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**STATE OF NEVADA
E.M.R.B.**

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

CHURCHILL COUNTY SCHOOL DISTRICT,

Case No. 2016-024

Complainant,

ORDER

v.

NEVADA CLASSIFIED SCHOOL EMPLOYEES
ASSOCIATION, CHAPTER 5,

ITEM NO. 823

Respondent.

On May 9, 2017, this matter came before the State of Nevada, Local Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Local Government-Management Relations Act (the "Act"), NAC Chapter 288 and NRS Chapter 233B. The Board held a 2-day administrative hearing on this matter on May 8 and 9, 2017 in Fallon, Nevada.

The Churchill County School District (the "District") filed the instant action as a petition for declaratory order seeking to exclude certain positions from a bargaining unit because the employees are confidential employees. Specifically, the District sought an order finding employees in the following five positions are confidential: (1) The Secretary to the Superintendent and Board of Trustees working directly under the superintendent; (2) Two Human Resource analysts working directly under the superintendent; (3) The Account Technician assigned cash receipts, general ledger positions and account reconciliation; and (4) The Account Technician assigned to payroll and workers' compensation. However, at the hearing, the parties agreed that the Secretary to the Superintendent was not at issue. As such, four employees remained at issue and are the subject of this Order.

With its initial Petition, the District submitted the declarations of Superintendent Sandra Sheldon ("Dr. Sheldon") and Director of Business Services Phyllis Dowd ("Dowd") (which were later confirmed through testimony at the hearing). Dr. Sheldon indicated that as the Superintendent, she works closely with the Board of Trustees to determine collective bargaining strategies and proposals.

1 Dr. Sheldon stated that she is responsible to the Board of Trustees for the collective bargaining process.
2 When Dr. Sheldon was hired in 2013, the positions of superintendent and human resources director
3 were merged, and she was given all of the executive duties of both positions. In 2014, the two
4 employees working in human resources were given the titled of "Human Resources Analyst" instead of
5 administrative secretary, and they were given raises and more substantial duty assignments. Dr.
6 Sheldon stated that the human resource analysts report directly to her, and she supervises and evaluates
7 them. Dr. Sheldon further indicated that she holds weekly human resources meetings (or HR meetings)
8 with the Human Resources Analysts and the Director of Business Services in which they discuss,
9 among other things, management proposals for changes to the collective bargaining agreement as they
10 arise on an on-going basis. Furthermore, they discuss interpretation of contract language, hiring,
11 discipline, workers' compensation, strategies for assignment employees, grievances, morale issues,
12 employee problems, employee transfers, and reductions in force. Dr. Sheldon further indicated that the
13 HR Analysts participate in negotiations as part of the management team. Dr. Sheldon declared that she
14 meets with the HR Analysts prior to negotiations to go through the contract with them to solicit their
15 suggestions for management proposals. Moreover, the HR Analysts draft contact language for
16 management proposal and, during negotiations, they make substantive suggestions in management
17 meetings. The HR Analysts also take notes as part of the management negotiating team during
18 collective bargaining, and they prepare tentative agreement documents. Dr. Sheldon also indicated that
19 she fully shares with them the information and strategies discussed in confidential board of trustees
20 negotiation session. Dr. Sheldon declared that the collective bargaining duties are a substantial and
21 integral part of the job duties of the HR Analysts, and they have access to the District's negotiation
22 notes, strategies, proposals, and worksheets.

23 Dowd declared that she works closely with the account technicians assigned to handling cash
24 receipts, ledger positions, grant reporting as well as the account technician assigned to payroll and
25 workers' compensation. Dowd stated that she frequently confers with these two account technicians to
26 seek their opinions on matters of management policy regarding collective bargaining. Dowd further
27 indicated that these two account technicians are critical to her preparation for negotiations.

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1 NCSEA indicated in its Reply that positions cannot be determined on pleadings and self-
2 servicing declarations, but must be determined after an evidentiary hearing. At the evidentiary hearing
3 that followed, the Board heard the testimony of Dr. Sheldon (Superintendent), Dowd (Dir. Of Business
4 Services), Janel Buchan (HR Analyst) ("Buchan"), and Lori Norcutt (HR Analyst) ("Norcutt") in this
5 matter.

6 DISCUSSION

7 Preliminarily, NRS 288.170 provides, in pertinent part:

8 4. Confidential employees of the local government employer must be excluded from
9 any bargaining unit but are entitled to participate in any plan to provide benefits for a
10 group that is administered by the bargaining unit of which they would otherwise be a
member.

11 6. As used in this section:

12 (a) "Confidential employee" means an employee who is involved in the decisions of
management affecting collective bargaining.

