STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107, Complainant, v. SOUTHERN NEVADA HEALTH DISTRICT, Respondent.	Case No. 2017-011 **ORDER** **ITEM NO. 828**

On February 13, 2018, 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 an administrative hearing on this matter on October 10-11, 2017. The Board also accepted post-hearing closing briefs.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107 ("SEIU Local 1107) appealed the determination of bargaining units relating to 3 positions at the SOUTHERN NEVADA HEALTH DISTRICT (the "District"): The Employee Health Nurse ("EHN"), the Helpdesk and Application Support Supervisor ("Helpdesk Supr."), and the Academic Affairs Coordinator ("AAC"). SEIU Local 1107 argued that the EHN and AAC positions belong in the general unit while the Help Desk Supr. belongs in the supervisory unit.

At the beginning of the hearing, the District stipulated that it was not contesting community of interest for the EHN and Helpdesk Supr., rather the District was only contesting this aspect in terms of the AAC. Further, the District brought a blown up version of a table listing the classifications and exclusions and paired each classification (*i.e.* the EHN, AAC, and Helpdesk Supr.) with its respective asserted exclusion(s).

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Preliminarily, while the parties stipulated at the hearing that SEIU Local 1107 would present their case in chief first, the parties were unable to agree on who ultimately bore the burden of proof.[1] NRS 288.170 (Determination of bargaining unit; appeal to Board) provides:

> 5. If any employee organization is aggrieved by the determination of a bargaining unit, it may appeal to the Board. Subject to judicial review, the decision of the Board is binding upon the local government employer and employee organizations involved. The Board shall apply the same criterion as specified in subsection 1.
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> 1. Each local government employer which has recognized one or more employee organizations shall determine, after consultation with the recognized organization or organizations, which group or groups of its employees constitute an appropriate unit or units for negotiating. The primary criterion for that determination must be the community of interest among the employees concerned.

Moreover, NAC 288.130 provides that:

> If any employee organization is aggrieved by the determination of a bargaining unit, it may appeal to the Board in accordance with the provisions of NAC 288.200 to 288.375, inclusive.

Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007); *Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170–71 (2008) ("court begins its statutory analysis with the plain meaning rule"); *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008) ("it is well established that, when interpreting a statute, the language of the statute should be given its plain meaning unless doing so violates the act's spirit."). "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293–94, 995 P.2d 482, 485 (2000). If the Legislature's intention is apparent from the face of the statute, there is no room for construction, and this court will give the statute its plain meaning. *Madera v. SIIS*, 114 Nev. 253,

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[1] The Board notes that the issue of who ultimately bears the burden of proving the asserted exclusions is moot for two reasons: (1) Local 1107 stipulated that it would present its case in chief first; and (2) the Board does not rely on the failure of either party to meet its burden in its Order herein. As such, the Board further notes that even if the burden had been placed on Local 1107, the Board would have ruled in Local 1107's favor.

257, 956 P.2d 117, 120 (1998). However, where a statute has no plain meaning, a court should consult other sources such as legislative history, legislative intent and analogous statutory provisions. *Id.* "If the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations this court will 'look to the provision's legislative history and the ... scheme as a whole to determine what the ... framers intended,' and we will examine 'the context and the spirit of the law or the causes which induced the legislature to enact it.'" *Clark Cty. v. S. Nevada Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). "Only when a statute is ambiguous will this court 'resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy.'" *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 393 P.3d 673, 679 (2017).

The statute does not provide for who ultimately bears the burden of proving an asserted exclusion. The Board finds that the statute is thus capable of two or more reasonable interpretations in that it does not address the subject of who ultimately bears the burden to prove an exclusion applies. The legislative history does not indicate who ultimately bears the burden on exclusions as well and neither party addressed this aspect in their post-hearing briefs despite the Board's request for the parties to do so. However, the legislative history indicates that the Employee-Management Relations Act ("EMRA") (Chapter NRS 288) is generally modeled after the National Labor Relations Act ("NLRA"). Moreover, the 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. *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993); *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Rel. Bd.*, 127 Nev. 631, 639, 261 P.3d 1071, 1076 (2011); *Weiner v. Beatty*, 121 Nev. 243, 248-49, 116 P.3d 829, 832 (2005).

The Board recognized this in the matter of *City of Reno v. Reno Firefighters Local 731*, Case No. A1-046049, Item No. 777-B (2012) (noting that "[t]he purpose of the Act is similar to that of the National Labor Relations Act and established and governs the collective bargaining relationship between Nevada's local government employers and local government employees, through their organizations."), *citing Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993). The Board held: "It follows then that the restriction on membership in an employee organization is proportional to these contours of the Act." *Id.*

Moreover, in that matter, the Board already determined as follows:

> ... Further, the designation of an employee as a supervisory employee is a departure from the general requirement that provides for collective bargaining rights and therefore any party that claims the supervisory exception has the burden to establish it applies.

