identified as the Directors of the Emergency

NYE COUNTY DISTRICT ATTORNEY
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PAHRUMP, NEVADA 89041
(775) 751-7080

Management Services, Health and Human Services, Management Information Systems, Planning, Public Works, Nuclear Waste Repository Project Office; Facilities Operations Manager, Chief Juvenile Probation Officer and Veterans Service Officer.

Each of these positions are department heads in charge of the overall administration of a department within the County. Shared characteristics are that each department head is responsible for all aspects of the administration of their respective department. Each proposes budgets and is responsible for the administration of the final budget having complete control over any discretionary spending. The department heads are responsible for the personnel in their department and have responsibility for handling grievances filed by their subordinates. The department heads are also part of the overall management team for the County and participate in discussions regarding issues with collective bargaining agreements and how such may impact their operations, which include discussions about the overall management strategy that will be employed during collective bargaining sessions with employee organizations covering subordinate employees and also with the NCMEA.

Another common characteristic of the described department heads is that each appointed by the County Manager, but only after ratification by the Board of County Commissioners. The department heads are expected and are required to use their independent judgment and are considered policymakers for their department. These obligations are not routine and the important function they play in County administration is highlighted by the requirement that their appointment be subject to Board approval.

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NYE COUNTY DISTRICT ATTORNEY
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(775) 751-7080

B. ISSUES OF LAW

This Board first addressed this statute in the *Reno Firefighters Local 731* decision. While this Board's decision provided some key interpretations of the act, this decision did not address what is the proper forum in which to address what employees are considered supervisory. Nye County submits that the request of the NCMEA to negotiate the inclusion or exclusion of employees as defined in NRS 288.140(4) is not a matter of the interpretation of a provision of the collective bargaining agreement, but rather rests upon an interpretation of a statute. Matters of this nature fall outside the scope of mandatory bargaining, which means the County did not commit any unfair labor practice by refusing to allow negotiations on this matter.

C. DISCUSSION

The thesis as presented by the NCMEA would mean that if there were a disagreement between the employer and the association regarding the application of NRS 288.140(4) such a matter could progress through the grievance procedure established in the CBA and ultimately result in a binding decision through arbitration. This result would cause varying interpretations of a state law and destroy any uniformity of application for all local government employers. The interpretation and application of the provisions of NRS 288.140(4) is best done through an action before this Board as provided in NRS 288.110.

This Board alone is empowered to enforce the provisions of Chapter 288 of the Nevada Revised Statutes. While Nye County embraces a resolution of this matter as a declaratory relief action, the refusal to negotiate on a matter that is not grieveable certainly cannot be construed as an unfair labor practice. The NCMEA pushes this latter position in their complaint by arguing the classification of employees within the

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
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(775) 751-7083

bargaining unit or the method used to "classify" employees as provided in NRS 288.150(2)(j), (k) are subjects of mandatory bargaining. No other legal authority is provided by the NCMEA in support of these conclusions.

Nothing contained in a plain reading of the statue suggests the Legislature intended for the provisions of NRS 288.140(4) to be read back through the mandatory provisions for collective bargaining to be subject to the vagaries of negotiation and the ensuing grievance processes. The NCMEA fails to offer any legal support for such a proposition. Simply stated, matters of statutory construction are not appropriate for determination through the bargaining and/or grievance procedures.

The United States Supreme Court applied this principle to actions within the FLRB, which are analogous to the Nevada EMRB. The Supreme Court noted arbitral decisions based on interpretations of legislation rather than on the interpretation of the CBA would exceed the scope of powers. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36,53 (1874). *See also Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78-79 (1998). Nye County submits this same principle shows the folly of suggesting an interpretation of a state statute could be the subject of collective bargaining.

Mandatory subjects of negotiation necessarily must involve matters upon which the local government employer and the employee organization have the discretion to implement. Nye County continues to recognize the NCMEA as the bargaining agent for employees not excluded from membership as provided in NRS 288.140, however, the parties lack the authority to negotiate how NRS 288.140 is applied to any employee.

///

///

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

III. LIST OF WITNESSES

A. Danelle Shamrell, Nye County Human Resources Manager

Ms. Shamrell is expected to testify concerning the discussions with the NCMEA and the powers and duties of the affected employees with regards to eligibility to participate in collective bargaining.

B. Pamela Webster, Nye County Manager

Ms. Webster will testify concerning the powers and duties of the affected employees with regards to determining eligibility to participate in collective bargaining.

C. All Employees that are the subject of this action.

IV. TIME ESTIMATE

The County estimates that it will need 4 hours to present its position.

RESPECTFULLY SUBMITTED this 15th day of August, 2013.

B. T. K

BRIAN T. KUNZI
Nye County District Attorney

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Nye County District Attorney and that on the 15th day of March, 2013 I personally served a true copy of the foregoing NOTICE OF ENTRY OF ORDER by mailing by first class mail, postage prepaid and by facsimile to:

Adam Levine, Esq.
Law Office of Daniel Marks
530 Las Vegas Boulevard South, Suite 300
Las Vegas, Nevada 89101

Vanessa Maxfield

Vanessa Maxfield

NYE COUNTY DISTRICT ATTORNEY
P.O. BOX 39
PAHRUMP, NEVADA 89041
(775) 751-7080

EXHIBIT D

EXHIBIT D

COMPROMISE AND SETTLEMENT AGREEMENT

THIS COMPROMISE AND SETTLEMENT AGREEMENT is made and entered into by and between the County of Nye, a political subdivision of the State of Nevada, (Nye County) as employer and the Nye County Management Employee Association (NCMEA), in resolution of disputes and differences that have arisen between the parties. In consideration of the mutual covenants and agreements of the Parties to this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is hereby warranted and agreed as follows:

RECITALS

A. A dispute arose between Nye County and the NCMEA regarding the application of NRS 288.140(4)(a) and NRS 288.075, which prohibits supervisory employees from being a member of an employee organization.

B. On or about June 18, 2003, NCMEA filed an action before the State of Nevada Local Government Employee-Management Relations Board, Case No. A1-046095, for a declaratory order seeking a determination that the disputed positions did not meet all of the functions described in NRS 288.075(1)(b)(1) through (3) and other appropriate relief regarding actions alleged to be in violation of NRS 288.270.

C. Without either Party admitting liability or fault, and in a compromise of each of their positions and rights, the Parties desire to enter into this Agreement to resolve all disputes related to their respective rights in the Action and arising out of the claims and allegations set forth therein upon the terms and conditions stated herein. Neither the execution nor the performance of this Agreement shall be considered an admission of fault, liability or wrongdoing whatsoever by any of the Parties.

TERMS OF AGREEMENT

1. The Parties stipulate and agree any exercise of authority as set forth in NRS 288.075(b)(1) through (3) by employees in any positions in dispute does not occupy a significant portion of each of the employee's workday.

2. Nye County will continue to recognize all positions as recognized in the last ratified agreement between the Parties as properly within the NCMEA excepting the position of Chief Juvenile Probation Officer, which shall be maintained in the NCMEA until such time as a transfer to another appropriate employee organization consistent with the requirements of NRS 288.140(3) can be made.

3. The Parties recognize they continue to operate under the terms and conditions of the collective bargaining agreement negotiated and ratified on or about July 1, 2008.

4. The Parties further stipulate and agree to dismiss the action pending before the State of Nevada Local Government Employee-Management Relations Board with prejudice, each party to bear its own fees and costs.

5. The NCMEA shall file a notice of dismissal consistent with the terms and conditions of this Agreement.

6. Upon fulfillment of the Terms of this Agreement, the Parties hereby forever release and discharge each other and their past and present employees, agents, attorneys, representatives, insurance carriers and other related parties from any and all claims, demands, debts, liabilities, damages, causes of action of whatever kind or nature, whether presently known or unknown arising out of or relating to the Action, including, without limitation, any claims that have been or could have been asserted in the Action.

7. This Agreement shall be binding upon and inure to the benefit of the Parties, and each of them, their successors, assigns, personal representatives, agents, employees, directors, officers and servants.

8. This Agreement may be executed in any number of counterparts and each counterpart executed by any of the undersigned together with all other counterparts so executed shall constitute a single instrument and agreement of the undersigned. Electronic or facsimile copies hereof and electronic and facsimile signatures hereon shall have the same force and effect as originals.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates as noted below.

NYE COUNTY

Pamela Webster, County Manager

Dated this 2nd day of May, 2014.

NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION

By: Adam Levine

Title: Attorney for NCMEA

Dated this 1st day of May, 2014.

EXHIBIT E

EXHIBIT E

From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Friday, September 1, 2023 2:33 PM
To: david gaba <davegaba@compasslegal.com>; Timothy Sutton <tsutton@nyecountynv.gov>
Cc: Adam Levine <ALevine@danielmarks.net>; Darrin Tuck <dtuck@nyecountynv.gov>; Kheel, Allison <akheel@fisherphillips.com>; Owens, Susan <sowens@fisherphillips.com>
Subject: RE: Impasse between Nye County and Nye County Management Employees Association – Motion to Postpone Factfinding

Dear Arbitrator Gaba,

Please consider this e-mail Nye County's Motion to Postpone the Factfinding presently scheduled for Tuesday, September 5, 2023. One of the County's concerns was the composition of the bargaining unit and whether 7 Director positions could properly be included in the NCMEA unit (along with their subordinates).

Very recently, in another matter, the County received a favorable decision from the Nevada Employee Management Relations Board (EMRB) – the public sector equivalent of the NLRB – finding that Police Captains did not belong in the supervisory bargaining unit. This prompted Nye County to re-evaluate the composition of the NCMEA bargaining unit. The composition of the bargaining unit is an issue that can only be decided by the EMRB.
Yesterday afternoon, in response to Nye County raising these concerns to the Union, Mr. Levine informed me that there was a previous EMRB complaint filed over this issue and a settlement agreement. This was the first time that Counsel for Nye County became aware of the complaint and settlement agreement.

Therefore, the County is requesting to postpone the non-binding factfinding in this matter in order to provide the County additional time to review these documents and advise the County on a course of action.

I apologize for the eleventh-hour notice before a holiday weekend and the County will bear the full cancellation fees associated with this motion.

If you require any additional information for this motion please do not hesitate to let me know.

Very truly yours,

Allison Kheel
Attorney at Law
Fisher & Phillips LLP
300 S. Fourth Street | Suite 1500 | Las Vegas, NV 89101
akheel@fisherphillips.com | O: (702) 862-3817 | C: (702) 467-1066
Website *On the Front Lines of Workplace Law℠*

From: david gaba <davegaba@compasslegal.com>
Sent: Thursday, August 31, 2023 9:11 AM
To: Timothy Sutton <tsutton@nyecountynv.gov>
Cc: Adam Levine <ALevine@danielmarks.net>; Kheel, Allison <akheel@fisherphillips.com>; Darrin Tuck <dtuck@nyecountynv.gov>
Subject: Re: Impasse between Nye County and Nye County Management Employees Association – Subpoenas for Fact finding

LOL, thanks for the heads up! Do we have a start time a hearing location?

EXHIBIT F

EXHIBIT F

Adam Levine

From:	Adam Levine
Sent:	Friday, September 1, 2023 2:48 PM
To:	'Kheel, Allison'; david gaba; Timothy Sutton
Cc:	Darrin Tuck; Owens, Susan; Joi Harper
Subject:	RE: Impasse between Nye County and Nye County Management Employees Association – Motion to Postpone Factfinding
Attachments:	1. Complaint and Petition for Declaratory Order.pdf; Settlement Agreement - Signed.pdf

Arbitrator Gaba:

The Nye County Management Employees Association opposes any continuance. This is nothing but a frivolous stall tactic.

The NCMEA has been attempting to get a contract since February 2022. The FMCS panel of arbitrators for impasse was requested in November 2022.

There is only one (1) Article which is a subject of the impasse which is wages (i.e. COLAs). The composition of the bargaining unit as nothing to do with the bargaining or the impasse.

Nye County doesn't like the fact that there are Directors included within the bargaining unit. However, the reason Directors are included within the bargaining unit is because Nye County agreed to place them back into the bargaining unit after unlawfully carving them out in 2013. Nye County entered into a Settlement Agreement which forever waived any further claims as it related to the composition of the bargaining unit. I have attached the EMRB Complaint giving rise to the dispute in 2013, and Nye County's 2014 Settlement Agreement (which was drafted by Nye County's Attorney in 2013).

I can't help the fact that Nye County has changed outside Counsel, and that Nye County chooses not to inform its outside counsel as to the prior Settlement Agreements it has entered into. I can't help the fact that subsequent management and subsequent counsel do not like the Agreement that their predecessors entered into. That is not our problem.

What is our problem is the fact that the members of the bargaining unit have not seen an increase to their salaries since July 2021 (before hyperinflation set in), and we have been bargaining since February 2022 to try to get an agreement. If this hearing does not go forward on Tuesday, it is likely that due to the schedules of counsel fact finding would not be able to be convened until December 2022 or January 2023 at the earliest (as I am booked with arbitrations, EMRB hearings, and a federal jury trial through the month of December).

I've told Ms. Kheel that the evidence needs to be presented to you as the fact finder on Tuesday, and any issues relating the composition of the bargaining unit can be addressed by the parties between themselves while we are waiting for the court reporter transcript, and preparing any necessary post-hearing briefs.

But there is absolutely no reason for you not to receive the evidence relating to the wage dispute on Tuesday.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net
General Counsel for the NCMEA

From: Kheel, Allison <akheel@fisherphillips.com>
Sent: Friday, September 1, 2023 2:33 PM
To: david gaba <davegaba@compasslegal.com>; Timothy Sutton <tsutton@nyecountynv.gov>
Cc: Adam Levine <ALevine@danielmarks.net>; Darrin Tuck <dtuck@nyecountynv.gov>; Kheel, Allison <akheel@fisherphillips.com>; Owens, Susan <sowens@fisherphillips.com>
Subject: RE: Impasse between Nye County and Nye County Management Employees Association – Motion to Postpone Factfinding

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Very recently, in another matter, the County received a favorable decision from the Nevada Employee Management Relations Board (EMRB) – the public sector equivalent of the NLRB – finding that Police Captains did not belong in the supervisory bargaining unit. This prompted Nye County to re-evaluate the composition of the NCMEA bargaining unit. The composition of the bargaining unit is an issue that can only be decided by the EMRB.
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Therefore, the County is requesting to postpone the non-binding factfinding in this matter in order to provide the County additional time to review these documents and advise the County on a course of action.

I apologize for the eleventh-hour notice before a holiday weekend and the County will bear the full cancellation fees associated with this motion.

If you require any additional information for this motion please do not hesitate to let me know.