13 In *Washoe County Sch. Dist. v. Nevada Classified Sch. Employees Ass'n*, Chapter 2, Item No.
14 490A, Case No. A1-045701 (2001), the Board noted that "[c]ourt cases as early as 1956 have defined
15 'confidential employees' to 'embrace only those employees who assist and act in a confidential capacity
16 to persons who formulate, determine, and effectuate management policies in the field of labor
17 relations.'" *Washoe County Sch. Dist.*, at 6-7, citing *B.F. Goodrich Co. v. Local No. 281*, 115 NLRB
18 722, 724 (1956); see also EMRB Item No. 21, quoting *Westinghouse Electric Corp. v. NLRB*, 398 F.2d
19 669 (4th Cir. 1968). The Board noted that the U.S. Supreme Court has approved of the NLRB's
20 utilization of the "labor nexus" test, and that the status of a confidential employee is a question of fact.

21 The Supreme Court has identified two categories of confidential employees who are excluded
22 from the NLRA's protection: (i) employees who 'assist and act in a confidential capacity to persons who
23 formulate, determine, and effectuate management policies in the field of labor relations,'; and (ii)
24 employees who 'regularly have access to confidential information concerning anticipated changes
25 which may result from collective-bargaining negotiations....' *N.L.R.B. v. Meenan Oil Co., L.P.*, 139
26 F.3d 311, 317 (2d Cir. 1998). The Supreme Court specifically stated that "the Board reaffirmed its
27 previous ruling in *Ford Motor* and underscored its intention 'in future cases ... to limit the term
28 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to

1 persons who formulate, determine, and effectuate management policies in the field of labor relations.’ In
2 succeeding years, while continuing to apply the labor-nexus test, the Board has deviated from that stated
3 intention in only one major respect: it has also, on occasion, consistent with the underlying purpose of the
4 labor-nexus test, designated as confidential employees persons who, although not assisting persons
5 exercising managerial functions in the labor-relations area, ‘regularly have access to confidential
6 information concerning anticipated changes which may result from collective-bargaining negotiations.’
7 *N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 188–89, 102 S. Ct. 216, 228, 70
8 L. Ed. 2d 323 (1981).

9 “The central inquiry in ascertaining whether an employee falls within the first category is whether
10 the employee is in a confidential work relationship with a specifically identifiable managerial employee
11 responsible for labor policy.” *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985). “An
12 employee is not regarded as confidential, however, simply because he supplies information to someone
13 involved in the handling of grievances.” *Id.* However, where the employee acts in a confidential capacity,
14 the fact that a “relatively small percentage” of the employee’s time is spent performing confidential duties
15 does not detract from the employee’s confidential status. *Esmeralda County Support Staff Org. v.*
16 *Esmeralda County Sch. Dist.*, Item No. 322, Case No. A1-045548 (1993), *quoting Raymond Baking Co.*,
17 249 NLRB 1100 (1980).

18 The Board looks to “the confidentiality of the relationship between the employee and persons
19 who exercise managerial functions in the field of labor relations.” *Meenan Oil Co., L.P.*, 139 F.3d at
20 317. “The rationale for the exclusion of confidential employees (as so defined) is that management should
21 not be forced to negotiate with a union that includes employees ‘who in the normal performance of their
22 duties may obtain advance information of the [c]ompany’s position with regard to contract negotiations,
23 the disposition of grievances, and other labor relations matters.’ An individual who routinely sees data
24 which would enable the union to predict, understand or evaluate the bargaining position of the employer is
25 therefore excluded from union membership.” *Id.*

26 HR Analysts

27 Dr. Sheldon testified that as Superintendent she is responsible for collective bargaining in the
28 District, and she supervises the management team. Dr. Sheldon is the lead negotiator for the District.

1 Dr. Sheldon described the bargaining team as herself, Dowd, Norcutt, and Buchan. Dr. Sheldon
2 testified that generally they begin negotiations in October/November and meet around two to three
3 times during the late fall, early winter, and then generally bargaining starts in January. They meet with
4 the Board of Trustees ("BOT") as well. They go through all the master agreements, make notations,
5 and Norcutt and Buchan usually keep notations as well. Dr. Sheldon testified that after she meets with
6 the BOT in closed session negotiations, she shares the Board's priorities, strategies, and thoughts with
7 the negotiation team that includes Norcutt and Buchan. Dr. Sheldon takes any suggestions they may
8 have, any thoughts that they have, and meet and finalize their proposals. Dr. Sheldon testified that this
9 was not information she would share with anyone else.

