

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

5 CITY OF RENO,

6 Petitioner,

7 vs.

8 RENO FIREFIGHTERS LOCAL 731,
9 INTERNATIONAL ASSOCIATION OF
10 FIREFIGHTERS

11 THE INTERNATIONAL UNION OF
12 OPERATING ENGINEERS,
13 STATIONARY LOCAL #39, AFL-CIO

14 THE RENO ADMINISTRATIVE AND
15 PROFESSIONAL GROUP

16 THE RENO POLICE PROTECTIVE
17 ASSOCIATION;

18 THE RENO POLICE SUPERVISORY AND
19 ADMINISTRATIVE EMPLOYEES
20 ASSOCIATION

21 THE RENO FIRE DEPARTMENT
22 ADMINISTRATORS' ASSOCIATION,

23 Respondents,

24 LAS VEGAS METROPOLITAN POLICE
25 MANAGERS & SUPERVISORS ASSOC.

26 Intervenor,

ITEM: 777-B

CASE NO. A1-046049

ORDER

27 Petitioner: City of Reno and their attorney Donald L. Christensen, Esq.

28 Respondents: Reno Firefighters Local 731, IAFF. & their attorney Laurence Peter
Digesti, Esq.

Respondents: International Union of Operating Engineers, Stationary Local #39, AFL-
CIO and Jerry Fredrick

Respondents: Reno Administrative and Professional Group and F. Allen Tryon, P.E.,
Secretary

Respondents: Reno Police Protective Association. & their attorney Michael E, Langton,
Esq.

1 Respondents: Reno Police Supervisory and Administrative Employees Association. &
2 their attorney Michael E. Langton, Esq.
3 Respondents: Reno Fire Department Administrators' Association. & their attorney
4 Thomas J. Donaldson, Esq.
5 Intervenor: Las Vegas Metropolitan Police Managers and Supervisors Association &
6 their Attorney Casey J. Nelson, Esq.
7 Amicus Curiae: Clark County Association of School Administrators and Professional-
8 technical employees & their attorney Adam P. Segal, Esq.
9 Amicus Curiae Professional Firefighters of Nevada and their attorney James W. Penrose,
10 Esq.

11 This matter came on before the State of Nevada, Local Government Employee-
12 Management Relations Board ("Board"), for consideration and decision pursuant to the
13 provisions of the Local Government Employee-Management Relations Act ("the Act"); NAC
14 Chapter 288, NRS chapter 233B, and was properly noticed pursuant to Nevada's open meeting
15 laws.

16 In this petition for declaratory order, Petitioner City of Reno ("City") seeks this Board's
17 interpretation of recent changes to the Act that were made in 2011 by the 76th Legislature. The
18 changes were part of Senate Bill 98 ("SB 98") which, among other things, amended the
19 definition of "supervisory employee" by adding subparagraph (1)(b) to NRS 288.075, and added
20 subsection (4) to NRS 288.140 which purports to exclude the supervisory employees who meet
21 the new definition in NRS 288.075(1)(b) from membership in an employee organization.

22 The City's petition seeks our interpretation of the scope and effect of these provisions of
23 SB 98. The City petitioned for declaratory relief to obtain the position of this Board on these
24 recent amendments to the Act before acting in a unilateral manner to implement the new
25 provisions of SB 98. This Board has been granted exclusive jurisdiction over the interpretation of
26 and complaints arising under the Act. See Rosequist v. International Ass'n of Firefighters Local
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1 1908, 118 Nev. 444, 49 P.3d 651 (2002). The Board is authorized to provide the requested
2 declaratory order pursuant to NRS 233B.120, NRS 233B.038(2)(a) and (2)(h), NRS 288.110 and
3 NAC 288.380-410.

4 Pursuant to NAC 288.380(2), the City has served the petition on each of the employee
5 organizations that it has recognized. The following organizations filed responses and participated
6 in this proceeding as Respondents: Reno Firefighters Local 731, International Association of
7 Firefighters; Reno Administrative and Professional Group; Reno Police Protective Association;
8 Reno Police Supervisory and Administrative Employees Association; and Reno Fire Department
9 Administrators' Association. Additionally, the Las Vegas Police Managers and Supervisors
10 Association intervened as allowed by NAC 288.420. Pursuant to NAC 288.410(2)(b), the Board
11 held a hearing on the City's Petition. The hearing was held on May 8, and 9, 2012 in Carson
12 City, Nevada. The questions raised by the City are addressed in turn.