Very truly yours,

Allison Kheel
Attorney at Law
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akheel@fisherphillips.com | O: (702) 862-3817 | C: (702) 467-1066
Website *On the Front Lines of Workplace Law℠*

EXHIBIT G

EXHIBIT G

Adam Levine

From:	david gaba <davegaba@compasslegal.com>
Sent:	Friday, September 1, 2023 4:02 PM
To:	Adam Levine; Kheel, Allison; Timothy Sutton
Cc:	Darrin Tuck; Owens, Susan; Joi Harper
Subject:	RE: Impasse between Nye County and Nye County Management Employees Association – Motion to Postpone Factfinding

Allison,

Unfortunately I have to deny your Motion. First, as I wrote to you in June:

> Parties should meet-and-confer prior to requesting a continuance or filing ANY Motion. All continuances that have not been mutually agreed to should state so clearly in the Motion for a Continuance and summarize the efforts that have been made resolve the issue between the parties. All other Motions should at a minimum summarize the efforts that have been made resolve the issue between the parties.

From your statements below it doesn't appear that you complied with my request (although to be fair I could be wrong).

Next, and FAR more important is that you stated to me on May 19; "I also just wanted to clarify that this will be non-binding factfinding under the statute." While I don't know what "the statute" is I'm guessing that it is NRS 288.200 (again, please let me know if I'm wrong). Of course NRS 288.200(4) states in part:

> A schedule of dates and times for the hearing must be established within 10 days after the selection of the fact finder pursuant to subsection 2, and the fact finder shall report the findings and recommendations of the fact finder to the parties to the dispute within 30 days after the conclusion of the fact-finding hearing.

Simply put, I don't know that I have any authority under the statute to "postpone" the hearing especially as you have been aware of the Unit's composition since before the hearing was set. Further when you state, "[T]his was the first time that Counsel for Nye County became aware of the complaint and settlement agreement." Unfortunately, your argument doesn't resonate with me as "Nye County" and their in-house counsel (who from my experience is VERY competent) should have been aware of this issue since it arose (again, this is an assumption on my part).

To conclude, the last minute nature of this request is problematic as I clearly only have a cursory understanding of the facts/law involved. While I feel that I have to deny your request at the present, you can certainly make the Motion again on Tuesday morning when we convene. That said, do we have a start time and hearing location for this one as I requested on Thursday, August 31, 2023, at 9:11 AM?

Cheers,

Compass Law Group PS Inc.

David Gaba
Direct (206) 251-5488

From: Adam Levine <ALevine@danielmarks.net>
Sent: Friday, September 1, 2023 2:48 PM
To: Kheel, Allison <akheel@fisherphillips.com>; david gaba <davegaba@compasslegal.com>; Timothy Sutton <tsutton@nyecountynv.gov>
Cc: Darrin Tuck <dtuck@nyecountynv.gov>; Owens, Susan <sowens@fisherphillips.com>; Joi Harper <JHarper@danielmarks.net>
Subject: RE: Impasse between Nye County and Nye County Management Employees Association – Motion to Postpone Factfinding

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But there is absolutely no reason for you not to receive the evidence relating to the wage dispute on Tuesday.

Adam Levine, Esq.
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(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net
General Counsel for the NCMEA

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Therefore, the County is requesting to postpone the non-binding factfinding in this matter in order to provide the County additional time to review these documents and advise the County on a course of action.

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If you require any additional information for this motion please do not hesitate to let me know.

Very truly yours,

Allison Kheel
Attorney at Law
Fisher & Phillips LLP
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Website *On the Front Lines of Workplace Law℠*

From: david gaba <davegaba@compasslegal.com>
Sent: Thursday, August 31, 2023 9:11 AM
To: Timothy Sutton <tsutton@nyecountynv.gov>
Cc: Adam Levine <ALevine@danielmarks.net>; Kheel, Allison <akheel@fisherphillips.com>; Darrin Tuck <dtuck@nyecountynv.gov>
Subject: Re: Impasse between Nye County and Nye County Management Employees Association – Subpoenas for Fact finding

LOL, thanks for the heads up! Do we have a start time a hearing location?

Cheers,

Dave Gaba
Sent from my iPad which explains my poor syntax, grammar, and the many typographical errors.

> On Aug 30, 2023, at 5:01 PM, Timothy Sutton <tsutton@nyecountynv.gov> wrote:
>
> Maybe you're the one who stuck out like a sore thumb Adam…
>
> **From:** Adam Levine <ALevine@danielmarks.net>
> **Sent:** Wednesday, August 30, 2023 3:51 PM
> **To:** david gaba <davegaba@compasslegal.com>
> **Cc:** Kheel, Allison <akheel@fisherphillips.com>; Timothy Sutton <tsutton@nyecountynv.gov>; Darrin Tuck <dtuck@nyecountynv.gov>
> **Subject:** RE: Impasse between Nye County and Nye County Management Employees Association – Subpoenas for Fact finding
>
>

Arbitrator Gaba:

Just a heads-up that the standard attire for arbitrations in Nye County is business casual or plain casual (i.e. blue jeans). County Manager Tim Sutton wore a tie to an arbitration I did in Nye County two weeks ago for another bargaining unit (and he stuck out like a sore thumb).

I will be appearing in business casual and would invite you as the arbitrator to do the same.

I presume we are starting at 9:00 AM on Tuesday.

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net
General Counsel for the NCMEA

From: david gaba <davegaba@compasslegal.com>
Sent: Monday, August 28, 2023 12:49 PM
To: Adam Levine <ALevine@danielmarks.net>
Cc: Kheel, Allison <akheel@fisherphillips.com>
Subject: Re: Impasse between Nye County and Nye County Management Employees Association – Subpoenas for Fact finding

Adam,

You can sign them on my behalf.

Cheers,

Dave Gaba
Sent from my iPad which explains my poor syntax, grammar, and the many typographical errors.

> On Aug 28, 2023, at 12:26 PM, Adam Levine <ALevine@danielmarks.net> wrote:
>
> I forgot to copy Allison on this.
>
> Adam Levine, Esq.
> Law Office of Daniel Marks
> 610 S. Ninth Street

Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net

From: Adam Levine
Sent: Monday, August 28, 2023 12:17 PM
To: 'davegaba@compasslegal.com' <davegaba@compasslegal.com>
Subject: Impasse between Nye County and Nye County Management Employees Association – Subpoenas for Fact finding

Arbitrator Gaba:

Attached are two subpoenas for the hearing on September 5, 2023. Can you either sign and return, or authorize the to sign on your behalf (which is the custom and practice here).

Adam Levine, Esq.
Law Office of Daniel Marks
610 S. Ninth Street
Las Vegas, NV 89101
(702) 386-0536: Office
(702) 386-6812: Fax
alevine@danielmarks.net
Counsel for the NCMEA

<Subpoena for Arbitration - Justin Snow.doc>
<Subpoena for Arbitration - Harry Means.doc>

EXHIBIT H

EXHIBIT H

BEFORE DAVID GABA, FACT-FINDER
IN THE MATTER OF THE IMPASSE FACT-FINDING BETWEEN

NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, on behalf of Bargaining Eligible Civilian Management, Union, and NYE COUNTY, NEVADA, Employer	**FACT-FINDER'S WRITTEN FINDINGS AND RECOMMENDATIONS FOR RESOLUTION OF IMPASSE ISSUES PURSUANT TO NEVADA REVISED STATUTE CHAPTER 288, *et seq.*** **Date Issued: December 10, 2023**

APPEARANCES:

On behalf of the Union:

Adam Levine
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
E-mail: alevine@danielmarks.net

On behalf of the Employer:

Allison List Kheel
Fisher & Phillips, LLP
300 South Fourth Street
Suite 1500
Las Vegas, NV 89101
E-mail: akheel@fisherphillips.com

INTRODUCTION

These Written Findings and Recommendations for Resolution of Impasse Issues (the "Recommendations") arise pursuant to Nevada Revised Statute (NRS) Chapter 288, *et seq.* (the Statute), under which David Gaba was mutually selected by the Parties to serve as the Fact-finder under the specific terms of the Statute. These Recommendations involve an impasse between the Nye County Management Employees Association (the Union or the NCMEA), on behalf of "bargaining eligible civilian management employees" (who are not public safety, such as police or fire),[1] and Nye County, Nevada (the Employer or the County) (collectively, the Parties), over a successor Collective Bargaining Agreement covering the period of July 1, 2022, through June 30, 2025 (the Successor CBA). The previous CBA was in effect, from July 1, 2019, through June 30, 2022 (the Expired CBA).

The Fact-Finding Hearing

On September 1, 2023, the County moved to postpone the fact-finding hearing (the Hearing) that had previously been scheduled by mutual agreement, for September 5, 2023, based on the County's concerns about the proper composition of this particular bargaining unit. I denied the County's Motion, as I found nothing in the Statute that gave me authority to grant such a motion.

On September 5, 2023, the Hearing was held in Pahrump, Nevada. The Parties had the opportunity to make opening statements, examine and cross-examine witnesses, introduce

[1] *See* Union's Post-Hearing Brief at page 1.

exhibits, and fully argue all of the issues in dispute. A transcript of the proceedings was provided. At the outset, the County asserted in its Opening Statement:

> 23
> Just for the record, the
> county objects to the fact finder having
> jurisdiction in this matter on the basis of the
> bargaining unit being inappropriate, and the
> appropriateness of the bargaining unit is a matter
> that must be heard and decided by the EMRB[2] before
> the bargaining process can proceed.

While the County did not use the word "motion," when making its above objection, I neither denied the Motion, nor agreed with the County's above argument, as it was simply argument and no *evidence* was presented show my lack of jurisdiction to hear the Parties' evidence concerning the impasse in negotiations to the Successor CBA.

At the end of the Hearing, the Parties stipulated to submit Post-Hearing Briefs on or before November 3, 2023, presuming the transcript was received thirty (30) days prior to that date. I received the Union's Post-Hearing Brief on November 8, 2023; however, the Union subsequently agreed, at the County's request, that the County's deadline to submit Post-Hearing Briefs could be extended to November 27, 2023.

On November 27, 2023—the same date the County's Post-Hearing Brief was due—the County filed a motion for an order *staying* all briefing and my Recommendations in this matter (the County's Motion to Stay), pending resolution of the County's Petition for a Declaratory Order Clarifying the Bargaining Unit (the County's Petition). The County's Petition was filed with the EMRB on the same date, November 27, 2023. The EMRB assigned Case No. 2023-023 to the

[2] The acronym "EMRB" stands for the State of Nevada's Employee-Management Relations Board.

County's Petition. The Union objected to *any* order staying the County's briefing or Recommendations in these proceedings. Ultimately, I denied the County's Motion to Stay, on the ground that I lacked the authority to issue such an order. Specifically, I held:

> Unfortunately, I feel that I have no choice but to deny Ms. Kheel's motion. While I fully understand the county's position, which is logical, I am not acting as an arbitrator in this matter, but as a statutory hearing officer. I think the best reading of NRS 288.200 which uses the word "*shall*" to delineate my actions is clear and absent a stipulation of the parties I don't have the power to stay this matter.[3]

Following my ruling, the County agreed to submit its Post-Hearing Brief on or before November 29, 2023. I received the County's Post-Hearing Brief on that same date. These Recommendations are timely issued in accordance with the Statute.

ISSUES

The Parties did not stipulate to a statement of the issue(s) to be addressed in these Recommendations. In its Post-Hearing Brief, the County re-asserts:

> *Only* the EMRB has jurisdiction to determine the appropriate composition of a bargaining unit. The County maintained a standing objection to the Factfinder's jurisdiction and renews and incorporates this objection in this Brief. Issuance of the recommendations of the Factfinder prior to a determination from the EMRB would prejudice the County and create the potential for inconsistent judicial decisions. Thus, the County renews and incorporates herein its motion for a stay of these Factfinding proceedings pending a resolution of the EMRB proceedings.[4]

I agree that *only* the EMRB has jurisdiction to determine the appropriate composition of this bargaining unit. Indeed, both Parties stipulated to that fact at the Hearing. However, as the Fact-finder, I was *not* selected to determine "the appropriate composition of a bargaining unit." Rather,

---

[3] Fact-finder's e-mail to the Parties on November 27, 2023, sent at 1:27 p.m. Pacific Daylight Time (emphasis added).
[4] County's Post-Hearing Brief at page 2, reference to transcript omitted; footnotes omitted (emphasis added).

as more fully addressed below, I was *mutually* selected by the Parties to issue Recommendations concerning the current impasse in negotiations for the Successor Collective Bargaining Agreement (Successor "CBA") between the Parties. Therefore, absent a recitation of *any* statutory or current case law that grants me the *authority* to issue an order granting a motion to stay these impasse proceedings, I have *no choice* but to issue these Recommendations as required by the Statute.

In that regard, the Union asserts:

> Because there is an ability to pay, the Fact-finder is to "consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the Fact-finder shall consider whether the Board found that either party had bargained in bad faith."[3]

I adopt the Union's above statement of the issues I am required by Statute to consider and recommend.

APPLICABLE STATUTORY PROVISIONS

The following language from the Nevada Revised Statute (NRS) Chapter 288 (the Statute) governs this impasse proceeding:

> **NRS 288.044 "Fact-finding" defined.** "Fact-finding" means the formal procedure by which an investigation of a labor dispute is conducted by a fact finder at which:
>
> 1. Evidence is presented; and
> 2. A written report is issued by the fact finder describing the issues involved, making findings and setting forth recommendations for settlement which may or may not be binding.
>
> ***

[3] Union's Post-Hearing Brief at page 4.

NRS 288.136 "Recognition" defined. "Recognition" means the formal acknowledgment by the local government employer that a particular employee organization has the right to represent the local government employees within a particular bargaining unit.

***

NRS 288.150 Negotiations by employer with recognized employee organization: Subjects of mandatory bargaining; matters reserved to employer without negotiation; reopening of collective bargaining agreement during period of fiscal emergency; termination or reassignment of employees of certain schools.

1. Except as otherwise provided in subsection 6 and NRS 354.6241, every local government employer shall negotiate in good faith through one or more representatives of its own choosing concerning the mandatory subjects of bargaining set forth in subsection 2 with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees. If either party so requests, agreements reached must be reduced to writing.

2. The scope of mandatory bargaining is limited to:

(a) Salary or wage rates or other forms of direct monetary compensation.

(b) Sick leave.

(c) Vacation leave.

(d) Holidays.

(e) Other paid or nonpaid leaves of absence.

(f) Insurance benefits.

(g) Total hours of work required of an employee on each workday or workweek.

(h) Total number of days' work required of an employee in a work year.

(i) Except as otherwise provided in subsections 8 and 11, discharge and disciplinary procedures.

(j) Recognition clause.

(k) The method used to classify employees in the bargaining unit.

(l) Deduction of dues for the recognized employee organization.

(m) Protection of employees in the bargaining unit from discrimination because of participation in recognized employee organizations consistent with the provisions of this chapter.

(n) No-strike provisions consistent with the provisions of this chapter.

(o) Grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements.

(p) General savings clauses.

(q) Duration of collective bargaining agreements.

(r) Safety of the employee.

(s) Teacher preparation time.

(t) Materials and supplies for classrooms.

(u) Except as otherwise provided in subsections 9 and 11, the policies for the transfer and reassignment of teachers.

(v) Procedures for reduction in workforce consistent with the provisions of this chapter.