City of Reno v. Reno Firefighters Local 731, Case No. A1-046049, Item No. 777-B (2012), at 8, *citing NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001).

The NLRB has continuously held that "[i]t is well established that the 'burden of proving supervisory status rests on the party asserting that such status exists.'" *In Re Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). As indicated above, the EMRA does not expressly allocate the burden of proving or disproving a challenged employee's status. Moreover, statutory "gaps may be filled in administratively" when there is "inadequate legislative expression[]." *State v. Rosenthal*, 93 Nev. 36, 43, 559 P.2d 830, 835 (1977). The Supreme Court of the United States explained:

> The Act does not, however, expressly allocate the burden of proving or disproving a challenged employee's supervisory status. The Board therefore has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor. For example, when the General Counsel seeks to attribute the conduct of certain employees to the employer by virtue of their supervisory status, this rule dictates that he bear the burden of proving supervisory status. Or, when a union challenges certain ballots cast in a representation election on the basis that they were cast by supervisors, the union bears the burden.
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> The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it. In addition, it is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it.

N.L.R.B. v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 710–11, 121 S. Ct. 1861, 1866, 149 L. Ed. 2d 939 (2001).

The subject statute only places the burden of appealing the initial determination of the government employer on the union (the statute unambiguously bestows the employer with the right to make the initial determination and thus the employer would have no reason to appeal).[2] The statute,

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[2] Black's Law Dictionary simply defines an "appeal" as" "[t]he complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is

however, does not provide who ultimately bears the burden on asserted exclusions.

The Board finds NLRB precedent in this matter persuasive and controlling and thus the Board applies the governing principles of the NLRA to Nevada's local government employees. Moreover, as the Board held in *City of Reno* as detailed above, excluding an employee is a departure from the general requirement that provides for collective bargaining rights and therefore any party that claims the exception has the burden to establish it applies. Because the other exclusions asserted, administrative and confidential, are likewise a departure from the general requirement, the same burden applies. Moreover, the same rationale, as detailed by the United States Supreme Court above, for placing the burden on the District here applies: it being easier to prove an employee's authority exercise the administrative functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting the exclusion. In the same vein, it is earlier to prove an employee's involvement in decisions of management affecting collective bargaining as well as an employee's actions in relation to persons who effectuate management policies or access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations, than to disprove it. *See also Union Oil Co. of California v. N.L.R.B.*, 607 F.2d 852, 853 (9th Cir. 1979) (placing the burden on the party seeking to have the employee deemed confidential and excluded from the bargaining unit); *Crest Mark Packing Co.*, 283 NLRB 999 (1987) (party claiming an exclusion because of confidential status has the burden of establishing that exclusion); Guidance Memorandum on Representation Case Procedure Changes, MEMORANDUM GC 15-06, 2015 WL 1564882, at *9 (Apr. 6, 2015) ("If a party raises statutory exclusions, such as §2(11) supervisory status, or exclusions based on policy considerations, such as ... confidential employee status ... the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof."). In this case, it is the District who asserts that the various exclusions apply to exclude the subject employees.

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called upon to correct or reverse. The removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial."

DISCUSSION

Preliminarily, NRS 288.170 provides, in pertinent part:

> 4. Confidential employees of the local government employer must be excluded from any bargaining unit but are entitled to participate in any plan to provide benefits for a group that is administered by the bargaining unit of which they would otherwise be a member.
> 6. As used in this section:
> (a) "Confidential employee" means an employee who is involved in the decisions of management affecting collective bargaining.

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

The Supreme Court has identified two categories of confidential employees who are excluded from the NLRA's protection: (i) employees who 'assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations,'; and (ii) employees who 'regularly have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations....' *N.L.R.B. v. Meenan Oil Co., L.P.*, 139 F.3d 311, 317 (2d Cir. 1998). The Supreme Court specifically stated that "the Board reaffirmed its previous ruling in *Ford Motor* and underscored its intention 'in future cases ... to limit the term 'confidential' so as to embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.' In succeeding years, while continuing to apply the labor-nexus test, the Board has deviated from that stated intention in only one major respect: it has also, on occasion, consistent with the underlying purpose of the labor-nexus test, designated as confidential employees persons who, although not assisting persons exercising managerial functions in the labor-relations area, 'regularly have access to confidential

information concerning anticipated changes which may result from collective-bargaining negotiations.' *N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 188–89, 102 S. Ct. 216, 228, 70 L. Ed. 2d 323 (1981).