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17 Whether Supervisory Employees Are Prohibited from Membership in an Employee Organization

18 The City's petition asks us to declare the effect of SB 98 on the employees who fall
19 within the definition of "supervisory employee" under NRS 288.075(1)(b).

20 This question is centered on the newly enacted subsection 4(a) of NRS 288.140 which
21 states:

22 4. The following persons may not be a member of an employee
23 organization:

24 (a) A supervisory employee described in paragraph (b) of
25 subsection 1 of NRS 288.075, including but not limited to
26 appointed officials and department heads who are primarily
27 responsible for formulating and administering management, policy
28 and programs.

The parties to this proceeding have advanced different interpretations of this subsection.

The City argues that this subsection does not impose a simple ban on membership in an

1 employee organization, but rather was intended only to restrict the rights of supervisory
2 employees to bargain collectively through an employee organization. The City reasons that the
3 legislative intent behind this subsection cannot be an outright ban on membership in an employee
4 organization because such a ban would likely be unconstitutional and would serve no practical
5 purpose.
6

7 Conversely some of the Respondents, notably Reno Fire Department Administrators'
8 Association, Reno Police Supervisory and Administrative Employees Association, Reno
9 Administrative and Professional Group and Reno Firefighters Local 731, International
10 Association of Firefighters contend that the plain language of subsection (4)(a) simply prevents
11 the supervisory employees who fall under NRS 288.075(1)(b) from holding membership in an
12 employee organization without any further effect. Respondents Reno Police Supervisory and
13 Administrative Employees Association and Reno Administrative and Professional Group argue
14 that such a broad rule banning membership in an employee organization would be
15 unconstitutional under the freedom of speech and freedom of association provisions in the First
16 Amendment, as well as unconstitutional under Article 1, section 10 of the Nevada Constitution.
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18 Since the codification of the original Local Government Employee-Management
19 Relations Act in 1969, the Act has always contained a purported restriction on membership in an
20 employee organization. NRS 288.140(3) states that law enforcement employees may only be a
21 member of an employee organization if that organization is composed exclusively of law
22 enforcement officers. In our previous applications of this provision, this Board has emphasized
23 the practical dimension of this particular subsection on the collective bargaining relationship
24 leading to the necessity to establish a separate bargaining unit for law enforcement officers. See
25 Juvenile Justice Supervisors & Assistant Managers Association v. County of Clark, Item No.
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1 704A, Case No. A1-045953 (2010); In the Matter of North Las Vegas Police Officers
2 Association, Item No. 104, EMRB Case No. A1-045333 (1980). Subsection (3) and the new
3 subsection (4) are both stated as exceptions to the general right to join or refrain from joining an
4 employee organization. NRS 288.140(1). Therefore subsection (3) and subsection (4) are *in pari*
5 *materia* and warrant a similar application emphasizing the impact on the collective bargaining
6 relationship.
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8 Prior to our hearing in this matter, the Legislative Counsel Bureau concluded that the
9 intention behind this new subsection (4) was to prevent a NRS 288.075(1)(b) supervisor from
10 "... engaging in collective bargaining or from being included in any bargaining unit under
11 Chapter 288 of NRS." LCB Letter to Assemblywoman Marilyn Kirkpatrick (May 1, 2012)
12 (admitted at the hearing as Exhibit 18). This conclusion was reached by looking to the definition
13 of collective bargaining as between an employer and a recognized employee organization and
14 reasoning that the restriction on membership in an organization will prevent collective
15 bargaining as to supervisory employees as there cannot be a constituted employee organization
16 to represent the supervisory employees with whom the employer is to bargain.
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19 The prohibition on membership in an employee organization in NRS 288.140(4)(a) is but
20 one part of the Act, and is identified as an exception to the general right of local government
21 employees to hold membership in an employee organization. NRS 288.140(1). In construing
22 subsection (4)(a), the Board must bear in mind the broader "ultimate and general purpose of the
23 legislature in the enactment of the law" and "every sentence and section of the entire law should
24 be interpreted with reference to such general object." Roney v. Buckland, 4 Nev. 45, 57 (1868).
25 The purpose of the Act is similar to that of the National Labor Relations Act and establishes and
26 governs the collective bargaining relationship between Nevada's local government employers
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1 and local government employees, through their organizations.¹ Truckee Meadows Fire Protection
2 Dist. v. International Ass'n of Fire Fighters, Local 2487, 109 Nev. 367, 374, 849 P.2d 343,
3 348 (1993). It follows then that the restriction on membership in an employee organization is
4 proportional to these contours of the Act. Thus, while NRS 288.140(4) is worded in such a way
5 as to restrict membership in an employee organization, the Board concludes that NRS
6 288.140(4)'s restriction on membership in an employee organization extends only as far as the
7 collective bargaining relationship between an organization and an employer set forth in NRS
8 Chapter 288. To extend the ban any further would improperly reach into matters that are of no
9 concern to the Act or of this Board.
10