(w) Procedures consistent with the provisions of subsection 6 for the reopening of collective bargaining agreements for additional, further, new or supplementary negotiations during periods of fiscal emergency.

***

NRS 288.200 Submission of dispute to fact finder: Selection, compensation and duties of fac finder; submission to second fact finder in certain circumstances; effect of findings and recommendations; criteria for recommendations and awards. Except in cases to which NRS 288.205 and 288.215, or NRS 288.217 apply:

1. If:

(a) The parties have failed to reach an agreement after at least six meetings of negotiations; and

(b) The parties have participated in mediation and by April 1, have not reached agreement,

→ either party to the dispute, at any time after April 1, may submit the dispute to an impartial Fact-finder for the findings and recommendations of the Fact-finder. The findings and recommendations of the Fact-finder are not binding on the parties except as provided in subsection 5. The mediator of a dispute may also be chosen by the parties to serve as the fact finder.

2. If the parties are unable to agree on an impartial fact finder within 5 days, either party may request from the American Arbitration Association or the Federal Mediation and Conciliation Service a list of seven potential Fact-finders. If the parties are unable to agree upon which arbitration service should be used, the Federal Mediation and Conciliation Service must be used. Within 5 days after receiving a list from the applicable arbitration service, the parties shall select their fact-finder from this list by alternately striking one name until the name of only one fact-finder remains, who will be the fact-finder to hear the dispute in question. The employee organization shall strike the first name.

3. The local government employer and employee organization each shall pay one-half of the cost of fact finding. Each party shall pay its own costs of preparation and presentation of its case in fact-finding.

4. A schedule of dates and times for the hearing must be established within 10 days after the selection of the Fact-finder pursuant to subsection 2, and the Fact-finder shall report the findings and recommendations of the

Fact-finder to the parties to the dispute within 30 days after the conclusion of the fact-finding hearing.

5. The parties to the dispute may agree, before the submission of the dispute to fact-finding, to make the findings and recommendations on all or any specified issues final and binding on the parties.

6. If parties to whom the provisions of NRS 288.215 and 288.217 do not apply [sic] do not agree on whether to make the findings and recommendations of the Fact-finder final and binding, either party may request the submission of the findings and recommendations of a Fact-finder on all or any specified issues in a particular dispute which are within the scope of subsection 11 to a second Fact-finder to serve as an arbitrator and issue a decision which is final and binding. The second Fact-finder must be selected in the manner provided in subsection 2 and has the powers provided for Fact-finders in NRS 288.210. The procedures for the arbitration of a dispute prescribed by subsections 8 to 13, inclusive, of NRS 288.215 apply to the submission of a dispute to a second Fact-finder to serve as an arbitrator pursuant to this subsection.

7. Except as otherwise provided in subsection 10, any fact finder, whether the fact finder's recommendations are to be binding or not, shall base such recommendations or award on the following criteria:

(a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision. If the local government employer is a school district, any money appropriated by the State to carry out increases in salaries or benefits for the employees of the school district must be considered by a Fact-finder in making a preliminary determination.

(b) Once the fact finder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the fact-finder shall consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the fact-finder shall consider whether the Board found that either party had bargained in bad faith.

(c) A consideration of funding for the current year being negotiated. If the parties mutually agree to arbitrate a multiyear contract, the Fact-finder must consider the ability to pay over the life of the contract being negotiated or arbitrated.

➥ The Fact-finder's report must contain the facts upon which the Fact-finder based the Fact-finder's determination of financial ability to grant monetary benefits and the Fact-finder's recommendations or award.

8. Within 45 days after the receipt of the report from the Fact-finder, the governing body of the local government employer shall hold a public meeting in accordance with the provisions of chapter 241 of NRS. The meeting must include a discussion of:

(a) The issues of the parties submitted pursuant to this section;

(b) The report of findings and recommendations of the Fact-finder; and

(c) The overall fiscal impact of the findings and recommendations, which must not include a discussion of the details of the report.

➥ The Fact-finder must not be asked to discuss the decision during the meeting.

9. The chief executive officer of the local government shall report to the local government the fiscal impact of the findings and recommendations. The report must include, without limitation, an analysis of the impact of the findings and recommendations on compensation and reimbursement, funding, benefits, hours, working conditions or other terms and conditions of employment.

10. Any sum of money which is maintained in a fund whose balance is required by law to be:

(a) Used only for a specific purpose other than the payment of compensation to the bargaining unit affected; or

(b) Carried forward to the succeeding fiscal year in any designated amount, to the extent of that amount,

➥ must not be counted in determining the financial ability of a local government employer and must not be used to pay any monetary benefits recommended or awarded by the Fact-finder.

11. The issues which may be included in a recommendation or award by a Fact-finder are:

(a) Those enumerated in subsection 2 of NRS 288.150 as the subjects of mandatory bargaining, unless precluded for that year by an existing collective bargaining agreement between the parties; and

(b) Those which an existing collective bargaining agreement between the parties makes subject to negotiation in that year.

➥ This subsection does not preclude the voluntary submission of other issues by the parties pursuant to subsection 5.

12. Except for the period prescribed by subsection 8, any time limit prescribed by this section may be extended by agreement of the parties.

NRS 288.270 Employer or representative; employee or employee organization.

1. It is a prohibited practice for a local government employer or its designated representative willfully to:

(a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

(b) Dominate, interfere or assist in the formation or administration of any employee organization.

(c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.

(d) Discharge or otherwise discriminate against any employee because the employee has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

(e) Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and fact-finding, provided for in this chapter.

(f) Discriminate because of race, color, religion, sex, sexual orientation, gender identity or expression, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.

(g) Fail to provide the information required by NRS 288.180.

(h) Fail to comply with the requirements of NRS 281.755.

2. It is a prohibited practice for a local government employee or for an employee organization or its designated agent willfully to:

(a) Interfere with, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

FINDINGS OF FACT

After a thorough review and careful consideration of the testimony and documentary evidence presented by the Parties, I make the following Findings.

The Parties

Nye County (the County or the Employer) is Nevada's largest county by area. The County's seat is located in the City of Tonopah. Article 1 of the Expired CBA defines the "County" to mean:

> ....the County of Nye and its Board of Commissioners, its facilities, *and/or the County Manager* or his/her designee (emphasis added)

Article 3, Section 1, provides that the Nye County Management Employees Association (the Union or the NCMEA) is:

> ...*recognized* by the County as the *sole* and *exclusive* collective bargaining representative of the employees assigned to the represented classifications *listed in Addendum B* who are eligible to be represented by the Association.... (emphasis added).

As defined in the Statute, "recognition" is to defined to mean:

> [T]he formal acknowledgment by the local government employer that a particular employee organization has the right to represent the local government employees within a particular bargaining unit.

Addendum B of the Expired CBA lists the classifications covered by the CBA, and recognized by the County as represented by the Union:

Grade	Represented Classification
15	Geoscientist I
	Law Clerk
	Principal Planner
	Specialty Court Coordinator
16	B&G Manager
	Court Reporter
	Human Services Manager
	Program Supervisor
17	Community Planner
	Data Base Manager
	Geoscientist II
18	Tourism Director
19	Geoscientist III
	Network Engineer
20	Utilities Superintendent
21	Assistant Planning Director
	Director, Emergency Management Services
	Geosciences Manager

	Principal Engineer Road Superintendent
22	Assistant Public Works Director Director, Facility Operations
	Director, Information Technology Geotechnical Representative
23	Director, Health & Human Services
24	Director, NWRPO Director, Planning
25	ACM - Director of Community Development Director, Public Works

The Original Dispute Regarding the Proper Composition of the Bargaining Unit

On or about June 18, 2013, the Union's counsel of record filed a Complaint and Petition for Declaratory Order with the EMRB, assigned as Case No. A1-046095 (the Union's Complaint). The Union's Complaint was concerning the proper composition of the bargaining unit as of the date it filed the complaint. Specifically, the Union asserted that the County violated NRS 288.150 by refusing to recognize the following classifications as part of the bargaining unit:

Director, Emergency Management Services
Director, Health and Human Services
Director, Management Information Systems
Director, Planning
Director, Public Works
Director, N.W.R.P.O.
Manager, Facilities Operations
Chief Juvenile Probation Officer
Veterans Service Officer

On or about May 4, 2014, the County and the Union reached a Settlement Agreement concerning the Union's Complaint. In the Settlement Agreement, the County specifically agreed

to recognize *all* the above-listed classifications that were a part of the bargaining unit as of the date of the last ratified agreement, with the *exception* of the Chief Juvenile Probation Officer position. In exchange, the Union agreed to withdraw its Complaint.

Under the "Recitals" section of the Settlement Agreement at subsection C., the Parties agreed:

> Without either Party admitting liability or fault, and in a compromise of each of their positions and rights, the Parties desire to enter into this Agreement to resolve *all* disputes related to their respective rights in the Action and arising out of the claims and allegations set forth therein upon the terms and conditions stated herein. Neither the execution nor the performance of this Agreement shall be considered an admission of fault, liability or wrongdoing whatsoever by any of the Parties.[6]

Based on the above language, it appears that the Parties *mutually* agreed that the Settlement Agreement resolved all disputes concerning the proper composition of this bargaining unit. In any event, more importantly to these Recommendations, there simply is no *evidence* that the County raised the issue of the proper composition of the bargaining unit *at any time* during *any* of the six (6) negotiation sessions held concerning the Successor CBA.

The Union Opens Negotiations for the Successor CBA

In February 2022, the Union notified the County that it wished to negotiate a Successor CBA to the now Expired CBA, in effect from July 1, 2019, through June 30, 2022. The Parties agreed to open (3) articles for renegotiation; those included Article 11 - Probationary Period, Article - 21 Holidays, and Article 26 - Wages.

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[6] Union Exhibit 9 (emphasis added).

The Union's President, Darrin Tuck, a County utility superintendent, acted as Chief Negotiator for the Union, and County Manager Tim Sutton acted as Chief Negotiator for the County. County Manager Sutton has been the County Manager since October 1, 2017, and Mr. Tuck has been the President of the Union for "approximately six (6) years."

NRS 288.150 provides, at Section 1:

> Except as otherwise provided in subsection 6 and NRS 354.6241, every local government employer shall negotiate in good faith *through one or more representatives of its own choosing* concerning the mandatory subjects of bargaining set forth in subsection 2 with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees. If either party so requests, agreements reached must be reduced to writing (emphasis added).

Based on the overall record, more likely than not, the County chose County Manager Sutton to act as Chief Negotiator on its behalf. My personal observation is that both these men were imminently qualified to act as Chief Negotiators.

At the Hearing, Mr. Tuck credibly testified that he negotiated the Expired CBA on behalf of the Union; he further credibly testified that the County did *not* raise any objection to the composition of the bargaining unit during negotiations for either the Expired CBA or the Successor CBA. Moreover, County Manager Sutton credibly testified about the County's previous bargaining history with the Union:

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24 NCMEA is a group that we generally don't
25 have a lot of issues with. We typically work

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1 together on wages. It's really short. We don't
2 typically involve counsel. So as I recall, I think
3 we had two or three sessions. Were able to TA a
4 document pretty quickly.

Based on both Parties' testimony, more likely than not, the Parties had a good working relationship prior to the meeting held on July 11, 2023, addressed below.

The Parties Reach a Tentative Agreement

Consistent with both Parties' testimony, the Parties initially met for successor negotiations three (3) times: on March 11, 2022, April 12, 2022, and June 13, 2022 (the Initial Meetings). The record further reflects that, as of the third (3rd) negotiation meeting held on June 13, 2022, the Parties reached a Tentative Agreement (TA) on the above three (3) articles, as well as Appendix A, which corresponds with Article 26 - Wages.

The Parties agreed to a three (3)-year Successor CBA, with the effective dates of July 1, 2022, through June 30, 2025 (Article 33 – Term of Agreement). County Manager Sutton signed the TA on behalf of the County, and Mr. Tuck signed the TA on behalf of the Union. Again, Mr. Tuck credibly testified that the County did not raise *any* concerns or issues related to the proper composition of the bargaining unit during *any* of the Initial Meetings concerning the Successor CBA.

The Tentative Agreement

The relevant portions of the TA reached on June 13, 2022, provide:

> **Article 11- Probationary Period**
>
> 1. All new full time employees shall fulfill a probationary period of twelve (12) months. During the probationary period following an original appointment and any extension of such period, employment may be terminated at will. Initial appointment shall be made at the entrance rate for the class, except as approved by the County Manager or his/her designee.

a. Upon initial appointment, an employee shall serve a probationary period of 2080- hours.

b.Probationary employees shall be provided a written performance evaluation no later than twenty (20) working days following performing 1040 hours of employment. Any employee that receives less than a fully satisfactory performance shall be continued on probation for the remainder of the probationary period.

c.If a probationary employee receives a fully satisfactory performance evaluation or in the event no written performance evaluation created as required herein the probationary employee shall be deemed to haves successfully completed probation and shall become a regular employee. Employees that complete probation prior to the expiration of the 2080-hour probationary period shall not be entitled to a salary step increase until the one-year anniversary of this Agreement.

d. Probationary employees that do not receive a lesson satisfactory performance evaluation within 20 working days of the completion of the full probationary. Shall be deemed to have successfully completed probation and shall become a regular employee.

2. ~~A probationary employee shall accrue benefit credit from his/her hire date.~~ When a former employee is rehired after a break in service of no more than one 1 year from the date of separation to a position in the same class held at the time of separation, s/he may be paid at or below the same hourly rate (including across the board schedule adjustment provided by this Agreement) s/he held at the time of separation.

~~a. An employee shall become eligible to use sick leave upon completion of thirty (30) days of service.~~

~~b. An employee shall become eligible to use annual leave upon completion of six (6) months of service.~~

~~c. An employee shall be eligible to use his/her group insurance benefits at such time as is provided by the insurance plan then in effect and/or chosen by the employee.~~

3. New probationary employees shall not constitute a part of the bargaining unit. They may, however, join the Association. When an employee is promoted, s/he shall be entitled to a salary increase to the

lowest step in the range for the higher class which provides at least a ten and one-half percent (10.5%) increase, provided that in no event will the new salary be less than the minimum rate of the range or greater than the top step of the range to which the employee is promoted. Any exception may be approved by the County Manager or designee upon written justification.

a-a. A promoted employee shall serve a qualifying period. The qualifying period will normally be 1040 hours - in paid status. At the discretion of the employee's direct supervisor and upon approval by the County Manager, prior to completion of the initial qualifying period, the qualifying period may be extended up to an additional 1040 hours for a maximum of 2080 hours. At the conclusion of the qualifying period, the employees shall be given a performance evaluation. Based on the performance evaluation and demonstrated qualifications, the employee will either be accepted or rejected for the position. If rejected, a reasonable effort will be made to place the employee in his/her previous position or another County position for which s/he qualifies. If no position is available, the action affecting the employee shall be subject to the provisions of Article 28, Layoff and Recall, Section 6.

b. When an employee is promoted, s/he shall retain the right during the first fifteen (15) shifts worked of the qualifying period to voluntarily demote to his/her previously held position. The employee shall have his/her salary reduced to the hourly rate (including across the board schedule adjustments provided by this Agreement) held prior to being placed on the qualifying period.