10 Dr. Sheldon explained that they meet on a weekly basis – with Norcutt, Buchan, and often
11 Dowd. Buchan testified that she has a binder, is given the proposals of Dr. Sheldon, Dowd and attorney
12 Sharla Hales, marks down what they discuss in the meetings and maintains the proposals in a binder.
13 During actual negotiation meetings, Buchan and Norcutt caucus with the management team. Dr.
14 Sheldon testified that the information discussed in there is expected to be confidential (e.g. the
15 discussion of proposed different salary schedules of the teachers). In the caucuses, they sit down as a
16 team and ask what they think about the negotiations and where they are with them. They discuss
17 proposals, what should be changed, the reasons related thereto, and finalize what they are going forward
18 with. They specifically discuss what is going on in negotiations with Buchan and Norcutt giving their
19 opinions. Buchan testified that in negotiation preparation meetings, that they discuss what they're
20 taking to the table, what they want. Buchan stated that she is part of those conversations regarding
21 strategy and negotiating.

22 Dr. Sheldon also specifically described how Norcutt and Buchan takes notes for the
23 management team as well as anything discussed in their HR meetings. Those are generally scheduled
24 every Monday morning for 45 minutes to an hour. Dr. Sheldon testified that Buchan and Norcutt take
25 on substantive roles as well in those discussions. Dr. Sheldon stated she values their input very much
26 because they have the history, in that they have been in this district for many years, longer than Dr.
27 Sheldon, and Dr. Sheldon heavily relies on them and their recommendations.

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1 Dr. Sheldon also testified that Buchan and Norcutt have full access to all of the District's
2 confidential negotiation notes, strategies, proposals and worksheets. Dr. Sheldon further indicated, that
3 as part of being on the management negotiation team, they all signed an agreement of confidentiality
4 and acknowledgment of that. Exhibit 38 was introduced in which Dr. Sheldon described the rules and
5 responsibilities for the negotiating team members which herself along with Norcutt, Buchan, and Dowd
6 signed. Dr. Sheldon further testified that Norcutt and Buchan decide and recommend employee
7 requests for leave, movement on the salary schedule, and processing grievances. Specifically, Dr.
8 Sheldon meets with Norcutt or Buchan to determine whether or not there has been a violation of the
9 contract, and they give substantive input on the grievance positions of the District. Moreover, Buchan
10 and Norcutt work with Dr. Sheldon when there are potential changes to policies and regulations
11 impacting Human Resources.

12 In relation to specific job descriptions of Human Resource Analyst, Dr. Sheldon testified that is
13 accurate that they "provide[] expertise and advice to management regarding the handling of
14 employee/labor relations issues; interprets collective bargaining agreement." Dr. Sheldon also testified
15 that it was Norcutt and Buchan who originally drafted the job descriptions because their jobs changed
16 when they became HR Analysts. Dr. Sheldon testified further that there are no other employees in the
17 HR Department and these employees have full access to every personnel record as well as all medical
18 records. They also coordinate and direct reductions in force including making recommendations. Dr.
19 Sheldon testified that the work Norcutt and Buchan provide is very integral to their bargaining process.
20 Norcutt testified that "[e]verything is confidential in my job", and she attends meetings where the
21 negotiating team will discuss potential changes. Norcutt stated that she takes notes and "mark the deals
22 that they're asking."

23 Dowd also testified that Buchan and Norcutt are members of the negotiating team. Dowd stated
24 that they attend negotiation preparation meetings and caucus meetings, and they did so before the
25 current negotiating year.

26 The Board finds the above testimony of Dr. Sheldon and Dowd credible and as such finds that
27 Norcutt and Buchan are confidential employees "who [are] involved in the decisions of management
28 affecting collective bargaining" per NRS 288.170. It is clear from the testimony provided that Norcutt

1 and Buchan not only “assist and act in a confidential capacity to persons who formulate, determine, and
2 effectuate management policies in the field of labor relations,” but also “regularly have access to
3 confidential information concerning anticipated changes which may result from collective-bargaining
4 negotiations.” Norcutt and Buchan has access to collective bargaining notes, spreadsheets, inquiries,
5 proposals, and discussions. Buchan and Norcutt attend management negotiation preparation meetings
6 and caucuses and understood that information in those meetings to be confidential.

7 Moreover, the Board finds Dr. Sheldon’s testimony credible that “it is not her intent to make
8 [Norcutt and Buchan] at-will employees” and it is her intent “to make sure that through their contract
9 they have the protections in place” of not being at-will employees. To the extent any complaint is filed
10 with the Board in the future in this regard, the Board notes any contrary conduct would be quite suspect
11 and would be a factor in its decision in awarding attorney’s fees.