11
12 As supervisory employees under NRS 288.075(1)(b) are not permitted to be a member of
13 an organization for collective bargaining purposes, it follows that such supervisory employees
14 may not engage in collective bargaining under NRS 288.140(4) as is outlined in Exhibit 18.

15
16 This interpretation also avoids the constitutional issues raised by the City and by
17 Respondents Reno Police Supervisory and Administrative Employees Association and Reno
18 Administrative and Professional Group. It is not the role of this Board to decide direct
19 constitutional questions such as are posed by the City and Respondents. However, when a labor
20 statute may be interpreted in a way to avoid a serious constitutional question, that interpretation
21 is to be preferred. N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (interpreting
22 National Labor Relations Act to avoid a First Amendment question regarding jurisdiction over
23 religious schools). Our interpretation of NRS 288.140(4) is such that it is consistent with the
24 objectives of the Act and avoids the constitutional questions raised by the City and by some of
25 the Respondents.
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¹ Even the Act's anti-discrimination provisions are identified as a prohibited labor practice under NRS 288.270.

1 Definition of A Supervisory Employee

2 The City also seeks a declaration from this Board on the newly-codified definition of a
3 supervisory employee found at NRS 288.075(1)(b). SB 98 added the following to the definition
4 of supervisory employee and defines a supervisory employee as :
5

6 (b) Any individual or class of individuals appointed by the
7 employer and having authority on behalf of the employer to:

8 (1) Hire, transfer, suspend, lay off, recall, terminate, promote,
9 discharge, assign, reward or discipline other employees or
10 responsibility to direct them, to adjust their grievances or to
11 effectively to recommend such action;

12 (2) Make budgetary decisions; and

13 (3) Be consulted on decisions relating to collective bargaining,
14 if, in connection with the foregoing, the exercise of such authority
15 is not of a merely routine or clerical nature, but requires the use of
16 independent judgment. The exercise of such authority shall not be
17 deemed to place the employee in supervisory employee status
18 unless the exercise of such authority occupies a significant portion
19 of the employee's workday

20 Our construction of this statute is controlled by its plain language. Ex parte Rickey, 31
21 Nev. 82, 100 P. 134 (1909).

22 The parties to this proceeding do not dispute, and we agree, that the use of the
23 conjunctive "and" between subparagraphs (2) and (3) means that a supervisory employee under
24 this subparagraph (1)(b) must have authority to perform all of the functions described in
25 subsections (1), (2) and (3) of subparagraph (b) in order to be properly considered a "supervisory
26 employee."

27 The language in subparagraph (1)(b)(1) is nearly identical to the language in
28 subparagraph (1)(a).² In addition, a "supervisory employee" under subparagraph (b) must be
"appointed by the employer." As a supervisory employee under (1)(b) must satisfy the pre-
existing definition of a supervisory employee, and in addition must be appointed, and must

² The only distinction is that NRS 288.075(1)(b)(1) includes "terminate" which is not listed in NRS 288.075(1)(a).