~~Probationary employees shall receive a written performance evaluation at the completion of their third, sixth, and eleventh month of their probationary period, when applicable.~~

4. A reclassification to a class with a higher grade shall be treated under the same terms and conditions as a promotion.

5. When an employee transfers to a position in the same class or at the same salary grade in another department, s/he shall be entitled to the same hourly rate held at the time of the transfer. The County Manager or designee, upon written justification by the direct supervisor, may approve a higher rate of pay. A voluntary transfer may result in the transferring employee serving a new qualifying period. The transferring employee will be notified, in writing, prior to accepting the transfer if a qualifying period will be required . Upon

successful completion of the qualifying period, the employee may, at the discretion of the direct supervisor, receive a one-step salary increase, provided that the employee is not at the top of the schedule for the class.

6. When an employee is demoted, his/her salary will not exceed the top of the new salary schedule unless the demotion was a result of a reclassification. Demotions, except for reclassifications, initiate a new anniversary date. Employees failing a qualifying period following promotion and returned to his/her previously held class shall have his/her salary reduced to the step and grade (including across the board schedule adjustments provided by this Agreement) held prior to being placed on the qualifying period.

7. For the purposes of this Article, "initial appointment" shall be defined as the first position held by an individual in the service of the County since the employee's last break in service.

***

Article 21 - Holidays

1. The County and the Association agree that per NRS 236.015 the following legal holidays will be observed:

- New Year's Day: January 1
- Martin Luther King Day: Third Monday in January
- President's Day: Third Monday in February
- Memorial Day: Last Monday in May
- Juneteenth: June 19
- Independence Day: July 4
- Labor Day: First Monday in September
- Nevada Day: Last Friday of October
- Veteran's Day: November 11
- Thanksgiving Day: Fourth Thursday in November
- Family Day: Friday following the Fourth Thursday in November
- Christmas: December 25
- Any day that may be appointed by the President of the United States for public fast, thanksgiving or as a legal holiday ~~expect~~ except for any Presidential appointment of the fourth Friday in October as Veterans Day.

2. If any of the above holidays fall on a Sunday, the following Monday shall be considered as a legal holiday. If any of the above holidays fall on Saturday, the preceding Friday shall be considered as a legal holiday.

3. An employee, in order to be entitled to a legal holiday as provided, shall be on pay status on his/her scheduled work day immediately preceding and immediately following such holiday.

~~3.~~4. If an employee works a four-day, forty-hour work week, s/he will only be entitled to claim eight hours of holiday pay for any holiday specified above.

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Article 26 – Wages

1. Effective July 1, 20~~19~~22 a three~~ f~~ive and six tenths percent (3~~5~~.6%) COLA (cost of living adjustment) shall be given to all employee's subject to this Agreement, ~~this COLA shall be retroactive to the dates the COLA's were given to the NCEA (Nye County Employee Association) employee's in years 2017-2019.~~ This rate is the result of the December 2021 change in Consumer Price index [sic], Urban Wage Earners and Clerical Workers West B/C 12- month period change of 7.1% less the previously granted 1.5% pursuant to the NCMEA Contract, Article 26 section 3 ratified August 16, 2019, with an effective period of July 1, 2019-June 30, 2022. December 2020 12-month average CPI was 1.5%.

2. ~~Immediately upon the removal of the "Me Too" clause from Article 32(1) of the NCEA bargaining agreement and within year two (2020-2021) of this agreement, a three percent (3%) COLA and/or wage increase shall be given to all employee's subject to this Agreement and shall be paid retroactive to July 1, 2020.~~ Effective July 1, 2023 all employees subject to this Agreement shall be given a COLA equal to the change in the Consumer Price Index, Urban Wage Earners and Clerical workers West B/C, and the rate of this COLA shall be based on the calculated average of the CPI index of the three (3) prior years, including the 12-month period ending December of 2022 and the previous two (2) years.

3. Effective July 1, 20~~21~~2024 all employees subject to this Agreement shall be given a COLA equal to the change in the Consumer Price Index, Urban Wage Earners and Clerical Workers, West B/C, ~~as of the previous December~~

~~provided that the cola to be implemented shall not exceed 3%~~and the rate of this COLA shall be based on the calculated average of the CPI index of the previous three (3) prior years, including the 12-month period ending in December of 2023 and the previous two (2) years.

~~3. The COLA increase in paragraph 3 above should only be given if audited property tax revenues (excluding net proceeds) for the prior fiscal year is in excess of five (5%) from the preceding year.~~

4. The County recognizes employees may be under an unusually heavy workload on-call schedule. The County Manager may, from time to time, in his or her absolute discretion, designate one or more employees to be in heavy workload or heavy on-call (HWOC) status. The County Manager may also, in his or her absolute discretion remove the HWOC designation from any employee at any time. The County Manager's decision to bestow the HWOC designation or remove the HWOC designation shall not be grievable and shall not be covered by the Grievance and Arbitration Procedures of this Agreement.

For each full pay period while in HWOC status the employee shall receive a payment of $250.

The TA also includes an Addendum A, which sets forth the new "Pay Scale" for employees.

Significantly, the TA lists the "fiscal impact" to the County:

Fiscal Impact
NCMEA CBA

	FY Impact
FY23 (Including 5.6% COLA)	$7,562,492
FY24 (Estimating 3% COLA)	$7,765,101
FY25 (Estimating 3% COLA)	$7,973,303
Total CBA Cost FY23-FY25	**$23,300,896**

NRS 288.153 Agreement must be approved at a public hearing; report of fiscal impact of agreement. Any new, extended or modified collective bargaining agreement or similar agreement between a local government employer and an employee organization must be approved by the governing body of the local government employer at a public hearing. The chief executive officer of the local government shall report to the local government shall report to the local government the fiscal impact of the agreement.

*Funds affected: 10101, 10205, 10209, 10230, 10236, 10254, 10282, 10283, 10340, 10697, 25101, 25222, 25268, 25220
Staff will bring forward an augment at a later meeting to remedy the budget in each fund.

I find this information to be particularly useful and preponderant on the issue of the County's "ability to pay," addressed in more detail below.

The Board of County Commissioners Refuse to Ratify the TA

On July 11, 2022, the Parties presented the proposed Collective Bargaining Agreement for ratification by the Board of County Commissioners (the Board) (the Ratification Meeting). While the record does not reflect whether the Union had already ratified the TA as of that date, more

likely than not, the Union either already had, or shortly thereafter, ratified the TA. Thus, more likely than not, the Parties only needed ratification by the Board to adopt the contract.

During the Ratification Meeting, the Board communicated they were *not* willing to ratify the contract for a variety of reasons. The first reason, raised by Commissioner Leo Blundo, was because "executive management should *not* be unionized at the top."[7] Commissioner Blundo offered his justification for this statement, when he stated, in relevant part:

> So in my opinion once you hit that tier, *I don't think the Union fits*. I think unions had their place, especially in the twenties (20s) and thirties (30s) in this country[8], but Nye County is not just a fair, but a very good employer. We go to bat for our employees and I think that's a testament to what the County Manager has put in place over the years from the top down (emphasis added).

While I agree with Commissioner Blundo that the County's Manager, Mr. Sutton, appears to have been doing an *outstanding* job representing the County in all negotiations he was involved with for this particular bargaining unit, I respectfully disagree that "*I don't think the Union fits*" is a good justification for failing to ratify the Parties' TA. This is because the County offered *no evidence* as to this alleged justification.

Commissioner Blundo also expressed concern that bargaining unit employees would receive subjective, rather than objective, performance evaluations under the new language in the TA. Again, I can appreciate Commissioner Blundo's comments, but, without any facts or *evidence*, I am simply *not* persuaded by Commissioner Blundo's *opinion*.

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[7] Disclaimer: While I used my best efforts to transcribe what I heard and understood while listening to the recording of the BOCC Meeting, since I am not a certified court reporter, I do not claim that the statements I transcribed are *exactly* what each Commissioner said. However, more likely than not, I captured the essence of what each Commissioner said during the BOCC Meeting.

[8] More likely than not, Commissioner Blundo was referring to the 1920's and the 1930's.

The third issue was raised by then Chairman and Commissioner, Frank Carbone.[9] Commissioner Carbone questioned whether the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers, West B/C used in the TA to determine the cost of living adjustment (COLA) for these bargaining unit members was appropriate. Specifically, Commissioner Carbone said words to the effect of, "we are *not* an urban unit or in an urban area" (emphasis added). Commissioner Carbone expanded on his concerns about the CPI, when he stated:

> As far as I can see, the calculations that we are using may be a little *out of whack* for the simple reason that as of today, the cost of living has gone out of sight and the fuel has gone out of sight (emphasis added).

I *might* have been persuaded by Commissioner Carbone's assertion that the CPI used to establish the COLA in the TA is "out of whack"; however, in its Post-Hearing Brief, the County *concedes*:

> Here, despite concerns raised by members of the BOCC regarding whether the CPI for Urban Wage Earners and Clerical Workers, West B/C was an appropriate CPI index for Nye County, the County *acknowledges* that this CPI index has been used in the NCMEA's predecessor agreements as well as many other CBAs in Nye County, and was contained in *every* bargaining proposal made by either party in negotiations.[10]

Based on the County's concession, more likely than not, I am *entitled* to rely on statistics from the United States Bureau of Labor Statistics (the BLS) concerning the CPI for Urban Wage Earners and Clerical Workers, West B/C, which applies to "areas [with a population of] 2.5 million or less."[11] Thus, while I can appreciate Commissioner Carbone's *opinion* regarding whether the CPI used in the TA was appropriate, again, his *opinion* simply does not matter, as the County conceded

[9] The record is unclear whether Commissioner Carbone was still the Chairman as of the date of the Hearing.
[10] County's Post-Hearing Brief at page 9 (emphasis added).
[11] https://www.bls.gov/regions/west/cpi-summary/ro9xg01a.htm

through its counsel of record that the CPI agreed to in the TA has historically been used by the County.

Next, at Commissioner Debra Strickland's request, Commissioner Bruce Jabbour addressed his concern whether the steps and grades in the TA were "misaligned" and "confusing" to bargaining unit members.[13] While I understood Commissioner Jabbour's comments, there is no *evidence* that any bargaining unit members were confused by *anything* the Parties agreed to in the TA. Again, I appreciate Commissioner Jabbour's opinion, but his opinion is not *evidence*.

Like Commissioner Carbone, Commissioner Strickland also questioned whether the CPI used in the TA was proper, when she stated:

> We all know that the economics currently are *out of whack* is what I heard someone mention, and I'm gonna say *it's not a good time to be negotiating a contract*. I don't know what that means when you're dealing with unions because apparently, we have *no choice* but to have unions, because it only takes two (2) people to unionize.
>
> ***
>
> I don't think an 8 1/2 percent CPI is--I think it's ridiculous. We can't keep up like this so we need to rethink what we're doing and I cannot support this at this time, and perhaps maybe the EMRB--perhaps they will need to come in and look at what we have to offer, what the Union has to offer and come to a negotiated agreement. But *it's not a good time to do a contract* and we are out of control right now as a country (emphasis added).

Again, Commissioner Strickland's repetitive statement that the CPI is "out of whack" is factually inaccurate, based on the County's admissions in its Post-Hearing Brief. Moreover, Commissioner Strickland's statement that "it's not a good time to do a contract" simply has no bearing on the

[13] Presumably, Commissioner Jabbour was referring to Addendum A – Pay Scale, which, as previously sets forth above, corresponds with the newly revised Article 26 – Wages.

statutory criteria I am required to consider. For these reasons, I cannot align my Recommendations with any of Commissioner Strickland's comments.

Lastly, Commissioner Donna Cox provided a general comment regarding her very apparent distaste for unions, when she stated:

> *I don't believe we should have unions.* We are a political entity out in the public sector but I have never supported them and I even know employees who don't support that because there's too many ups and downs, there are some levels making too much money, and other people not making enough money, and we can only do so much up here as a Board as far as working those out, but I know we have unhappy employees that are not in agreement with things that have been done with unions, so on top of that with all the things you people have already said, I feel the same way. I don't think this is going to go anywhere at this point (emphasis added).

In sum, the Board expressed Union animus against this particular bargaining unit and against unions in general during the Ratification Meeting. While I can appreciate the Board's comments were made in the spirit of attempting to understand the County's statutory obligations, none of the Board's comments and opinions carry any weight when issuing these Recommendations, as these comments do not address the statutory criteria I must consider. On this point, I truly sympathize with the County's counsel, and the County's Manager, as, in my humble opinion, they probably had *no idea* the Board would refuse to ratify the TA for the reasons stated.

The Board Gives Direction to the County Manager

At the Hearing, County Manager Sutton credibly testified about the direction the Board gave him following the Ratification Meeting:

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18 A. The Board raised various issues, various
19 concerns that they had with the proposal, with the

20 TA document.
21 And one was the fact that we were in a
22 strange economic climate and wanted to wait until
23 that settled down. The other one was, as I
24 mentioned, that the department heads could not be –
25 should not be part of a bargaining unit. The other

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1 one was whether or not the appropriate comparables
2 were being used. The other one was whether CPI was
3 an appropriate index to be used, considering that
4 we're a rural county.

Based on the overall record, the Board's direction following the Ratification Meeting was very likely *contrary* to *any* direction County Manager Sutton had ever received in the past.

The ERMB's July 19, 2023, Decision

At the Hearing, the County offered to supplement the record with the ERMB's decision, *Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al*, Item No. 887, Case No. 2022-009, (July 19, 2023) (the NCASS case), in support of its proposition that:

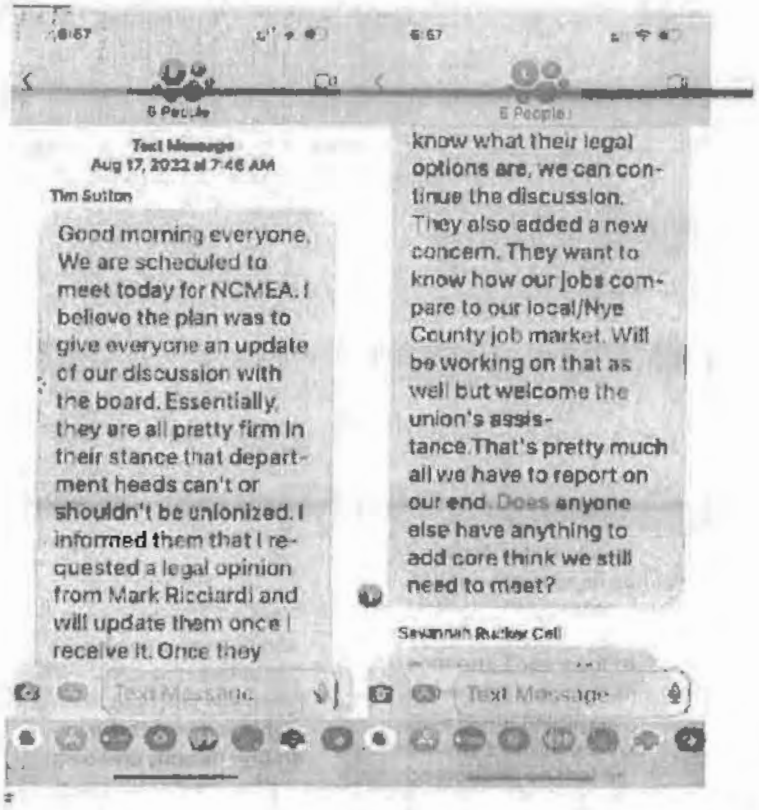
> [T]he impasse proceedings…are an extension of the bargaining process and the County cannot be forced to negotiate and bargain with an inappropriate bargaining unit, nor be compelled to enter into a CBA with an inappropriate bargaining unit.[13]

Both Parties stipulated that, as of the date of the Hearing, the parties in that action were still attempting to negotiate a successor agreement. In any event, I have read the decision, and do not find it persuasive in this particular circumstance, as more fully addressed below.