"The central inquiry in ascertaining whether an employee falls within the first category is whether the employee is in a confidential work relationship with a specifically identifiable managerial employee responsible for labor policy." *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985). "An employee is not regarded as confidential, however, simply because he supplies information to someone involved in the handling of grievances." *Id.* However, where the employee acts in a confidential capacity, the fact that a "relatively small percentage" of the employee's time is spent performing confidential duties does not detract from the employee's confidential status. *Esmeralda County Support Staff Org. v. Esmeralda County Sch. Dist.*, Item No. 322, Case No. A1-045548 (1993), *quoting Reymond Baking Co.*, 249 NLRB 1100 (1980). The Board looks to "the confidentiality of the relationship between the employee and persons who exercise managerial functions in the field of labor relations." *Meenan Oil Co., L.P.*, 139 F.3d at 317.

EHN

Preliminarily, the District argues that the consideration of this position is barred by the statute of limitations contained in NRS 288.110(4). We disagree.

Time limitations are not triggered until the victim receives unequivocal notice of a final decision. *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 639, 261 P.3d 1071, 1076-77 (2011). Indeed, "equitable tolling 'focuses on 'whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.'" *Id.* at 640. "[T]he following factors, among any other relevant considerations, should be analyzed when determining whether equitable tolling will apply: the claimant's diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer."

The Board finds the evidence presented at the hearing credible in regards to the District's misleading authoritative statements and conduct to SEIU Local 1107 at its January 28, 2016 meeting

indicating the EHN would "[c]ontribute to decisions of management affecting the collective bargaining agreement." Indeed, Chief Steward Victoria Harding informed the District that she would take a wait and see approach and if it turned out that the EHN was not truly confidential, she would file with the Board, which is exactly what she did. However, when the parties began negotiating in March of 2017, the EHN was not involved. At this point, SEIU Local 1107 received "clear and unequivocal" notice. *Id.* As such, equitable tolling applies in this matter. SEIU Local 1107 thus filed its complaint within the requisite time period, was diligent in doing so, and reasonably relied on authoritative agency statements and conduct. Moreover, the prejudice to the employer is minimal in this matter as it was the party who choose to portray the EHN as involved in the decisions of management affecting collective bargaining, when such was not to be the case (as further evident by the hearing in this case).

The District also argues that the EHN does not belong in the general unit because the EHN is a confidential employee.[3] We disagree.

Most of the job duties performed by the EHN were previously performed by the Public Health Preparedness Nurse ("PHPN") which was a general bargaining unit position. Those job responsibilities included employee testing for the purposes of OSHA, including TB testing and blood-borne pathogens testing. It further involved the fitting of respiratory masks for employees.

In January 2016, HR Admin Hudson sent the Chief Steward for the general unit an e-mail indicating that it was determined the PHPN was a confidential position "[g]iven the location and overarching duties and responsibilities involving confidential matters...." A copy of the job description was included. Thereafter, they were notified the name would be changed to EHN.

"Confidential employee" means an employee who is involved in the decisions of management affecting collective bargaining. It appears the District simply concluded that the positions would

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[3] The District also argues that the EHN is an administrative employee in its post-hearing brief. However, at the hearing, the District clearly indicated that the only exclusion that applied to the EHN is confidential (indeed, the District even used a blown up demonstrative illustrating its exclusions as applied to each position and specifically did not draw a line to the administrative exclusion, when it could have easily done so). Therefore, the Board does not consider this exclusion (though the Board notes it's was preliminarily inclined to find said exclusion did not apply as the testimony revealed that the EHN does not meet that definition; indeed, the primary duties of the EHN were the same as the PHPN). To the extent, the District feels it properly asserted the administrative exclusion for the EHN, the Board invites the District to file a petition for rehearing as provided in NAC 288.364.

contribute to decisions affecting the collective bargaining agreement. Credible testimony at the hearing clearly indicated this not to be the case. The testimony revealed that the difference between the PHPN and EHN was that the new position had the following additional duties: wellness responsibilities; possible work with workers compensation; developing an immunization program for employees, and developing policies for employee health and well-being. The EHN also testified that she is doing blood borne pathogen training as well as doing the respiratory protection program (which means fit testing employees for preparedness purposes). The EHN further testified that she has to do the tuberculosis skin testing. However, none of these duties fall within the definition for a confidential employee.

Instead, the EHN characterized herself as confidential because she has access to information on matters such as employee health which the District deemed confidential. This was the same sort of explanation given by Director of Administration Glass. Glass also indicated the EHN was confidential because she has access to employee files on a daily basis and sits in on HR meetings where grievances and discipline are discussed. Indeed, Harding testified that when she asked the management team what they meant by confidential, they said they are going to be dealing with employees records, such as their health charts and testing. Harding testified they used the word confidential to be synonymous with simply not wanting that person to be in the union – their meaning of the word when they designated the position as confidential, was related to HIPAA, health records, and social security numbers. Mark Bergtholdt provided similar testimony

However, this is not how confidential is defined in NRS 288 as "involved in the decisions of management affecting collective bargaining" per NRS 288.170 as well as NLRB precedent detailed above. As the Board has held, "management cannot indiscriminately associate or expose other employees not necessary to the assisting or acting on collective bargaining issues to such a situation and expect them to be deemed confidential." *Washoe County Sch. Dist. v. Nevada Classified Sch. Employees Ass'n, Chapter 2*, Item No. 490A, Case No. A1-045701 (2001). Indeed, "[a]n employee is not regarded as confidential, however, simply because he supplies information to someone involved in the handling of grievances." *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985); *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985) (stating the same); *see also Union Oil Co. of California*, 607 F.2d at 854 (indicating that "[t]he record only indicates that the computer operators have access to

personnel or statistical information upon which the company's labor relations policy is based. The Board has consistently held that access to such information is insufficient to establish confidential status.").