1 satisfy each additional requirement of subsections (1)(b)(2) and (1)(b)(3), it follows that the class
2 of employees qualifying as a "supervisory employee" under subparagraph (1)(b) will necessarily
3 be a narrower class than employees than those who are considered supervisory employees under
4 subparagraph (1)(a).
5

6 As a general rule, the determination of whether a particular employee or class of
7 employees is a supervisory employee must be made on a case-by-case basis. Further, the
8 designation of an employee as a supervisory employee is a departure from the general
9 requirement that provides for collective bargaining rights and therefore any party that claims the
10 supervisory exception has the burden to establish that it applies. accord. N.L.R.B. v. Kentucky
11 River Community Care, Inc., 532 U.S. 706, 711 (2001).
12

13 14 Temporary Change in Circumstances/Significant Portion of Workday

15 The City's petition presents the question of whether or not an employee's status as a
16 supervisory employee depends upon a temporary change in circumstances. It does not.
17

18 NRS 288.075(1)(b) expressly states that "[t]he exercise of such authority shall not be
19 deemed to place the employee in supervisory employee status unless the exercise of such
20 authority occupies a significant portion of the employee's workday." This language was taken
21 directly from pre-existing language in NRS 288.075(1)(a). Subparagraph (1)(a) was enacted to
22 require that there be an authentic grant of supervisory authority and to guard against the practice
23 of an employer creating a "straw boss" as a ruse to avoid its collective bargaining obligations.
24
25 See Minutes of Assembly Committee on Government Affairs, A.B. 572 (58th Leg., April 22,
26 1975). By re-adopting identical language in subparagraph (1)(b), it is our opinion that the
27 Legislature expressed a similar purpose in the newly-enacted definition of a supervisory
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1 employee. Allowing a temporary change in circumstances to separate an employee from his
2 collective bargaining rights is inconsistent with the plain language of NRS 288.075(1)(b). Instead
3 the proper focus is whether there is an authentic grant of authority to perform the functions listed
4 in subsections (1), (2) and (3) of NRS 288.075(1)(b) by considering the exercise of that
5 authority.
6

7 Under the statute, there must be the actual exercise of the enumerated supervisory
8 authority such that the exercise of that authority occupies a "significant portion of the
9 employee's workday." NRS 288.075(1)(b). We note that this Board has previously had occasion
10 to consider the "significant portion of an employee's workday" language in subparagraph (1)(a)
11 and as the "significant portion of the employee's workday" language is also identical between
12 subparagraph (1)(a) and subparagraph (1)(b), we would look to those prior decisions on this
13 issue when considering whether an employee is a "supervisory employee" under subparagraph
14 (1)(b). See Operating Engineers, Local 3 v. County of Lander, Item No. 346, EMRB Case No.
15 A1-045553 (1994); Incline Village General Improvement District v. Operating Engineers, Local
16 Union No. 3, Item No. 454B, EMRB Case No. A1-045663 (2000).
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19 Therefore, the Board concludes that a temporary change in circumstance will not convert
20 an employee into a "supervisory employee" under NRS 288.075(1)(b), and that the actual
21 exercise of supervisory authority enumerated in NRS 288.075(1)(b)(1)- (1)(b)(3) must occupy a
22 significant portion of the employee's workday.
23

24 The same rationale applies to an analysis of the authority under NRS 288.075(1)(b)(2)
25 (authority to make budgetary decisions) – there must be an authentic grant of authority such that
26 the enumerated supervisory functions must occupy a significant portion of the employee's
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workday, and the required use of independent judgment by the employee must be shown. NRS 288.075(1)(b)

DECLARATORY ORDER

Based upon the foregoing, the Board unanimously declares as follows:

1. The Board has exclusive jurisdiction over the interpretation of NRS Chapter 288.
2. The Board is authorized to provide the requested declaratory order pursuant to NRS 233B.120, NRS 233B.038(2)(a) and (2)(h), NRS 288.110 and NAC 288.380-.410.
3. The Board should interpret the Act to avoid constitutional questions, if possible per N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
4. The object of the Local Government Employee-Management Relations Act is to promote harmony in labor relations by establishing the collective bargaining rights and responsibilities of local government employers, local government employee and employee organizations.
5. NRS 288.140(4) restriction against supervisory employee's membership in an employee organization should not be interpreted to be broader than the objective of Act itself, and therefore is a ban on membership for the purposes of collective bargaining only.
6. As supervisory employees, as that term is defined in NRS 288.075(1)(b), may not be members of an employee organization for purposes of collective bargaining, those same supervisory employees are prevented from engaging in the collective bargaining process by NRS 288.140(4)(a).
7. The interpretation of NRS 288.075(1)(b) is controlled by its plain language.
8. The class of supervisory employees under NRS 288.075(1)(b) is a narrower class of supervisory employees than are supervisory employees under NRS 288.075(1)(a).