[13] County's Post-Hearing Brief at page 1.

The County's Text Message to the Union on August 17, 2022

On August 17, 2022, County Manager Sutton sent the following text message to the Union's Chief Negotiator:



I find County Manager Sutton's comment that the Board's "stance that department heads can't or shouldn't be unionized" is pertinent to these Recommendations, as addressed below.

The Final Three (3) Negotiation Sessions

Following the Board's failure to ratify the TA, the Parties met for three (3) additional negotiation sessions, on July 26, 2022, September 22, 2022, and October 25 of 2022 (the Final Negotiation Sessions). During those Final Negotiation Sessions, the Union offered to reduce the

COLA from the agreed-upon rate of 5.6% to 4.5%. The Union's final offer was to reduce the COLA to 4%. The County did *not* accept any of the Union's offers.

Again, the record establishes that the County did not raise any concern about the composition of the bargaining unit during *any* of those Final Negotiation Sessions. Thus, while I totally believe that County Manager Sutton was simply communicating the Board's position to the Union as of August 18, 2022, there simply is no *evidence* that the Board *acted* on its position during the Final Negotiation Sessions.

The Union Declares Impasse

Both Parties stipulated that the Union declared impasse on November 7, 2022. Again, nothing in the record suggests that the County took any *action* concerning the composition of the bargaining unit *prior* to the declaration of impasse, nor is there any evidence that the County took action *before* the Hearing held on September 5, 2023.

The County Files its Petition

As addressed above, the County did not file a Petition with the EMRB until November 27, 2023. Within the Petition, the County alleged:

> The crux of this matter is the Union's improper attempt to insist on the continued unlawful inclusion of the supervisory classifications of Director of Natural Resources, Director of Information Technology, Director of Human Services, Director of Planning, Director of Public Works, Director of Facility Operations, and Director of Emergency Management ("Subject Positions") in the same collective bargaining unit as those positions whom they directly supervise. Including supervisors in the same unit as those they directly supervise is expressly prohibited by Nevada law.

Both Parties stipulated, and I agree, that I do *not* have jurisdiction to determine which classifications are appropriate for this bargaining unit. As such, I am not making any findings or recommendations in that regard.

The BLS Statistics

As set forth above, the County conceded that the CPI-U for West B/C has historically been used for this particular bargaining unit. In that regard, based on the most current information provided by the BLS, as of October 2023, the CPI-U for West B/C advanced 3.3 percent,[14] and food prices rose by 3.5 percent. However, energy prices declined 0.8 percent, largely as the result of a decrease in the price of gasoline. [15] Unfortunately, the index for all items less food and energy advanced 3.7 percent over the past year.[16]

The County's Ability to Pay

The Parties included the estimated fiscal cost of the Successor CBA on page 47 of the TA:

Fiscal Impact NCMEACBA	FY Impact
FY23 (Including 5.6% COLA)	$7,562,492
FY24 (Estimating 3% COLA)	$7,765,101
FY25 (Estimating 3% COLA)	$7,973,303
Total CBA Cost FY23-FY25	$23,300,896

[14] https://www.bls.gov/regions/west/news-release/consumerpriceindex_west.htm
[15] https://www.bls.gov/regions/west/news-release/consumerpriceindex_west.htm
[16] https://www.bls.gov/regions/west/news-release/consumerpriceindex_west.htm

The County's External Comparable Jurisdictions

While County Manager Sutton credibly testified that the Board questioned whether the "traditional" comparable jurisdictions for the County were "appropriate" following the Ratification Meeting, neither Party presented *any evidence* that establishes exactly which counties the Parties have traditionally recognized as the County's external comparable jurisdictions. Having said that, County Manager Sutton did credibly testify:

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we have
traditionally used Class III counties, which are

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counties that are similarly sized in terms of population as our comparative markets. And the Board, kind of surprisingly, indicated that that is not perhaps -- is not what they wanted to be limited to.

They wanted to look at neighboring markets, such as Las Vegas, Boulder City, Mesquite, Henderson, and all the other ones that have been previously mentioned. They also wanted to possibly look nationally. And also, not just confined to local government, but also perhaps in looking at the private sector as well. Which was surprising to all of us, but that's what they told us to do.

Based on County Manager Sutton's credible testimony, the Parties need to dialogue concerning the Board's direction to County Manager Sutton to include "neighboring markets" such as Las Vegas, Boulder City, Mesquite, Henderson, et cetera. For purposes of these Recommendations, I will attempt to determine what the "traditional Class III counties" are, since neither Party presented any evidence concerning the County's traditional comparator jurisdictions.

County Manager Sutton also testified that the Board's direction to look at "neighboring markets" prompted the Board to determine that a County Classification and Compensation study should be commenced. However, as of the date of the Hearing, the County was still reviewing proposals from a variety of firms. Importantly, County Manager Sutton agreed at the Hearing that it is *not* the County's position that the Union should go without a Successor CBA "until such time as the County completes its Classification and Compensation study."

The Parties' Stipulations

At the Hearing, the Parties entered into the following stipulations:

- Union Exhibit 5 is the TA'd agreement between the chief negotiators from the NCMEA and Nye County that was presented to the Board of County Commissioners. The Board of County Commissioners voted to reject the TA.
- Union Exhibits 1 through 5 are admitted.
- The County stipulates that Union Exhibits 8, 9, 10 and 11 are true and correct copies of the documents they purport to be. However, the County disputes any relevance to these proceedings or the arbitrator's ability to even rule on the issues that these exhibits would pertain to.
- The Parties talked about, and agreed, to waive mediation.
- The Union declared impasse on November 7, 2022.
- The County has a standing objection on the basis of jurisdiction on the grounds that this matter needs to be presented to the EMRB, and issues of waiver are not relevant.
- The Union's Exhibit 7 is the July 5, 2022 Board of County Commissioners' meeting.
- The Union's Exhibit 7 is in MP4 format.
- The Union's Exhibits 7 through 11 are admitted.
- Large parts of Exhibit 7 are simply irrelevant to today's proceedings.

- The Parties will attempt to provide a Word copy, or at least a high quality pdf of Union Exhibit 3. If the Parties are unable to do so, the Parties will provide a typed version in their Post-Hearing Briefs.

- The Union played Union Exhibit 7 during the hearing, but only played from the 0.0 minute mark to two minutes and nine seconds; and then skipped ahead to minute 30, 13 seconds, and watched it until 43:04; and then we skipped ahead to 46 minutes. And then we played it to 50:29.

- The relevant portions of Union Exhibit 7 are from the start to two (2) minutes and nine (9) seconds, and from thirty (30) minutes and thirteen (13) seconds until fifty-one (51) minutes.

- The supervisor positions at issue that the County wants out can be found in Union Exhibit 1, Bates 31, and they are the Director of Emergency Management Services, the Director of Health and Human Services, the Director of IT, the Facility Operations Manager, the Director of NWRPO, the Director of Planning and the Public Works Director.

- The Factfinder has no jurisdiction over which employees are appropriately in this bargaining unit.

- The issue of who is properly in the bargaining unit is a subject that the Board has exclusive jurisdiction over.

- Employer Exhibits A, B, and C were communicated to the County prior to impasse.

- No EMRB complaint has been filed over this bargaining unit to date.[17]

- The Parties selected a fact-finder from a seven (7)-member fact-finding panel provided by the FMCS pursuant to the Statute; however, the fact-finder selected did not respond to e-mails, and that's why the Parties mutually selected Mr. Gaba.

- Nye County Association of Sheriff's Supervisors (NCASS) is currently still bargaining a successor agreement.

- Briefs are due by close of business by 5:00 p.m. Pacific time on November 3rd, presuming the transcript is received more than 30 days prior to that date.[18]

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[17] However, the County subsequently filed a Petition For a Declaratory Order Clarifying the Bargaining Unit with the EMRB on November 27, 2023.

[18] However, as set forth above, the Parties ultimately agreed to extend the deadline to November 27, 2023, and the County requested an additional extension to November 29, 2023.

- The Fact-finder's fact-finding recommendation will not be due for forty-five (45) days after receipt of the Parties' briefs.

- The court reporter is taking a full set of the exhibits for this hearing with her, and will return the exhibits to Ms. Keel. The court reporter is not transcribing the video that was admitted as the Union's Exhibit 7.

- Fisher Phillips is the official custodian of the record and will have all of the exhibits for this hearing.

- The Fact-finder will strip his file and destroy all exhibits within 48 hours of the issuance of the Recommendations.

OPINION

I. The Parties' Positions

The County asserts:

> The County anticipates the Union will argue that "even if the EMRB had the authority or is willing to exercise the authority to carve the personnel that the county is objecting to out of the bargaining unit, [the Factfinder] would still have the ability to recommend the contract terms for those members that remain in the bargaining unit." However, such a recommendation would be inappropriate because it has the effect of forcing the County to participate in negotiations and impasse proceedings with an illegal bargaining unit. NRS Chapter 288 does not permit an employer to bargain with — and by extension reach impasse with — an illegal bargaining unit. Thus, there is no ripe dispute presently at impasse and the Factfinder should refrain from issuing any recommendations to parties who are not properly before him under NRS § 288.200.[19]

On the other hand, the Union asserts:

> Ultimately, the Fact-finder has jurisdiction because he was *mutually* selected [sic] the parties pursuant to NRS 288.200(2). That statute provides that if the parties are unable to agree upon an impartial factfinder, they may obtain a list of FMCS and strike names until one remains. The parties did strike names, but the fact-finder selected to that process was unresponsive [sic] the emails. Therefore, the County proposed six (6) names, and the Arbitrator was

[19] County's Post-Hearing Brief at page 10 (references to transcript omitted).

> selected from this list proposed by the County. (See email of May 3, 2023 attached to this Brief).
>
> The County's "jurisdictional" argument is resolved by reference to NRS 288.200 itself. In laying out the criteria to be considered under subsection (7)(b), the statute provides that "the Fact-finder *shall* consider whether the Board found that either party had bargained in bad faith."
>
> If the County believed that NCMEA's insistence upon bargaining for the positions agreed to in the Settlement Agreement constituted bad-faith bargaining, it was incumbent upon the County to take that matter before the EMRB and obtain a finding as to whether the NCMEA was bargaining in bad faith. However, under the plain language of the statute the existence of potential prohibited practice disputes does not stop the fact-finding process from going forward; the Fact-finder is only to consider an actual Board finding on the subject in fashioning his/her recommendations. Were the rule to be otherwise, an employer could stymie impasse proceedings by raising disputes about the bargaining unit, but not actually taking any action to pursue such disputes (as Nye County has done in this case).[20]

I have taken each of these valid and very well-written arguments into consideration. Having said that, unfortunately, again, while I sincerely believe counsel's arguments on behalf of the County are sound and even creative, based on the Statute, I have no choice but to find that I am *not* authorized to grant the County's request to "refrain from issuing recommendations."

I also find that the Union correctly asserted that I have authority to issue these Recommendations based on the fact that I was *mutually* selected by *both* Parties to act as Fact-finder (as stipulated to at the Hearing), and that my authority to issue these Recommendations are determined by the Statute itself.

Indeed, I am *bound* to consider the criteria that directs that the Fact-finder "*shall*" consider whether either Party...bargained in good faith, and, whether the County *refused* to bargain

[20] Union's Post-Hearing Brief at page 7 (emphasis in original).

collectively in good faith (which also includes actively participating in the "fact-finding" process). I realize that my Recommendations may not be binding; as such, I will make by best attempt to articulate all the reasons for issuing these Recommendations below.

II. Fact-Finding Under NRS 288.200

These Recommendations are issued pursuant to the specific procedures outlined in the Statute. In the case at hand, the Fact-finder has spent a considerable amount of time reviewing the exhibits provided by the Parties and giving full and thoughtful consideration to each of the Parties' arguments. Both Parties provided well-written Post-Hearing Briefs, and I am mindful of my function in this impasse proceeding, as stated by Elkouri and Elkouri:

> The task is more nearly legislative than judicial. The answers are not to be found within the "four corners" of a pre-existing document which the parties have agreed shall govern their relationship. Lacking guidance of such a document which confines and limits the authority of arbitrators to a determination of what the parties had agreed to when they drew up their basic agreement, our task here is to search for what would be, in the light of all the relevant factors and circumstances, a fair and equitable answer to a problem which the parties have not been able to resolve by themselves.[21]

Typically, the standard of proof for contractual disputes is preponderance of the evidence. Preponderance of the evidence can be defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.[22]

I apply the preponderance of evidence standard to these Recommendations.

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[21] Elkouri and Elkouri, *How Arbitration Works*, Chapter 22, page 4 (8th ed. 2020).
[22] *Black's Law Dictionary* (8th ed. 2020).

III. Analysis of the Statutory Criteria

NRS 288.200 at subsection 7. directs me to consider the following criteria:

> (a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision. If the local government employer is a school district, any money appropriated by the State to carry out increases in salaries or benefits for the employees of the school district must be considered by a Fact-finder in making a preliminary determination.
>
> (b) Once the factfinder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the Fact-finder shall consider, to the extent appropriate, compensation of other government employees, both in and out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute and the Fact-finder shall consider whether the Board found that either party had bargained in bad faith.
>
> (c) A consideration of funding for the current year being negotiated. If the parties mutually agree to arbitrate a multiyear contract, the Fact-finder must consider the ability to pay over the life of the contract being negotiated or arbitrated.

I first address the Statute criteria, and then I will address the reasonableness of the TA.