The EHN in question never participated in labor negotiations and was not part of the negotiating team. *See, e.g., Operating Engineers v. County of Lander*, Item No. 346, Case No. A1-045553 (1994). Moreover, the EHN testified that her predecessor did not provide her with any notes, spreadsheets, proposals, or discussions of management in connection with collective bargaining on the issue of wages. The EHN clearly indicated that she did not have any experience in collective bargaining or has been involved in the grievance process. Moreover, the EHN testified that she reports to the Director of Administration and has not had any discussions with him regarding a role in the collective bargaining process, though the Director told her that she will be participating in policy discussions. As indicated by the 2nd Circuit, "[t]here are arguably some confidential aspects to many employment relationships, but the Board (for that reason) hews strictly to a narrow definition of a confidential employee." *N.L.R.B. v. Meenan Oil Co., L.P.*, 139 F.3d 311, 317 (2d Cir. 1998); *N.L.R.B. v. Lorimar Prods., Inc.*, 771 F.2d 1294, 1298 (9th Cir. 1985) (stating that "[i]f we were to accept Lorimar's argument, virtually every employee with access to information concerning company income, expenses, or past and present labor costs would be a confidential employee because the information could be used to predict the company's future bargaining position. As we made clear in *Union Oil, supra*, this is not the result contemplated by the *Pullman Standard test*."). As such, the EHN does not meet either of the confidential types of employees detailed in *Meenan Oil*.[4] *See also Union Oil Co. of California v. N. L. R. B.*, 607 F.2d 852, 853 (9th Cir. 1979) ("Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee.").

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[4] Indeed, the Court in *Meenan Oil* further explained: "The rationale for the exclusion of confidential employees (as so defined) is that management should not be forced to negotiate with a union that includes employees 'who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters.' An individual who routinely sees data which would enable the union to predict, understand or evaluate the bargaining position of the employer is therefore excluded from union membership." *Meenan Oil Co., L.P.*, 139 F.3d at 317.

AAC

The District provides internship, residency and fellowship opportunities in the field of public health. These interns, residents and fellows are not employees of the District but are supervised by District employees who volunteer to take on the responsibilities. The District is organized into four departments which are headed by a director who reports to the CHO Dr. Iser.

The District argues that the AAC meets the exclusions for administrative, managerial[5], and confidential. However, as was the case with EHN, the District incorrectly designated the position as confidential because it would have access to materials that may be confidential in contexts other that those affecting collective bargaining. Portions of the October 27, 2016 Board of Health Meeting illustrated this point. Dr. Iser indicated that the AAC was confidential because the person would be looking at "confidential student evaluations", "training related to our own employees", and looking at other confidential "internal and external materials such as those covered by FERPA". Dr. Iser also stated that the position would have access to his office and he "won't allow anyone who is not union exempt to have access to [his] office".

The original draft job description for the AAC made no mention of anything related to decisions of management affecting collective bargaining. When the final version was adopted, the District inserted the following language: "May serve as a scribe and management assistant during negotiations." Valentino, who held the position, provided credible testimony that her job duties were to coordinate interns, residents, medical fellows and other students; coordinate preceptor training, chair the Academic Affairs Committee, meet with program coordinators, faculties and deans, encourage staff to go back to school, update the District website, and work on manuals. Further, Valentino expressly testified that she had not been

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[5] The District made clear that it bases its "managerial" exclusions off the parties' CBA (Art. 1(1)(B)). The Board notes that its authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the Employee-Management Relations Act. NRS 288.110(2). The District seeks the Board to enforce the parties' CBA including a contractual exclusion that the parties negotiated. However, it is well established that doing so is expressly beyond the Board's jurisdiction. *See* NRS 288.110(2); *City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474–75, 653 P.2d 156, 158 (1982); *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union,* 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); *City of Henderson v. Kilgore*, 122 Nev. 331, 333, 131 P.3d 11, 12 (2006); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case No. A1-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. A1-04611, Item No. 796 (2014); *see e.g., Flores v. Clark Cty.*, Case No. A1-045990, Item No. 737 (2010); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017).

involved in collective bargaining negotiations, formulating strategy, or involved in the collective bargaining process at all.