12 **Account Technicians**

13 Dowd described that the business office has three account technicians (two of which are at
14 issue). Sue Pruit (“Pruit”) handles payroll and worker’s compensation, all of the day-to-day payroll
15 processing. Terra Laca (“Laca”) does grant reporting and general ledger reporting. Laca also does all
16 of the reviewing for accounts payable and for payroll.

17 When asked who the negotiation team was, Dowd specifically excluded both Laca and Pruit.
18 Indeed, Dowd testified that she does not consider either Pruit or Laca to be indispensable members of
19 the management negotiating team. While Dowd indicated that she assigned research work to Laca and
20 Pruit, Dowd stated that it was true that both Laca and Pruit deal in “all hypothetical situation”. Dowd
21 further indicated that their job descriptions don’t “line out individually collective bargaining”, only that
22 “there’s a couple of pieces that I interpret to mean that.” Moreover, Dowd testified that Laca “has
23 strong analytical skills and she looks at it from a position outside of the negotiation team....”. Laca’s
24 role is simply to make sure that it is clearly understood and that it doesn’t have unintended
25 consequences.

26 Contrary to her testimony regarding Norcutt and Buchan, Dr. Sheldon also testified that Pruit
27 has never participated in negotiations, is not a member of the negotiating team, and has never
28 participated in caucuses during negotiations.

1 While Fruit and Laca may do some research and calculations, evidence was not presented that
2 they are "involved in the decisions of management affecting collective bargaining" per NRS 288.170.
3 As the Board has held, "management cannot indiscriminately associate or expose other employees not
4 necessary to the assisting or acting on collective bargaining issues to such a situation and expect them to
5 be deemed confidential." *Washoe County Sch. Dist. v. Nevada Classified Sch. Employees Ass'n, Chapter*
6 *2, Item No. 490A, Case No. A1-045701 (2001)*. Dowd specifically testified that she does not consider
7 either Fruit or Laca to be indispensable members of the management negotiating team. Indeed, "[a]n
8 employee is not regarded as confidential, however, simply because he supplies information to someone
9 involved in the handling of grievances." *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir.
10 1985); *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985) (stating the same). The
11 Account Technicians in question never participated in labor negotiations and were not considered
12 members of the management team. *See, e.g., Operating Engineers v. County of Lander*, Item No. 346,
13 Case No. A1-045553 (1994). As indicated by the 2nd Circuit, "[t]here are arguably some confidential
14 aspects to many employment relationships, but the Board (for that reason) hews strictly to a narrow
15 definition of a confidential employee." *N.L.R.B. v. Meenan Oil Co., L.P.*, 139 F.3d 311, 317 (2d Cir.
16 1998); *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985) (stating that "[i]f we were to
17 accept Lorimar's argument, virtually every employee with access to information concerning company
18 income, expenses, or past and present labor costs would be a confidential employee because the
19 information could be used to predict the company's future bargaining position. As we made clear in *Union*
20 *Oil, supra*, this is not the result contemplated by the *Pullman Standard test*").

21 Finally, based on the facts in this case and the issues presented, the Board declines to award cost
22 and fees in this matter.

23 **FINDINGS OF FACT**

24 1. Dr. Sheldon is the Superintendent and is responsible for collective bargaining in the
25 District, and she supervises the management team.

26 2. Dr. Sheldon is the lead negotiator for the District.

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1 3. In 2014, the two employees working in human resources were given the titled of
2 "Human Resources Analyst" instead of administrative secretary, and they were given raises and more
3 substantial duty assignments.

4 4. Norcutt and Buchan report directly to Dr. Sheldon, and she supervises and evaluates
5 them.

6 5. The bargaining team included Dr. Sheldon, Dowd, Norcutt, and Buchan.

7 6. Dr. Sheldon holds weekly HR meetings often with the Human Resources Analysts and
8 the Director of Business Services in which they discuss, among other things, management proposals for
9 changes to the collective bargaining agreement as they arise on an on-going basis.

10 7. Furthermore, they have discussed interpretation of contract language, hiring, discipline,
11 workers' compensation, strategies for assignment employees, grievances, morale issues, employee
12 problems, employee transfers, and reductions in force.

13 8. Buchan has a binder, is given the proposals of Dr. Sheldon, Dowd and attorney Sharla
14 Hales, marks down what they discuss in the meetings and maintains the proposals in a binder.

15 9. During actual negotiation meetings, Buchan and Norcutt caucus with the management
16 team.

17 10. The information discussed in there is expected to be confidential.