A. The County's financial ability to pay.

The Statute first requires me to make a "preliminary determination…as to the financial ability of the local government employer."[23] In the public sector, an employer's inability to pay can be the decisive factor in a fact-finding or interest arbitration, notwithstanding the fact that

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[23] *See* the Statute at NRS 288.200, Section 7(a): A preliminary determination must be made as to the financial ability of the local government employer.."

comparable employers in the area may have agreed to higher wage scales.[24] Having said that, normally, a case concerning "ability to pay" is necessarily complex, and involves a presentation on governmental budgets, projected revenues and expenditures, a myriad of financial issues pertaining to the resources of the local governmental body, and an assessment of the condition of the local economy.[25]

During times of crisis such as the recent Global Pandemic (as declared by the World Health Organization on March 11, 2020),[26] or the "Great Recession,"[27] there can even be interest arbitrations or fact-findings over the size of pay *decreases*.[28] In such instances, the undersigned has previously framed the issue as:

> In the instant case, there is no question that the County is experiencing a very difficult economic environment; however, the Union is not requesting any increase in wages; rather the only question is how large will the wage reductions be.[29]

Absent a Pandemic, a financial meltdown such as the Great Recession, or an earthquake or other natural disaster, it is normally *incumbent* on an *employer* to raise its alleged inability to pay during negotiations.[30] Put another way, traditionally:

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[24] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 7, page 132 (LRIS, 3rd ed., Scott, et al. eds. 2022).
[25] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 7, page 132 (LRIS, 3rd ed., Scott, et al. eds. 2022).
[26] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7569573/
[27] *See, e.g.*, "*World Economic Situation and Prospects 2013*," *Development Policy and Analysis Division of the UN secretariat*. Retrieved December 19, 2012.
[28] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 7, page 132 (LRIS, 3rd ed., Scott, et al. eds. 2022).
[29] *County of Aurora*, 127 BNA 1773 (Gaba, 2010).
[30] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 7, page 135 (LRIS, 3rd ed., Scott, et al. eds. 2022).

> The employer has the burden of proof to establish an inability to pay. The burden must be met by more than mere speculation. An *unwillingness* to pay does not satisfy the burden.[11]

In the instant case, while the Board intimated that the CPI used to determine the COLA for bargaining unit members could impact the County's immediate and future obligations, the County failed to provide any *evidence* that would establish that the County had an inability to pay the COLA as agreed upon. Rather, the Parties agreed in the TA that the total fiscal impact over the three (3) years of the Successor CBA would be $23,300,896. By reaching agreement on this number, more likely than not, the County obligated itself to pay the COLA as agreed upon. By implication, the County also agreed that it had the *ability* to pay this amount.

Moreover, as of October 2023, the CPI-U advanced 3.3 percent over the past twelve (12) months.[12] Based on the rate of inflation one can conservatively estimate that property prices will go up by at least half the rate of inflation.[13] It is axiomatic that as inflation increases, the County's collection of property and personal taxes (all other factors being equal) will increase.

The bottom line is, while the County may have an *unwillingness* to pay for the TA'd agreement, the County did not meet its burden to establish that it actually *lacks* the ability to pay. Thus, on this issue, the Union prevails by *default*. Accordingly, the undersigned must now address the other statutory criteria.

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[11] *County of Albany*, No. IA-11-12 (Doedecker, 2013) (*emphasis* added).
[12] https://www.bls.gov/regions/west/news-release/consumerpriceindex_west.htm
[13] *See, e.g.*, https://www.bls.gov/news.release/pdf/cpi.pdf (Table A, "shelter").

B. The compensation of other government employees, both in and out of the State.

Having made the "preliminary determination" (as required by the Statute) that the County has the ability to pay, the next criteria the Statute requires me to consider is, "to the extent appropriate, compensation of other government employees, both in and out of the State." In my opinion, next to ability to pay, the issue of comparability, in and of itself, is the *most important issue* for a fact-finder to consider. Indeed, historically, the most significant factor in public sector interest arbitration (or statutory fact-findings) has been external comparables;[34] those external comparables "meaning the wages, hours, and terms and conditions of employment of similar public employees in comparable units of government."[35]

A major consideration regarding comparative data was expressed by Arbitrator Carlton Snow:

> A concern with any comparative data in interest arbitration is whether the cities being compared accurately reflect what is being compared, such as the real price of labor. Wage rates may be similar, but the price of labor may be substantially different in cities which have been compared. Pension plans and other fringe benefits have a startling impact on the overall wage cost as well as labor market conditions which may be unique to a particular County.[36]

Thus, the comparability of other jurisdictions must focus on the *total compensation* of the employees, so that an apples-to-apples comparison can be made.

When most employees hear the term "compensation," they typically only think of the money they receive in their paycheck each payday.[37] However, "total compensation" goes beyond

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[34] *See, e.g.*, Marvin F. Hill, Jr. and Emily Delacenserie, *Interest Criteria in Fact-Finding and Arbitration: Evidentiary and Substantive Considerations* (Marquette Law Rev. Vol. 74:599) (1991).
[35] See *State of Ill. Dep't of Cent. Mgmt. Svcs*, Case No. S-MA-08-262 (Benn, 2009).
[36] *County of Renon*, 71 BNA 271 (Snow, 1978).
[37] *County of Aurora*, 127 BNA 1773 (Gaba, 2010).

salary; it is the complete pay package for any group of employees. This amount includes all forms of money, benefits, services, and other "perks" employees in this particular bargaining unit are eligible for at the County. Basically, "[t]otal compensation can be defined as all of the resources available to employees which are used by the employer to attract, motivate, and retain employees."[38]

In some--not all--but *most* cases, "the selection of comparable jurisdictions is relatively simple if the parties have historically agreed upon or at least consistently used a certain set of comparable jurisdictions in their prior negotiations."[39] Once a pattern is established, the party seeking to add or subtract jurisdictions to the traditional list bears the burden of proving the previously agreed-upon list unsuitable.[40] It is not uncommon to see interest arbitrator awards and fact finding decisions stating:

> In order to maintain that stability, prior interest arbitration awards must be accepted at face value in subsequent proceedings unless they are glaring wrong which is not the case here... It is well-established that the party seeking to change historical comparables has the burden of clearly proving that a change is warranted.[41]

Here, this impasse proceeding is not a "relatively simple" case, as the Parties did not stipulate to a set of external comparable jurisdictions, nor is there any evidence concerning what the Parties have "historically" considered to be the County's external comparable jurisdictions.

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[38] *County of Aurora*, 127 BNA 1773 (Gaba, 2010).
[39] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 3, page 64 (LRIS, 3rd ed., Scott, et al. eds. 2022), citing *County of Lynnwood*, WA PERC Case No. 24694-I-12-588 (Beck, 2013) (held: "Arbitrators have routinely used mutually agreed upon comparators as the basis for comparability analysis").
[40] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 3, page 64 (LRIS, 3rd ed., Scott, et al. eds. 2022), citing *See County of Rockford*, Case No. S-MA-12-108 (Goldstein, 2013), and *County of Rockford*, Case No. S-MA-11-09 (Perkovich), where attempts to change historical comparables were rejected.
[41] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 3, page 64 (LRIS, 3rd ed., Scott, et al. eds. 2022), citing *Village of Algonquin*, ILRB Case #S-MA-17-262 (Greco, 2019).

Having said that, generally speaking, a "comparability range" sets the extent to which another jurisdiction can vary from the jurisdiction under study (or "target" jurisdiction) and still be considered as a possible comparable jurisdiction.[42]

For example, a very simplistic comparability selection process in this impasse proceeding might search for all counties with populations *within fifty percent* (50%) (plus or minus) of the population of Nye County, the target jurisdiction. Given that the County's population is approximately 54,738,[43] based on County Manager Sutton's credible testimony that the County "traditionally used Class III counties," more likely than not, the County's comparable jurisdictions *could* include:

Jurisdiction	Population
Lyon County	61,585
Carson City[44]	58,130
Elko County	54,046
Douglas County	49,628
Churchill County	25,843[45]

Here, unfortunately, neither Party submitted evidence of comparable *total compensation* on the outstanding economic issues for these potential external comparators. Therefore, I can only conclude that the wages and other monetary benefits offered in the TA'd agreement are more-

[42] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 3, page 65 (LRIS, 3rd ed., Scott, et al. eds. 2022).
[43] *U.S. Census Bureau QuickFacts: Nevada*. U.S. Census Bureau. Retrieved March 30, 2023.
[44] Carson City is an independent city. *U.S. Census Bureau QuickFacts: Nevada*. U.S. Census Bureau. Retrieved March 30, 2023.
[45] All statistics are derived from *U.S. Census Bureau QuickFacts: Nevada*. U.S. Census Bureau. Retrieved March 30, 2023.

likely-than-not *equivalent* to the "compensation of other government employees, both in and out of the State."

C. Other "normal criteria for interest disputes."

Lastly, the Statute requires me to consider "other normal criteria for interest disputes" regarding the terms and provisions to be included in an agreement "in assessing the *reasonableness* of the position of each party as to each issue in dispute" (emphasis added). More likely than not, the "normal criteria for interest disputes" referenced in the Statute includes what has traditionally been developed over decades of interest arbitration practice; these issues include the interest and welfare of the public, comparable wages and working conditions, cost of living (including changes in the cost of living), ability of the employer to pay, ability to attract and retain personnel and/or other factors, depending on the specifics of the issues that are presented to the arbitrator or fact-finder.[46] Thus, having already addressed the ability of the County to pay, and the comparability of the County's external jurisdictions, I now address these other "normal criteria" that appear to be relevant to this impasse proceeding.

1. Interest and welfare of the public.

As a general rule, most arbitrators and fact-finders have found it *impossible* to apply a standard such as "the interest and welfare of the public," without considering other factors. As Arbitrator Carlton Snow observed:

> In the abstract, it is impossible to find meaning in the phrase "the interest and welfare of the public." The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case.[47]

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[46] *See e.g.*, Barry Winograd, *An Introduction to the History of Interest Arbitration in the United States*, Labor Law Journal, Fall 2010, pp. 164-168.

[47] *State of Oregon (OSCI Security Staff)*, IA-1 1-95 (Snow, 1996).

It is my conclusion that the interest and welfare of the public is best served by Recommendations that have the least chance of increasing employee turnover, decreasing employee morale, or inserting language into the contract that is illegal or that may raise taxes. Of course, these goals are mutually incompatible. On this additional relevant consideration, the Union prevails.

2. **The "Status Quo" Doctrine.**

In addition to the above factors, I am also mindful of the *Status Quo* Doctrine, which holds that "a party proposing new contract language has the burden of proving that there should be a change in the *status quo*."[48] The rationale underlying the *Status Quo* doctrine—an arbitrator-created doctrine not found in most fact-finding or interest-arbitration statutes—is that the party seeking to change *status quo* contract language must have given something up to get that language in the first place.[49] When its proponents give any reason for employing the doctrine, they typically argue that a party seeking to change the *status quo* should have to show either: (a) that maintenance of the *status quo* would be unfair (because it has failed or is inequitable in practice); or (b) that it has offered a sufficient "*quid pro quo*" (*i.e.*, concession) in exchange for undoing the *status quo*.[50] This is sometimes called the "breakthrough" test to represent the burden that must be met to break through the *status quo* and build new terms into the contract.[51]

Here, while some of the County's Board members questioned whether the correct CPI was applied to determine the COLA in the TA'd agreement, the County failed to present any evidence

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[48] *City of Tukwila*, PERC No. 130514-I-18 (Latch, 2018)
[49] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 9, page 178 (LRIS, 3rd ed., Scott, et al. eds. 2022).
[50] *Village of Dolton*, ILRB No. S-MA-11-248 (Fletcher, 2016).
[51] Will Aitchison, Jonathan Downes and David Gaba, *Interest Arbitration*, Chapter 9, page 178 (LRIS, 3rd ed., Scott, et al. eds. 2022).

that establishes that the *status quo* is unfair or that the County made any *quid pro quo* concessions in order to change the CPI historically used at the County. For this reason, the Union prevails.

3. Other "normal" criteria. Based on the overall record, I recommend that the County ratify the TA, based on my findings above, and for the following additional reasons.

a. Was the County Required to Bargain in Good Faith with the Union?

Yes. In its Post-Hearing Brief, the County asserts that it was not *required* to bargain in good faith with the Union, based on the NCASS[52] case. Specifically, the County asserts:

> The County has objected to the Factfinder's jurisdiction and the appropriateness of the impasse proceedings as such proceedings are an extension of the bargaining process and the County cannot be forced to negotiate and bargain with an inappropriate bargaining unit, nor be compelled to enter into a CBA with an inappropriate bargaining unit. *See Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al,* Item No. 887, Case No. 2022-009, (July 19, 2023) (finding no bad faith negotiations occurred in refusal to bargain). For the Union to argue that the Factfinder can impose (or recommend imposing) through factfinding, an agreement the parties could not be compelled to negotiate, defies logic.[53]

The problem with the County's above argument is that the NCASS case is clearly distinguishable from this impasse proceeding.

In the NCASS case, there were two (2) issues before the ERMB: the first being whether then-bargaining unit member David Boruchowitz could continue to be a member of the NCASS after he was promoted to Administrative Captain; the second being whether the County engaged in bad faith bargaining by refusing to bargain with Mr. Boruchowitz while acting as the Union's Chief Negotiator in negotiations. Importantly, the County filed its petition with the ERMB *before*

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[52] *Nye County v. Nye County Association of Sheriff's Supervisors (NCASS), et al,* Item No. 887, Case No. 2022-009, (July 19, 2023).
[53] County's Post-Hearing Brief at page 1 (references to exhibit omitted).

either party declared impasse. As to the first issue, the ERMB found:

> It is clear to the Board that Respondent Boruchowitz is a senior member of the Nye County Sheriff's Office having supervisory control and management responsibilities closely related to the duties of the elected Sheriff and Undersheriff. Thus, the Board finds that given his job description, his actual duties as described in the testimony and other evidence presented, and as admitted by Boruchowitz in his November 22, 2019 e-mail, the evidence presented relative to Boruchowitz' [sic] budgetary authority, the role Boruchowitz played on behalf of Nye County relative to grievances and other factors contained in the record of this case, Boruchowitz is a supervisory employee for the purposes of NRS 288.138(b) and cannot lawfully be a member of Petitioner NCASS.[54]

Regarding the second issue, the ERMB determined:

> It was reasonable for Petitioner to refuse to bargain with Boruchowitz given the findings herein, and as such, no bad faith bargaining occurred nor was there a unilateral change.[55]

Here, neither Party has asserted that the Union's Chief Negotiator cannot be a member of this bargaining unit, so obviously the ERMB's holding on that issue is simply inapplicable to this case. More importantly, unlike the NCASS case, here, the County simply *failed* to act on any of its concerns about the composition of this bargaining unit until *after* the Parties reached a TA; *after* the Union declared impasse; and *after* the Hearing was held. In fact, the record establishes that the County *never* raised the issue of the proper composition of this bargaining unit at *any* time during the six (6) negotiation meetings held concerning the Successor CBA.

Based on this record, more likely than not, the County may have inadvertently violated NRS 288.270(1)(e), which provides:

> (1) It is a *prohibited practice* for a local government employer or its designated representative willfully to:

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[54] NCASS case at page 11.
[55] NCASS case at page 10.

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(e) *Refuse to bargain collectively in good faith* with the exclusive representative as required in NRS 288.150. Bargaining collectively *includes the entire bargaining process*, including mediation and *fact-finding*, provided for in this chapter (emphasis added).