As with the EHN above, "management cannot indiscriminately associate or expose other employees not necessary to the assisting or acting on collective bargaining issues to such a situation and expect them to be deemed confidential," and the AAC fails to meet either of the confidential types of employees detailed in *Meenan Oil*. *See also N.L.R.B. v. Los Angeles New Hosp.*, 640 F.2d 1017, 1023 (9th Cir. 1981) ("Board decisions have established that mere access to confidential material or typing of confidential labor relations memoranda does not, without more, establish a confidential relationship.... mere access to confidential data is insufficient to constitute confidential employee status.").

Moreover, the AAC does not meet the definition of an administrative employee per NRS 288.025. NRS 288.025 defines an administrative employee as:

> any employee whose primary duties consist of work directly related to management policies, who customarily exercises discretion and independent judgment and regularly assists an executive. In addition, it includes the chief administrative officer, the chief administrative officer's deputy and immediate assistants, department heads, their deputies and immediate assistants, attorneys, appointed officials and others who are primarily responsible for formulating and administering management policy and programs.

NRS 288.170(3) provides that an administrative employee must not be a member of the same bargaining unit as the employees under the direction of that administrative employee. The AAC did not have primary duties directly related to management policies, who customarily exercises discretion and independent judgment and regularly assists an executive, nor is primarily responsible for formulating and administering management policy and programs. In addition to the above, the evidence at the hearing established that Valentino did not customarily exercise discretion and independent judgment in connection with the performance of her job. Moreover, Valentino reports to Dr. Iser and while the job description indicated that she may serve as a scribe, testimony revealed this not to be the case. Valentino does not have oversight for any full time employees and testified that she has no involvement in any employee related matters. Valentino testified that she would coordinate interns, residents, fellows, and students of that kind, but none of these are employees. Further, she does not have the ability to discipline. Additionally, Valentino testified that while she is the chair of academic affairs committee, the committee sets policy as a whole. Finally, Valentino testified that she did not participate in the creation of the AAC.

The Board also finds that the AAC shares a community of interest with the other employees of the bargaining unit. NRS 288.170(1) provides, in pertinent part:

> Each local government employer which has recognized one or more employee organizations shall determine, after consultation with the recognized organization or organizations, which group or groups of its employees constitute an appropriate unit or units for negotiating. The primary criterion for that determination must be the community of interest among the employees concerned.

NRS 288.028 further defines a "bargaining unit" as "a group of local government employees recognized by the local government employer as having sufficient community of interest appropriate for representation by an employee organization for the purpose of collective bargaining."

A community of interest includes, among other considerations: similarities in duties, skills, working conditions, job classifications, employee benefits, and the amount of interchange or transfer of employees, integration of an employer's operations and supervision of employees. *Nye County Law Enforcement Ass'n v. Nye County*, Item No. 805, Case No. A1-046123 (2015). The Board also considers factors such as the desires of the affected employees, geographic proximity, common objectives in providing services, personnel policy, and the frequency of contact among the employees. *The Douglas County Professional Ed. Ass'n v. The Douglas County Sch. Dist.*, Item No. 230, Case No. A1-045442 (1989); *Int'l Bhd. of Elec. Workers, Local 1245 v. Truckee Meadows Water Auth., EMRB Case No. 2017-022*, Item No. 825 (2017).

The Board generally favors larger wall-to-wall units in order to minimize the practical difficulties on a local government employer that result from a proliferation of bargaining units and to serve as a safeguard for employees against the diluted effectiveness caused by smaller and fragmented bargaining units. *Nye County Law Enforcement Ass'n v. Nye County*, Item No. 805, Case No. A1-046123 (2015); *Int'l Bhd. of Elec. Workers, Local 1245 v. Truckee Meadows Water Auth., EMRB Case No. 2017-022*, Item No. 825 (2017).

"In its analysis on bargaining units in past decisions, the Board has determined that 'a broad interpretation of community of interest, although it places a responsibility on the employees to develop a strong and fairly representative negotiating team from all contributing elements within each employee organization, provides the most effective representation for the employees.'" *The Douglas County*

Professional Ed. Ass'n v. The Douglas County Sch. Dist., Item No. 230, Case No. A1-045442 (1989). The "interests of both local government employers and local government employees are best served by establishing large bargaining units of employees rather than a proliferation of smaller units." *Id.*

Prior to being consolidated in the positions of AAC, the work was previously performed by bargaining unit members. Valentino worked at the same facility as the other bargaining unit employees, and her job is part of advancing the same objective as other bargaining unit employees, to advance public health. Moreover, she has frequent contact with nonsupervisory employees and is part of a larger preceptor training project. She shares the same salary schedules and benefits as bargaining unit members and is subject to the same rules and regulations as bargaining unit members. As such, the factors cut in favor of finding a community of interest.