18 11. In the caucuses, they sit down as a team and ask what they think about the negotiations
19 and were they are with them.

20 12. They also discuss proposals, what should be changed, the reasons related thereto, and
21 finalize what they're going forward with as well as what is going on in negotiations.

22 13. The HR Analysts take notes as part of the management negotiating team during
23 collective bargaining.

24 14. After Dr. Sheldon meets with the BOT in closed session negotiations, she shares the
25 Board's priorities, strategies, and thoughts with the negotiation team that includes Norcutt and Buchan.

26 15. Buchan and Norcutt have full access to all of the District's confidential negotiation
27 notes, strategies, proposals and worksheets.

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16. As part of being on the management negotiation team, Norcutt and Buchan signed an agreement of confidentiality and acknowledgment of that.

17. Norcutt and Buchan provide expertise and advice to management regarding the handling of employee/labor relations issues.

18. Norcutt testified that “[e]verything is confidential in my job”, she attends meetings where the negotiating team will discuss potential changes, and she takes notes and “mark the deals that they’re asking.”

19. Pruit handles payroll and worker's compensation, and all of the day-to-day payroll processing.

20. Laca does grant reporting and general ledger reporting and all of the reviewing for accounts payable and for payroll.

21. Pruit or Laca are not indispensable members of the management negotiating team and are not part of the negotiation team.

22. Pruit has never participated in negotiations, is not a member of the negotiating team, and has never participated in causes during negotiations.

23. While Pruitt and Laca may do some research and calculations, evidence was not presented that are “involved in the decisions of management affecting collective bargaining” per NRS 288.170.

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

CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the Local Government Employee-Management Relations Act.

2. The Board has exclusive jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS Chapter 288.

3. NRS 288.170 provides that a Confidential employee means an employee who is involved in the decisions of management affecting collective bargaining.

4. Court cases as early as 1956 have defined confidential employees to embrace only those

1 employees who assist and act in a confidential capacity to persons who formulate, determine, and
2 effectuate management policies in the field of labor relations.

3 5. The U.S. Supreme Court has approved of the NRLB's utilization of the labor nexus test,
4 and that the status of a confidential employee is a question of fact.

5 6. There are two categories of confidential employees who are excluded from the NLRA's
6 protection: (i) employees who 'assist and act in a confidential capacity to persons who formulate,
7 determine, and effectuate management policies in the field of labor relations,' and (ii) employees who
8 'regularly have access to confidential information concerning anticipated changes which may result
9 from collective-bargaining negotiations....'

10 7. An employee is not regarded as confidential, however, simply because she supplies
11 information to someone involved in the handling of grievances.

12 8. However, where the employee acts in a confidential capacity, the fact that a relatively small
13 percentage of the employee's time is spent performing confidential duties does not detract from the
14 employee's confidential status.

15 9. Management cannot indiscriminately associate or expose other employees not necessary
16 to the assisting or acting on collective bargaining issues to such a situation and expect them to be
17 deemed confidential.

18 10. The Board hews strictly to a narrow definition of a confidential employee.

19 11. If any of the foregoing conclusions is more appropriately construed as a finding of fact, it
20 may be so construed.

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1 **ORDER**

2 Based on the foregoing, it is hereby ordered that the Board finds that HR Analysts Janel Buchan
3 and Lori Norcutt are confidential employees who must be excluded from any bargaining unit per NRS
4 288.170. The Board further finds that Account Technicians Sue Pruitt and Terra Laca are not
5 confidential employees and therefore are not required to be excluded from any bargaining unit per NRS
6 288.170.

7 DATED this 21 day of June, 2017.

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9 LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

10 
11 By: _____
12 PHILIP LARSON, Chairman

13 
14 By: _____
15 BRENT ECKERSLEY, ESQ., Vice-Chairman

16 Sandra Masters, Board Member, concurs in the judgment.

17 I join with the decision made in the opinion to the extent the majority finds that Account
18 Technicians Sue Pruitt and Terra Laca are not confidential employees and therefore are not required to
19 be excluded from any bargaining unit per NRS 288.170.

20 DATED this 21 day of June, 2017.

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22 LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

23 
24 By: _____
25 SANDRA MASTERS, Board Member

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1 Sandra Masters, Board Member, dissents in the judgment.

2 I dissent from the decision made in the opinion to the extent the majority finds that HR Analysts
3 Janel Buchan and Lori Norcutt are confidential employees who must be excluded from any bargaining
4 unit per NRS 288.170. I would find that they are not confidential employees.

5 DATED this 21 day of June, 2017.

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7 LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

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9 By: 
10 SANDRA MASTERS, Board Member
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