1 9. In order for an employee or class of employees to satisfy the definition of a "supervisory
2 employee" under NRS 288.075(1)(b), each of the following criteria must be met:

- 3 - the employee must be an appointed employee;
- 4 - the employee must have the authority on behalf of the employer to hire, transfer,
5 suspend, lay off, recall, terminate, promote, discharge, assign, reward or
6 discipline other employees or responsibility to direct them, to adjust their
7 grievances or to effectively to recommend such action;
- 8 - the employee must have the authority to make budgetary decisions;
- 9 - the employee must have the authority to be consulted on decisions related to
10 collective bargaining on behalf of the employer
- 11 - the exercise of the foregoing authority must not be of a routine or clerical nature
12 but require the use of independent judgment; and
- 13 - the exercise of the foregoing authority must occupy a significant portion of the
14 employee's workday.

15 10. An employee's status as a "supervisory employee" cannot be established by a temporary
16 change in circumstances.

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1 11. The Board makes no finding in this order that any local government employee or class of
2 local government employees is or is not a supervisory employee under NRS
3 288.075(1)(b)

4 DATED this 1st day of August, 2012.

5 LOCAL GOVERNMENT EMPLOYEE-
6 MANAGEMENT RELATIONS BOARD
7

8 BY: 
9 SEATON J. CURRAN, ESQ., Chairman

10
11 BY: 
12 PHILIP E. LARSON, Vice-Chairman

13
14 BY: 
15 SANDRA MASTERS, Board Member
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1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD
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5 CITY OF RENO,

6 Complainant,

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8 RENO FIREFIGHTERS LOCAL 731,
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18 THE RENO POLICE SUPERVISORY AND
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21 THE RENO FIRE DEPARTMENT
22 ADMINISTRATORS' ASSOCIATION,

23 Respondents,

24 LAS VEGAS METROPOLITAN POLICE
25 MANAGERS & SUPERVISORS ASSOC.

26 Intervenor
27
28

CASE NO. A1-046049

NOTICE OF ENTRY OF ORDER

To: City of Reno and their attorney Donald L. Christensen, Esq.

To: Reno Firefighters Local 731, IAFF. & their attorney Laurence Peter Digesti, Esq.

To: International Union of Operating Engineers, Stationary Local #39, AFL-CIO and Jerry Fredrick

To: Reno Administrative and Professional Group and F. Allen Tryon, P.E., Secretary

To: Reno Police Protective Association. & their attorney Michael E. Langton, Esq.

1 To: Reno Police Supervisory and Administrative Employees Association. & their attorney
Michael E, Langton, Esq.
2 To: Reno Fire Department Administrators' Association. & their attorney Thomas J. Donaldson,
3 Esq.
4 To: Las Vegas Metropolitan Police Managers and Supervisors Association & their
Attorney Casey J. Nelson, Esq.
5 To: Clark County Association of School Administrators and Professional-technical employees
6 & their attorney Adam P. Segal, Esq.
7 To: Professional Firefighters of Nevada and their attorney James W. Penrose, Esq.

8 PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on
9 August 1, 2012.

10 A copy of said order is attached hereto.

11 DATED this 1st day of August, 2012.

12 LOCAL GOVERNMENT EMPLOYEE-
13 MANAGEMENT RELATIONS BOARD

14 BY

15 
16 JOYCE A. HOLTZ, Executive Assistant
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1 CERTIFICATE OF MAILING

2 I hereby certify that I am an employee of the Local Government Employee-Management
3 Relations Board, and that on the 1st day of August, 2012, I served a copy of the foregoing
4 ORDER by mailing a copy thereof, postage prepaid to:

5 Donald L. Christensen, Esq.
6 Deputy City Attorney
7 PO Box 1900
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9 Laurence Peter Digesti, Esq.
10 485 W. Fifth Street
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JOYCE HOLTZ, Executive Assistant