Given the testimony presented, along with the Board preference for larger wall-to-wall units, the Board finds that the AAC shares as community of interest with the bargaining unit employees.

Helpdesk Supr.

The District argues that the following exclusions apply to this classification: Managerial (see n. 5 above), confidential, and supervisory per NRS 288.075. NRS 288.140(4)(a) provides that the following persons may not be a member of an employee organization: A supervisory employee described in paragraph (b) of subsection 1 of NRS 288.075, including but not limited to appointed officials and department heads who are primarily responsible for formulating and administering management, policy and programs.

NRS 288.075(1)(b) defines as supervisory employees as follows:

> (b) Any individual or class of individuals appointed by the employer and having authority on behalf of the employer to:
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> (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;
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> (2) Make budgetary decisions; and
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> (3) Be consulted on decisions relating to collective bargaining,
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> ➥ 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.

Pursuant to the plain language of the above provision, to constitute a Supervisory Employee, the employee must be "appointed". Chief Steward Harding testified that the Helpdesk Supr. was not appointed; rather, the position was posted and had to be interviewed for. In any event, however, the Board finds that Helpdesk Supr. does not meet the **conjunctive** test as detailed in the statute.[6]

While the Helpdesk Supr. Luhar testified that she "recommended" an employee for hire, she further testified that the ultimate decision rested with Frame and as such did not appear to require the use of independent judgment. Further, Luhar testified that she has never disciplined an employee. Importantly, Luhar testified that she had not been involved in making any budgetary decisions and doesn't even have a budget for the Helpdesk. Luhar testified that she is not even part of maintaining a budget or making budgetary decisions. Luhar only testified on further cross examination that she may theoretically in the future act as a backup IT manager and may need to make decisions that affect the budget. Further, there is no mention in the Helpdesk Supr.'s job description for a collective bargaining role, but, in any event, Luhar testified that she did not participate in the 2017 negotiations in any manner. Finally, the statute requires that the exercise of such supervisory authority occupy a significant portion of the employee's workday and Luhar testified that the majority of time is spent doing hands-on IT work.

Director of Administration Glass testified that the position was created because the "span of control" by the IT Manager was too broad. The Board heard testimony from IT Manager Jason Frame that the Helpdesk Supr. had the authority to make hiring decisions, to discipline as needed, help with budgetary needs, and make recommendations for ideas on projects. The Board does not find said conclusory testimony credible.

Finally, the Helpdesk Supr. testified that she was not involved or attended any of the meeting related to the bargaining sessions between the parties. She further testified that she did not make any proposals or submit any proposals in connection with those meetings. Moreover, the job description for the Helpdesk Supr. does not mention confidential or collective bargaining. As such, the Helpdesk Supr.

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[6] As the Board previously held, "the use of the conjuntive 'and' between subparagraphs (2) and (3) means that supervisory employee under this subparagraph (1)(b) must have authority to perform all of the functions described in subsections (1), (2) and (3) of subparagraph (b) in order to be properly considered a 'supervisory employee'." *City of Reno v. Reno Firefighters Local 731*, Case No. A1-046049, Item No. 777-B (2012).

was not consulted on decisions relating to collective bargaining.

Similar to the EHN and AAC, the evidence also established that the Helpdesk Supr. is not a confidential employee as she was admittedly not involved in the decisions of management affecting collective bargaining. As indicated, the Helpdesk Supr. testified that no aspect of her position is related to collective bargaining. While the Helpdesk Supr. may have access to some confidential information generally related to employees (though she testified, when questioned specifically, that she has never tried to retrieve e-mails of a general counsel), she did not have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations. Moreover, as indicated above, an employee is not regarded as confidential simply because she supplies information to someone involved in the handling of grievances. As the Board has repeatedly held, management cannot indiscriminately associate or expose other employees not necessary to the assisting or acting on collective bargaining issues to such a situation and expect them to be deemed confidential, and the Board hews strictly to a narrow definition of a confidential employee. *See also N.L.R.B. v. Los Angeles New Hosp.*, 640 F.2d 1017, 1023 (9th Cir. 1981) ("Board decisions have established that mere access to confidential material or typing of confidential labor relations memoranda does not, without more, establish a confidential relationship.... mere access to confidential data is insufficient to constitute confidential employee status.").

Motion to Strike

On February 9, 2018, the District filed a Motion to Strike (MTS) portions of Local 1107's Post-hearing brief (the Board notes that Local 1107 filed its Post-hearing Brief on January 24, 2018 and the District waited until the Friday prior to the Monday this matter was agenized to be decided to file its motion). The MTS is moot as the Board did not rely in its Order on those portions of Local 1107's Post-hearing Brief on which the District sought to be struck, including Local 1107's argument that an article of the parties' CBA is repugnant on its face to NRS Chapter 288. Moreover, the District does not identify in its MTS the authority for bringing said motion. Indeed, in the history of the Board, it has never accepted a MTS a post-hearing brief and there is no provision in either NRS 288 or NAC 288 for doing so. In any event the Board denies the motion to strike.