Use of the word "refuse" in the above-cited section is instructive; it means:

1. indicate or show that one is not willing to do something.
   - "I refused to answer"
2. indicate that one is not willing to accept or grant (something offered or requested).
   - "she refused a cigarette"[56]

Synonyms for the word "refuse" include, but are not limited to:

decline; turn down; say no to; reject; spurn; scorn; rebuff; disdain; repudiate; dismiss; repulse[57]

Here, the County chose to select County Manager Sutton to bargain the Successor CBA on its behalf. This is appropriate, considering that the CBA defines the "County" to mean "the County of Nye and its Board of Commissioners, its facilities, *and/or the County Manager* or his/her designee (emphasis added). Moreover, again, more likely than not, the County reasonably *selected* County Manager Sutton to negotiate on its behalf as its representative of "of its own choosing."[58]

As the County Manager, Mr. Sutton was able to quickly reach agreement with the Union during the third of the Initial Meetings, as he had done in the past. However, after the Ratification Meeting, while it may not have been intentional, the County "refused" to bargain in

[56] *Oxford English Dictionary* (11th ed. 2022).
[57] *Oxford English Dictionary* (11th ed. 2022).
[58] NRS 288.150(1).

good faith, by repeatedly asserting that it was not required to do so because of its concerns over the proper composition of the bargaining unit. The logical conclusion is that the County could have, and should have, filed its Petition with the EMRB *before* impasse and *before* the Hearing. The facts are undisputed that the County did not file its Petition with the EMRB until a mere thirteen (13) days ago. This means that the County refused to bargain in good faith with the Union through *"the entire bargaining process*, including mediation and *fact-finding*" as required by the Statute.

b. Can the County Attack these Recommendations on Traditional Common Law Grounds?

No. It is well-established that, generally speaking, an arbitration award (or, in this case, a statutory fact-finding) can only be overturned for one (1) of the following four (4) common law reasons:

> 1. Fraud, misconduct, or partiality by the arbitrator, or gross unfairness in the conduct of the proceedings;
> 2. Fraud or misconduct by the parties affecting the result;
> 3. Complete want of jurisdiction in the arbitrator, or action beyond the scope of the authority conferred on the arbitrator or failure of the arbitrator to fully carry out his or her appointment (i.e., the arbitrator decides too much or too little); and
> 4. Violation of public policy as by ordering the commission of an unlawful act.[39]

I would also add that an arbitration award or fact-finding recommendation could be attacked if there is evidence that there was a "rogue" negotiator that did not act with authority on behalf of the party he or she was purportedly representing. Here, there simply is no *evidence* that any such reasons to attack these Recommendations exist.

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[39] Elkouri and Elkouri, *How Arbitration Works*, Chapter 2, page 22 (8th ed. 2020).

c. **Did the County Violate the Statute by Refusing to Recognize the Seven (7) Classifications Throughout the Entire Bargaining Process?**

More likely than not, yes. Article 3, Section 1 of the Expired CBA provides that the Union is:

> *recognized* by the County as the *sole* and *exclusive* collective bargaining representative of the employees assigned to the represented classifications *listed in Addendum B* who are eligible to be represented by the Association.... (emphasis added).

Addendum B lists all of the classifications the Union represents; these classifications include the seven (7) classifications the County now asserts should not be included in the bargaining unit.

While I can understand the County's position, it is well-established that the terms and conditions of an expired CBA continues in effect under the National Labor Relations Act, until a new agreement can be reached.[60] Thus, unless and until the County ratifies the TA, or the ERMB rules on the proper composition of this bargaining unit, the terms and conditions of the Expired CBA remain in effect.

Second, by refusing to bargain with the Union *through the entire bargaining process*, the County likely has also inadvertently violated NRS 288.150 at Section 2.(j), which provides:

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[60] *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206, 207 (1991), which held: After a CBA expires:

> ....the terms and conditions [of employment] *continue in effect* by operation of the NLRA. They are no longer agreed-upon terms; *they are terms imposed by law*, at least so far as there is no unilateral right to change them.
>
> ***
>
> NLRA § 8(a)(1) and (5) demand a "*continuation of the status quo*" during negotiations over a successor CBA, absent "explicit" agreement to the contrary.

See also, *NLRB v. Nexstar Broadcasting, Inc.*, 4 F.4th 801, 811 (9th Cir. 2021) (held: a dispute may be arbitrable after the CBA's expiration when the dispute concerns "rights which accrued or vested under the [CBA].")

2. The scope of mandatory bargaining is limited to:
(j) *Recognition clause.*

By refusing to recognize the seven (7) classifications, the County has in essence refused to bargain over a mandatory subject of bargaining.

Lastly, although the County asserts that I lack jurisdiction to issue these Recommendations, again, the undersigned's authority comes from the Statute itself. Specifically, NRS 288.200 provides:

> 1. If:
> (a) The parties have failed to reach an agreement after at least six meetings of negotiations; and
> (b) The parties have participated in mediation and by April 1, have not reached agreement, either party to the dispute, at any time after April 1, may submit the dispute to an impartial Fact-finder for the findings and recommendations of the Fact-finder. The findings and recommendations of the Fact-finder are not binding on the parties except as provided in subsection 5. The mediator of a dispute may also be chosen by the parties to serve as the fact finder.
> 2. If the parties are unable to agree on an impartial fact finder within 5 days, either party may request from the American Arbitration Association or the Federal Mediation and Conciliation Service a list of seven potential Fact-finders. If the parties are unable to agree upon which arbitration service should be used, the Federal Mediation and Conciliation Service must be used. Within 5 days after receiving a list from the applicable arbitration service, the parties shall select their fact-finder from this list by alternately striking one name until the name of only one fact-finder remains, who will be the fact-finder to hear the dispute in question. The employee organization shall strike the first name.

The undisputed facts establish that all of the above criteria occurred in this impasse proceeding; that is (1) the Parties failed to reach agreement after six (6) negotiation session; (2) the Parties discussed, but mutually agreed not to participate in mediation; and (3) the Parties stipulated that

they mutually selected the undersigned as the Fact-finder for this case. Thus, again, these Recommendations are issued based on my statutory authority.

IV. The *Reasonableness* of the TA

Lastly, I address the Statute's requirement that I consider "the *reasonableness* of the position of each party as to each issue in dispute" (emphasis added). In that regard, the Union asserts:

> Beyond the selection of the appropriate CPI index, the only remaining dispute is what the COLA should be for the fiscal year July 1, 2022 through June 30, 2023 (hereafter "FY 2023"). As set forth above, at the bargaining table the agreed-upon amount was 5.6%. That is the amount that should be recommended by the Fact-finder because the most "reasonable" proposal is that which the parties actually reached through the bargaining process.
>
> It is anticipated that the County will argue that any recommendation for FY 2023 should be the last proposal made by the Union of a 4% COLA. (County Exhibit "B"). However, it is undisputed that this proposal was rejected by the County without any counterproposals. The NCMEA only came down from the 5.6% *mutually* agreed to by the parties for purposes of attempting to settle the contract without the delay and expense of statutory impasse proceedings. If Nye County wished to the COLA to be 4%, it should have accepted the offer when made. That offer is no longer open as a result of the rejection without any counter.[81]

The County literally made no argument and presented no evidence that rebuts the Union's above assertions, nor is there any *evidence* that the County ever accepted the Union's latest offer of four percent (4%) COLA in the first year. Moreover:

> An interest arbitrator's [and Fact-finder's] job is to determine the deal the parties should have reached during negotiations.[82]

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[81] Union's Post-Hearing Brief at page 9 (references to transcript omitted; emphasis in original).
[82] Elkouri and Elkouri, *How Arbitration Works*, Chapter 22, page 32 (8th ed. 2020).

What happened in this case is not unusual, although it is usually the union who cannot get an agreement ratified. In these cases arbitrators and fact-finders usually impose on the union what was TA'd at the table, much as I did in *Basin Electric Power Cooperative*.[6] In *Basin*, it was the union that failed to ratify an agreed to proposal and it was the union that lost.

Here, the TA is sufficiently useful in determining the agreement the Parties *should* have reached, had the Board not refused to ratify, for reasons that simply have *no bearing* on these Recommendations. In sum, I agree that the most "reasonable" proposal for the COLA FY 2023 should be what the Parties *mutually agreed* upon on June 13, 2022.

I fully understand the positions articulated by the members of the Board in this case. Unfortunately, their opinions/positions simply do not comport with Nevada law. If the Board members wish to limit collective bargaining in Nevada they can do so; however, first they must resign their positions and run for the Nevada state legislature in order to repeal or modify the provisions of NRS 288.200.

Counsel for the County did an excellent job advocating for her client in this matter; in my experience, she is an excellent attorney who works for one of the most prestigious labor-law firms in the United States. Unfortunately, while Ms. Kheel did an excellent job of *arguing* the County's positions, what transpired in this matter left her with few facts and no *evidence* to support her creative and well-thought-out arguments.

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[6] *Basin Electric Power Cooperative*, 120 BNA LA 210 (2004).

FINAL WRITTEN RECOMMENDATIONS FOR SETTLEMENT OF THE IMPASSE ISSUES BETWEEN THE PARTIES

Having carefully considered all evidence, authority, and argument submitted by the Parties concerning this matter, and, pursuant to the procedures outlined in the Statute, the Fact-finder issues the following written recommendations:

1. The Parties' Successor CBA shall include *all* language the Parties mutually agreed to in the TA reached on June 13, 2023.
2. Within forty-five (45) days after receipt of these Recommendations, "the governing body of the local government employer shall hold a public meeting in accordance with the provisions of chapter 241 of NRS."
3. The costs associated with the fees and expenses of the Fact-finder shall be shared equally by the Parties, as provided for in NRS 288.200, at Section 3.

/s/ David Gaba
David Gaba, Fact-finder
Irvine, California

DATED: December 10, 2023

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STATE OF NEVADA
EMPLOYEE-MANAGEMENT RELATIONS BOARD

NYE COUNTY, Petitioner. vs. NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, Respondent.	Case No.: 2023-033

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT

Petitioner Nye County ("the County"), by and through its counsel of record, Fisher & Phillips, LLP, hereby files this Reply to Respondent Nye County Management Employees Association's ("NCMEA") Answer to Petition for Declaratory Order Clarifying the Bargaining Unit.

NCMEA's entire defense to the County's petition is grounded in alleged waiver. Specifically, NCMEA argues that a 2014 settlement agreement in EMRB Case No. A1-

[1] Notably, NCMEA is not contesting, nor could it contest, the general jurisdiction of the EMRB to consider the County's petition to clarify the bargaining unit. *See* NRS 288.170(3) ("**Any** dispute between the parties as to whether an employee is a supervisor must be submitted to the Board.") (emphasis added); *Incline Village General Improvement District v. Operating Engineers, Local Union, No. 3*, Case No. A1-045663, Item No. 454B (2000) (entertaining unit clarification petition); *McGill-Ruth Consolidated Sewer & Water General Improvement District v. Operating Engineers, Local No. 3*, Case No. A1-045651 *et al.*, Item No. 441A (1999) (same); *Las Vegas Valley Water District v. Water Employees Assoc. and Las Vegas Valley Public Employees Association*, Case No. A1-045462, Item No. 251, at 12 (1990) ("[A] petition for

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046095 ("2014 Settlement Agreement"), which resolved a dispute between the parties concerning whether certain Directors could be part of *any* bargaining unit. "forever waives any claims that the Directors should not be in the NCMEA bargaining unit." NCMEA's Answer to Petition ("Answer"), p. 3.[2] NCMEA's arguments are legally and factually baseless and should be rejected.

1. A party cannot "forever waive" its right to clarify a bargaining unit to ensure the unit does not violate the law.

The EMRB has recognized that the Employee-Management Relations Act ("EMRA") is "generally modeled" after the National Labor Relations Act ("NLRA") and that "[t]he Nevada Supreme Court has recognized that the intent of the EMRA is to apply the governing principles of the NLRA to Nevada's local government employees." *City of Elko v. Elko Police Officers Protective Association, Nevada Public Safety Officer Communications Workers of America, AFL-CIO, Local 9110*, Case No. 2017-026, Item No. 831, at 3 (2018) (citations omitted). The NLRB has long held that parties in a collective-bargaining relationship have the right to file a unit clarification petition to exclude classifications that, despite being historically included in a unit and/or covered by a contract, would violate the principles of the NLRA if they remained included.[3]

In *Washington Post Company*, 254 NLRB 168 (1981), the employer filed a unit clarification petition seeking to exclude individuals as either supervisory, managerial, or confidential employees under the NLRA. The union moved to dismiss the petition arguing that since the positions the employer sought to exclude had long existed, and the job duties of the position had not been changed, there were no grounds to clarify them

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a . . . unit clarification pursuant to NRS Chapter 288 may be entertained by the Board after the normal course of negotiations.").

[2] The 2014 case involved the following positions: Director, Emergency Management Services; Director, Health and Human Services; Director, Management Information Systems; Director, Planning; Director, Public Works; Director, Nuclear Waste Repository Project Officer ("NWRPO"); Manager, Facilities Operations; Chief Juvenile Probation Officer; and Veterans Service Officer. *See* Answer, Exhibit A, p. 2. The instant case involves some, but not all, of these positions. The instant case does not involve the following positions: Director, NWRPO; Manager, Facilities Operations; Chief Juvenile Probation Officer; or Veterans Service Officer. Also, the instant case, unlike the 2014 case, involves the Director, Facilities Operations.

[3] Like the NLRA, the EMRA "recognizes the inherent conflict of interest" that exists when a supervisor and his subordinates are in the same unit. *City of Elko*, above at 6.

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out of the unit. *Id.* at 168. The union further argued that processing the petition would be destructive of the parties' 40-plus year collective-bargaining relationship. *Id.* The NLRB rejected the union's arguments, explaining as follows:

> The [NLRA] provides specifically for the exclusion of "supervisors." And, it is well settled that managerial and confidential employees similarly are to be excluded from bargaining units. Thus, except in certain limited and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the [NLRA]. While it may be that certain of the positions sought to be excluded by a unit clarification petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory, managerial, or confidential status, we are compelled to exclude them.

Id. at. 168-169 (footnotes omitted).[4]

The NLRB has consistently applied *Washington Post* to clarify bargaining units that potentially violate the NLRA, provided the petition for clarification is filed at an appropriate time (i.e., not mid-term of a contract). *See, e.g., Goddard*, 351 NLRB at 1236 ("Because the disputed positions here are alleged to be supervisory and thus their inclusion in the unit would violate statutory principles, we need only to examine whether the petition was filed at an appropriate time. . . . [T]here is no contention before us now that the petition was untimely filed during the term of the contract."); *Bethlehem Steel Corp.*, 329 NLRB 243, 244 fn. 5 (1999) ("[T]he Board will clarify a unit to exclude a position or classification that has historically been included in the unit where the Petitioner has established a statutory basis for the exclusion (e.g., that the individuals are statutory supervisors . . . .). In those situations, the only issue as to whether the Board will entertain the petition is whether it is filed at an appropriate time.").