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

FINDINGS OF FACT

1. Most of the job duties performed by the EHN were previously performed by the PHPN.

2. Those job responsibilities included employee testing for the purposes of OSHA, including TB testing and blood-borne pathogens testing. It further involved the fitting of respirator masks for employees.

3. The difference between the PHPN and EHN was that the new position had the following additional duties: wellness responsibilities; possible work with workers compensation; developing an immunization program for employees, and developing policies for employee health and well-being. The EHN is doing blood borne pathogen training as well as doing the respiratory protection program and tuberculosis skin testing.

4. The EHN characterized herself as confidential because she has access to information on matters such as employee health which the District deemed confidential. This was the same sort of explanation given by Director of Administration Glass.

5. Harding testified that when she asked the management team what they meant by confidential, they said they are going to be dealing with employees records, such as their health charts and testing. Harding testified they used the work confidential to be synonymous with simply not wanting that person to be in the union – their meaning of the word when they designated the position as confidential, was related to HIPAA, health records, and social security numbers.

6. The EHN in question never participated in labor negotiations and was not part of the negotiating team.

7. The EHN was not provided with any notes, spreadsheets, proposals, or discussions of management in connection with collective bargaining on the issue of wages

8. The Director of Administration has not had any discussions with the EHN regarding a role in the collective bargaining process.

9. The EHN is not a confidential employee.

10. The District provides internship, residency and fellowship opportunities in the field of

public health. These interns, residents and fellows are not employees the District but are supervised by District employees who volunteers to take on the responsibilities.

11. Dr. Iser indicated that the AAC was confidential because the person would be looking at "confidential student evaluations", "training related to our own employees", and looking at other confidential "internal and external materials such as those covered by FERPA".

12. Valentino provided credible testimony that her job duties were to coordinate interns, residents, medical fellows and other students; coordinate preceptor training, chair the Academic Affairs Committee, meet with program coordinators, faculties and deans, encourage staff to go back to school, update the District website, and work on manuals.

13. Valentino was not involved in collective bargaining negotiations, formulating strategy, or involved in the collective bargaining process at all.

14. The AAC did not have primary duties directly related to management policies, who customarily exercises discretion and independent judgment and regularly assists an executive, nor is primarily responsible for formulating and administering management policy and programs.

15. Valentino did not customarily exercise discretion and independent judgment in connection with the performance of her job.

16. Valentino reports to Dr. Iser and while the job description indicated that she may serve as a scribe, this was not the case.

17. Valentino does not have oversight for any full time employees and she has no involvement in any employee related matters.

18. Valentino coordinates interns, residents, fellows, and students of that kind, but none of these are employees. Further, she does not have the ability to discipline.

19. Valentino testified that while she is the chair of academic affairs committee, the committee sets policy as a whole.

20. Prior to being consolidated in the positions of AAC, the work was previously performed by bargaining unit members.

21. Valentino worked at the same facility as the other bargaining unit employees, and her job is part of advancing the same objective as other bargaining unit employees, to advance public health.

22. She has frequent contact with nonsupervisory employees and is part of a larger preceptor training project.

23. She shares the same salary schedules and benefits as bargaining unit members and is subject to the same rules and regulations as bargaining unit members.

24. The factors cut in favor of finding a community of interest.

25. The AAC is not a confidential employee.

26. The AAC does not meet the definition of an administrative employee.

27. The AAC shares a community of interest with the other employees of the bargaining unit.

28. The Helpdesk Supr. was not appointed; rather, the position was posted and had to be interview for.

29. The ultimate decision to hire rested with Frame and as such did not require the use of independent judgment.

30. Luhar has never disciplined an employee.

31. Luhar had not been involved in making any budgetary decisions and doesn't have a budget for the Helpdesk.

32. Luhar is not part of maintaining a budget or making budgetary decisions.

33. There is no mention in the Helpdesk Supr.'s job description for a collective bargaining role, and she did not participate in the 2017 negotiations.

34. The majority of Luhar's time is spent doing hands-on IT work.

35. The Board does not find IT Manager Jason Frame's testimony credible indicating that the Helpdesk Supr. had the authority to make hiring decisions, to discipline as needed, help with budgetary needs, and make recommendations for ideas on projects.

36. Luhar was not involved or attended any of the meeting related to the bargaining sessions between the parties, she did not make any proposals or submit any proposals in connection with those meetings, and was not consulted on decisions relating to collective bargaining.

37. While the Helpdesk Supr. may have access to some confidential information generally related to employees, she did not have access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations.

38. The Helpdesk Supr. is not a supervisory employee under the EMRA.

39. The Helpdesk Supr. is not a confidential employee.

40. The Board finds the evidence presented at the hearing credible in regards to the District's misleading authoritative statements and conduct to SEIU Local 1107 at its January 28, 2016 meeting.