[4] The "limited and well-defined factual situations" to which the *Washington Post* Board was referring are those in which the parties are mid-term of a contract. *See id.* at fn. 7 (citing *San Jose Mercury*, 200 NLRB 105, 106 (1972) and *Wallace-Murray Corporation*, 192 NLRB 1090 (1972)). The NLRB has also since recognized an exception "when a party has specifically stipulated, in a representation case proceeding, to the inclusion of a particular classification and later attempts to file a clarification petition to exclude the classification on supervisory grounds." *Goddard Riverside Community Center*, 351 NLRB 1234, 1235 (citing *Premier Living Center*, 331 NLRB 123 (2000); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921 (1997)). None of these exceptions applies here.

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The County's petition in the instant case was filed at an appropriate time—before a successor contract has been signed. The petition raises the critical legal issue of whether certain Directors are supervisory employees who can be included in the same bargaining unit as the employees they oversee. If they are, the plain language of the EMRA and well-established policy prohibit their inclusion. *See* NRS 288.170(3) ("[A] supervisory employee **must not** be a member of the same bargaining unit as the employees under the direction of that . . . supervisory employee.") (emphasis added); *City of Elko*, above at 12 ("There are potential problems and inherent conflicts of interest in having a supervisor in the same unit as the employees they supervise."). Consequently, the EMRB is authorized and obligated to entertain the County's petition.

Despite the above well-established authority, NCMEA takes the position that the County has "forever waived" its right to clarify the unit in light of the 2014 Settlement Agreement. Not surprisingly, NCMEA fails to cite any persuasive authority to support its position. Indeed, the only case NCMEA does cite, *Washoe County Public Attorney's Association v. Washoe County*, Case No. A1-046001, Item No. 750A (2011), is easily distinguishable.

The principal issue in *Washoe County* was whether issue preclusion justified Washoe County's refusal to bargain over discipline and discharge procedures for its public attorneys. NRS 288.150(2)(i) provides that discipline and discharge procedures are a mandatory subject of bargaining; however, a state court had ruled 18 years earlier that the provision did not apply to public attorneys, who were considered at-will serving at the pleasure of their appointing authorities. *Id.* at 2. Consequently, Washoe County argued in defense of the refusal-to-bargain claim that the state court decision was controlling under the doctrine of issue preclusion. *Id.*[5]

The EMRB agreed with Washoe County. According to the EMRB, all four legal elements for establishing issue preclusion were met: (1) the issue decided in the prior

[5] Washoe County also argued that claim preclusion justified its refusal to bargain; however, the EMRB rejected that defense because the claims arose 18 years apart and through different avenues. *Id.* at 2-3.

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litigation was identical to the issue presented in the current action; (2) the initial ruling was on the merits and was final; (3) the party against whom the judgment was asserted was a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Id.* at 3 (citing *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008)). Consequently, the EMRB concluded that Washoe County did not unlawfully refuse to bargain over discipline and discharge procedures for public attorneys. *Id.*

The *Washoe County* case is easily distinguishable. Most apparently, that case involved a prior final decision on the merits after actual and necessary litigation, which are key elements of issue preclusion. Here, of course, there was no such decision or litigation—only a settlement. *See Kaufman v. Public Restroom Company*, 133 Nev. 1037 (2017) (recognizing that issue preclusion only applies when parties have actually litigated, on the merits, a specific issue of fact, rather than when the parties have reached a settlement agreement).

Further, *Washoe County* did not involve the same policy concerns associated with the "inherent conflict" that exists when a supervisor is in the same bargaining unit as his subordinates. *See City of Elko*, above at 12. Instead, that case hinged on whether a particular bargaining subject –discipline and discharge– was mandatory or non-mandatory, which is not an issue here.

Accordingly, NCMEA's position that the County has "forever waived" its right to pursue clarification of the bargaining unit to exclude certain Director positions by virtue of the 2014 Settlement Agreement is not supported by law or well-established policy

2. The County did not clearly and unmistakable waive its right to pursue the instant petition.

Even assuming *arguendo* that the County could "forever waive" its right to seek clarification of a bargaining unit to ensure it complies with the law, it did not do so in the 2014 Settlement Agreement. It is well-established that "[a]ny waiver of a statutory right must be 'clear and unmistakable.'" *Clark County Public Employees Association v.*

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Housing Authority of the City of Las Vegas, Case No. A1-045478, Item No. 270, at 6 (1991) (citing *The Timkan Roller Bearing Company v. NLRB*, 325 F.2d 756 (6th Cir. 1963); *New York Mirror*, 151 NLRB 834 (1965); *Norris Industries*, 231 NLRB 50 (1977)).

In *Postal Service*, 348 NLRB 25 (2006), the NLRB considered whether an employer "clearly and unmistakably" waived its right, through an earlier settlement agreement, to file a unit clarification petition.[6] The union in the case initially filed a unit clarification petition with the NLRB to determine whether certain classifications should be included in the bargaining unit. Rather than proceed to a hearing, the parties reached a settlement agreement through which they agreed to have an arbitrator decide whether the positions belonged in the unit. The settlement agreement expressed that it "fully and completely resolve[d] any and all issues, and all currently pending grievances" regarding the union's unit clarification petition. *Id.* at 25. An arbitrator thereafter issued an award against the employer, which prompted the employer to file its own unit clarification petition with the NLRB. *Id.* The union argued the prior settlement agreement barred the employer's petition; however, the NLRB disagreed. *Id.*

According to the NLRB, the employer did not "clearly and unmistakably" waive its statutory right to file a unit clarification petition through the earlier settlement agreement. *Id.* The NLRB observed that "there was no express agreement that the Employer would refrain from exercising its right to file a petition with the Board" and that "[w]here, as here, the right involved is the statutory right of access to the Board, we would not lightly infer an agreement to forgo that right." *Id.* at 26.

Like the settlement agreement in *Postal Service*, the 2014 Settlement Agreement did not expressly preclude any party from seeking to clarify the bargaining unit at a later time. At most, it included a boilerplate "release" of "any and all claims, demands, debts, liabilities, damages, causes of action of whatever kind or nature, whether presently known

[6] Notably, the classifications at issue in *Postal Service* did not include supervisors or other positions that, when combined with other employees, created an inherent conflict of interest. Consequently there was no issue regarding whether the parties *could* waive their rights.

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or unknown arising out of or relating to the Action, including, without limitation, any claims that have been or could have been asserted in the Action." Answer, Exhibit D, p. 2. Such a broad provision cannot be read as preventing either party, in perpetuity, from seeking clarification of the bargaining unit, especially in the event of changes in the facts and/or law related to the unit positions.

The circumstances leading to the 2014 Settlement Agreement and subsequent change in law lend further support for the conclusion that the County did not "clearly and unmistakably" waive its right to file the instant petition. The County filed the instant petition seeking a declaratory order from the EMRB that certain Director positions should be excluded from the NCMEA bargaining unit under NRS 288.170(3), which prohibits a "supervisory employee" (as defined in NRS 288.138(1)(a)) from being in the same unit as employees he supervises. The 2014 case, on the other hand, arose out of a dispute between the parties regarding the application of NRS 288.140(4)(a), which prohibits a "supervisory employee" (as defined in NRS 288.138(1)(b) [then-NRS 288.075(1)(b)]) from being a member of *any* employee organization.[7] There are critical differences between these statutory provisions, and those differences materially distinguish the instant case from the 2014 case.

NRS 288.138(1)(a), which governs the issue of whether supervisors should be in the same unit as employees they supervise, defines a "supervisory employee" as "[a]ny individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them, to adjust their grievances or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." NRS

[7] *See* Answer, Exhibit D, p. 1 (2014 Settlement Agreement) ("**RECITALS** A. A dispute arose between Nye County and the NCMEA regarding the application of NRS 288.140(a) and NRS 288.075 which prohibits supervisory employees from being a member of an employee organization. B. On or about June 18, 2023, NCMEA filed an action before the [EMRB] . . . for a declaratory order seeking a determination that the disputed positions did not meet all of the functions described in NRS 288.075(1)(b)(1) through (3) . . .").

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288.138(1)(b), which governs the issue of whether supervisors should be in any unit, on the other hand, defines a "supervisory employee" as follows:

> (b) Any individual or class of individuals appointed by the employer and having authority on behalf of the employer to:
>
> (1) Hire, transfer, suspend, lay off, recall, terminate, promote, discharge, assign, reward or discipline other employees or responsibility to direct them, to adjust their grievances or to effectively recommend such action;
>
> (2) Make budgetary decisions; and
>
> (3) Be consulted on decisions relating to collective bargaining.
>
> if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The exercise of such authority shall not be deemed to place the employee in supervisory employee status unless the exercise of such authority occupies a significant portion of the employee's workday.

The EMRB has expressly recognizes that the differences between NRS 288.138(1)**(a)** and NRS 288.138(1)**(b)** are meaningful. *See City of Reno v. Reno Firefighters Local 731*, Case No. A1-046049, Item No. 777-B, at 7-8 (2012) ("As a supervisory employee under (1)(b) must satisfy the preexisting definition of a supervisory employee, and in addition must be appointed, and must satisfy each additional requirement of subsections (1)(b)(2) and (1)(b)(3), it follows that the class of employees qualifying as a 'supervisory employee' under subparagraph (1)(b) will necessarily be a narrower class than employees than [sic] those who are considered supervisory employees under subparagraph (1)(a)."); *Nye County v. Nye County Association of Sheriff's Supervisors and David Boruchowitz*, Case No. 2022-009, Item No. 887, at fn. 3 (2023) (noting that the test is "more stringent" under NRS 288.138(1)(b) than under NRS 288.138(a)(1)).

NCMEA initiated the action that led to the 2014 Settlement Agreement by filing a complaint seeking a declaratory order that the County was unlawfully refusing to negotiate a successor collective-bargaining agreement that included certain Director positions the County believed to be supervisory. *See* Answer, Exhibit A. NCMEA intended to argue to the EMRB in support of its complaint that the director positions the County was refusing to negotiate over did not meet *all* the criteria of 288.138(1)(b) and,

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therefore were properly in the unit. *See* Answer. Exhibit A. p. 4 ("It is the position of Petitioner that the . . . the employees holding such positions are either not appointed and/or do not have the authority to perform all of the functions described in NRS 288.075(1)(b)(1) through (3) [currently NRS 288.138(1)(b)(1) through (3)]."). *See also* Answer. Exhibit B. p. 2 (NCMEA's Pre-Hearing Statement) ("This action before the Board is brought to determine whether certain Nye County department heads . . . were supervisory employees within the meaning of NRS 288.075(1)(b) [currently NRS § 288.138(1)(b)] . . . .").

The County's pre-settlement position in the 2014 case accordingly focused on NRS 288.075(1)**(b)** [currently NRS 288.138(1)(b)] and NRS 288.140(4)(a). *See* Answer. Exhibit C. p. 1 (County's Pre-Hearing Statement) ("The issues of fact involve an analysis of the powers and duties of certain identified administrative department heads and whether such powers and duties make these department heads 'supervisory' employees as defined by NRS 288.075(1)(b) [currently NRS 288.138(1)(b)]."); *id.* at p. 2 ("Nye County believes the listed department heads 'are primarily responsible for formulating and administering management. policy and programs' as articulated in NRS 288.140(4)."); *id.* ("Nye County refused to negotiate in violation of NRS 288.140(4)(a) with those employees believed to meet the definition of a supervisory employee.").

Accordingly, NRS 288.138(1)(a) was not squarely at issue in 2014. Of further significance, in 2014 the EMRB had not yet decided *City of Elko*, in which it held that NRS 288.138(1)(a) requires a party seeking to prove supervisory status show the authority to exercise only 1 of the 12 criteria. *See City of Elko*, above at 3 ("The Board finds that the statute plainly and unambiguously requires only 1 of the 12 criteria to be shown. The statute clearly uses the word 'or' and not 'and.'"). Thus, at that time, both parties were under the view that all 12 criteria had to be established to prove supervisory status.

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In light of the circumstances surrounding the 2014 Settlement Agreement, including the varying statutory provisions on which the parties relied at that time, no "clear and unmistakable" waiver can be found.

CONCLUSION

For the foregoing reasons, the EMRB should reject NCMEA's defense and consider the County's petition to clarify the unit.

DATED this 23rd day of January, 2024.

FISHER & PHILLIPS LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2024, I filed by electronic means the foregoing **NYE COUNTY'S REPLY IN SUPPORT OF PETITION FOR A DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT**, as follows:

Employee-Management Relations Board
3300 W. Sahara Ave., Suite 260
Las Vegas, Nevada 89102
emrb@business.nv.gov

I also mailed one copy of the foregoing, certified mail, return receipt requested, prepaid postage, with an electronic copy addressed to the following:

Daniel Marks, Esq.
Adam Levine, Esq.
Law Office of Daniel Marks
530 South Las Vegas Boulevard, Suite 300
Las Vegas, Nevada 89101
Attorneys for Respondent,
Nye County Management Employees Association

By: */s/ Susan A. Owens*
An employee of Fisher & Phillips LLP

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STATE OF NEVADA
EMPLOYEE-MANAGEMENT RELATIONS BOARD

NYE COUNTY Petitioner vs. NYE COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, Respondent.	Case No.: 2023-033

PETITIONER'S REQUEST FOR HEARING ON PETITION FOR DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT

Petitioner Nye County ("the County"), by and through its counsel of record, Fisher & Phillips, LLP, hereby requests a hearing before the Employee-Management Relations Board with respect to its Petition for Declaratory Order Clarifying the Bargaining Unit filed on November 27, 2023. Respondent Nye County Management Employees Association ("NCMEA") filed their Answer to the Petition on January 9, 2024. Petitioner Nye County filed its Reply to Respondent's Answer to Petition for Declaratory Order Clarifying the Bargaining Unit on January 23, 2024.

The matters alleged in the petition and the supporting affidavits or other written evidence in briefs or memorandum of legal authorities do not permit the fair and expeditious disposition of the petition. There are multiple positions at issue in the petition

and the Board would need facts specific to each job, including the duties, supervisory functions of each position and what portion of the workday each duty occupies in order to properly evaluate each position's inclusion in the bargaining unit. Contrary to Respondent's assertions, many of the duties of the Subject Positions have changed significantly in the past 10 years, and the Board would benefit from testimony and other evidence on these facts. The Board will likely need to resolve many issues of disputed facts and potential issues of witness credibility and thus live testimony would be necessary to avoid prejudicing either party in this matter.

Therefore, based on the above reasons, Petitioner requests that the Board set this matter for hearing and receive evidence and testimony to clarify the scope of the bargaining unit at issue in the Petition.

DATED this 30th day of January, 2024.

FISHER & PHILLIPS LLP

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Attorneys for Petitioner [illegible] County

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2024, I filed and served by electronic means the foregoing **NYE COUNTY'S REQUEST FOR HEARING ON PETITION FOR A DECLARATORY ORDER CLARIFYING THE BARGAINING UNIT**, as follows:

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