41. Chief Steward Victoria Harding informed the District that she would take a wait and see approach and if turned out that the EHN was not truly confidential, she would file with the Board, which is exactly what she did.

42. When the parties began negotiating in March of 2017, the EHN was not involved.

43. At this point, SEIU Local 1107 received "clear and unequivocal" notice.

44. SEIU Local 1107 was diligent in filing, reasonably relied on authoritative agency statements and conduct, and the prejudice to the employer is minimal in this matter as it was the party who choose to portray the EHN as involved in the decisions of management affecting collective bargaining, when such was not to be the case.

45. The same rationale for placing the burden on the District here applies: it being easier to prove an employee's authority exercise the administrative functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting the exclusion.

46. In the same vein, it is easier to prove an employee's involvement in decisions of management affecting collective bargaining as well as an employee's actions in relation to persons who effectuate management policies or access to confidential information concerning anticipated changes which may result from collective-bargaining negotiations, than to disprove it.

47. It is the District who asserts that the various exclusions apply to exclude the subject employees.

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

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

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

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

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

9. Mere access to confidential material or typing of confidential labor relations memoranda does not, without more, establish a confidential relationship.

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

11. Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee.

12. An administrative employee must not be a member of the same bargaining unit as the employees under the direction of that administrative employee.

13. A community of interest includes, among other considerations: similarities in duties,

skills, working conditions, job classifications, employee benefits, and the amount of interchange or transfer of employees, integration of an employer's operations and supervision of employees. The Board also considers factors such as the desires of the affected employees, geographic proximity, common objectives in providing services, personnel policy, and the frequency of contact among the employees.

14. The Board generally favors larger wall-to-wall units in order to minimize the practical difficulties on a local government employer that result from a proliferation of bargaining units and to serve as a safeguard for employees against the diluted effectiveness caused by smaller and fragmented bargaining units.

15. A broad interpretation of community of interest, although it places a responsibility on the employees to develop a strong and fairly representative negotiating team from all contributing elements within each employee organization, provides the most effective representation for the employees.

16. The interests of both local government employers and local government employees are best served by establishing large bargaining units of employees rather than a proliferation of smaller units.

17. NRS 288.140(4)(a) provides that the following persons may not be a member of an employee organization: A supervisory employee described in paragraph (b) of subsection 1 of NRS 288.075, including but not limited to appointed officials and department heads who are primarily responsible for formulating and administering management, policy and programs.

18. Pursuant to the plain language of the above provision, to constitute a Supervisory Employee, the employee must be "appointed".

19. Time limitations are not triggered until the victim receives unequivocal notice of a final decision.

20. Equitable tolling applies in this matter, and SEIU Local 1107 thus filed its complaint within the requisite time period.

21. The District made bases its "managerial" exclusions off the parties' CBA (Art. 1(1)(B)); however, the Board' authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the Employee-Management Relations Act, and the District seeks the Board to

enforce the parties' CBA including a contractual exclusion that the parties negotiated. However, it is well established that doing so is expressly beyond the Board's jurisdiction.

22. The statute does not provide for who ultimately bears the burden of proving an asserted exclusion and is thus capable of two or more reasonable interpretations in that it does not address the subject of who ultimately bears the burden to prove an exclusion applies.

23. The subject statute only places the burden of appealing the initial determination of the government employer on the union.

24. Excluding an employee is a departure from the general requirement that provides for collective bargaining rights and therefore any party that claims the exception has the burden to establish it applies.

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

ORDER

Based on the foregoing, it is hereby ordered that the Board finds that the EHN, AAC, and Helpdesk Supr. are not required to be excluded from any bargaining unit.

DATED this 20th day of March, 2018.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chairman

By: _____
SANDRA MASTERS, Vice-Chairman

By: _____
PHILIP LARSON, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107, Complainant, vs. SOUTHERN NEVADA HEALTH DISTRICT, Respondent.	CASE NO. 2017-011 **NOTICE OF ENTRY OF ORDER**

TO: Service Employees International Union Local 1107 and its attorneys Adam Levine, Esq. and the Law Office of Daniel Marks;

TO: Southern Nevada Health District and its attorneys David B. Dornak, Esq. and Fisher & Phillips LLP.

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on March 20, 2018.

A copy of said order is attached hereto.

DATED this 20th day of March 2018.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____

MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 20th day of March 2018, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER by mailing a copy thereof, postage prepaid to:

Law Office of Daniel Marks
Daniel Marks, Esq.
Adam Levine, Esq.
610 South Ninth Street
Las Vegas, NV 89101

David B. Dornak, Esq.
Fisher & Phillips LLP
300 S. Fourth Street, Suite 1500
Las Vegas, NV 89101

MARISU ROMUALDEZ ABELLAR
Executive Assistant