STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

LUQUISHA MCCRAY,

Complainant,

v.

CLARK COUNTY,

Respondent.

Case No. 2019-012

NOTICE OF ENTRY OF ORDER

PANEL D

ITEM NO. 850

TO: Complainant Luquisha McCray and her attorneys, Adam Levine, Esq. and the Law Office of Daniel Marks;

TO: Respondent Clark County and its attorneys, Scott Davis, Deputy District Attorney and the Clark County District Attorney's Office.

PLEASE TAKE NOTICE that the **ORDER ON RESPONDENT'S MOTION TO DISMISS** was entered in the above-entitled matter on September 27, 2019.

A copy of said order is attached hereto.

DATED this 27th day of September 2019.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____

MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 27th day of September 2019, 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

Scott Davis
Deputy District Attorney
Civil Division
500 South Grand Central Parkway
Las Vegas, NV 89155

MARISU ROMUALDEZ ABELLAR
Executive Assistant

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

LUQUISHA MCCRAY,

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ORDER ON RESPONDENT'S MOTION TO DISMISS

PANEL D

ITEM NO. 850

On August 13, 2019, this matter came before the State of Nevada, Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Employee-Management Relations Act, NAC Chapter 288, and NRS Chapter 233B. At issue was Respondent, Clark County's ("County") Motion to Dismiss the Complaint.

The County primarily argues that the Board should dismiss this matter as the Complaint is, in essence, a substantive challenge to the scope of the County and SEIU bargaining unit and thus Complainant lacks standing to pursue these allegations. NRS 288.170(5) plainly and unambiguously provides, in pertinent part: "If any employee organization is aggrieved by the determination of a bargaining unit, it may appeal to the Board."

In *Brown v. City of Las Vegas*, Item No. 757A, Case No. A1-046012 (2011), the City of Las Vegas filed a motion to dismiss the complaint asserting that the complaint raised only an appeal of an employer's bargaining unit determination, and the Complainant lacked standing to proceed with that type of complaint. The Board noted that the complaint asserted that a group of employees at the WPCF asked to be removed from a larger bargaining unit, and the complaint asked that the employees at the WPCF be recognized as a separate bargaining unit. The Board held: "Because this complaint asks us to review the City's decision to include the WPCF employees in a larger bargaining unit, the Board agrees with the City that the complaint presents an appeal of the City's bargaining unit determination and is controlled by NRS 288.170." As NRS 288.170(5) requires that only an "employee organization" which

is aggrieved by the determination of a bargaining unit may appeal to the Board, the Board held that the local government employee lacked standing to appeal the City's bargaining unit determination. The Board dismissed the complaint. In the same vein, as further detailed below, McCray is an individual and lacks standing to challenge whether exempt-appointed employees such as herself should be a part of the bargaining unit or not.

The County points to the recognition clause contained in the CBA between the County and SEIU, which details the scope of the bargaining unit. *See Int'l Brotherhood of Elec. Workers, Local 1245 v. City of Fernley*, Item No. 565A, Case No. A1-045779 (2005). Said clause provides that County employees who are excluded from the bargaining unit include those employees exempted in accordance with NRS 245.216. Complainant admits that she was exempt-appointed pursuant to NRS 245.216. Am. Complaint, at ¶ 4. As such, Complainant concedes she is excluded from the bargaining unit. The Board takes official notice, pursuant to NAC 288.332, of *In the Matter of SEIU and Clark County* (Fincher Arb. Dec. 19, 2018), attached as Exhibit 3 to the instant Motion to Dismiss, and incorporates it by reference. *See also Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 823 P.2d 877 (1991); NRS 288.140(2). The Amended Complaint specifically asks the Board to determine that exempt-appointed employees are covered by the CBA. The County argues that not only did it make this initial determination, but the union agreed to such exclusion pursuant to the express language of the contract. This is substantively a dispute about the scope of the SEIU bargaining unit and which employees should be in that unit.

In Opposition, Complainant provided Appendix A, which identifies those classifications to be represented, including Family Services I and II, which are clearly delineated as covered positions (is it undisputed that Complainant is a Family Services Specialist). Complainant argues: "As set forth above, the position of Family Services Specialist *is part of the bargaining unit.* If Clark County wishes to bargain with SEIU Local 1107 to *remove all Family Services Specialists* from the bargaining unit, it may do so." Opposition, at 3 (*emphasis* added). As such, Complainant is currently arguing, in the same vein as *Brown*, that the County has improperly excluded the position of Family Services Specialist from the bargaining unit. *See Brown, supra*, (holding that "Because this complaint asks us to review the City's decision to include the WPCF employees in a larger bargaining unit, the Board agrees with the

City that the complaint presents an appeal of the City's bargaining unit determination and is controlled by NRS 288.170.").

Complainant argues that "Clark County is repudiating the entire grievance process and unlawfully attempting to exclude the position from the bargaining unit." Complainant points to the Board's decision in *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Item No. 811, Case No. A1-046120 (2015). The Board held: "When appointing an employee to a bargaining unit position an employer cannot *unilaterally create or alter the negotiated terms of employment affecting an employee in that position*, regardless of whether an employee is 'exempt appointed'..." There is no middle ground under the Act that allows an employer to treat an employee in a bargaining unit position as only partially or selectively covered by a [CBA]." *Id.* (emphasis added). Preliminarily, in *Local 1908*, the union, and not the individual, was the one bringing the challenge. As the Board in *Local 1908* made clear, the employer cannot unilaterally alter the CBA. However, here the CBA provides that exempt employees are excluded, and Complainant admits that she was exempted-appointed pursuant to NRS 245.216 and excluded. A distinguishing difference in this case is that the parties agreed that exempt employees would not be in the bargaining unit. The Board further held that "[w]hen Tuke was appointed to this bargaining unit position [EMS Coordinator], his terms of employment became those contained in the applicable collective bargaining agreement."

Complainant argues that this contract language predates the Board's decision in *Local 1908*, such negotiations would likely be unlawful under said decision, and "[t]his is not a case where, after the decision in ... *Local 1908* ..., the County and SEIU Local 1107 got together and expressly negotiated to exclude such employees." Opposition, at 3. Yet, as indicated, Local 1107 and the County agreed per the CBA, unlike in *Local 1908*, that exempt employees are not part of the unit.

Complainant points to the language in *Local 1908* stating: "There is no middle ground under the Act that allows an employer to treat an employee in a bargaining unit position as only partially or selectively covered by a CBA." This language makes clear that an employer cannot treat an employee *in a bargaining unit position* as only *partially or selectively* covered. In *Local 1908*, "[t]here [was] no dispute that EMS Coordinator is a position included within the represented bargaining unit." Here, however, the County argues that essentially exempt positions are not in the bargaining unit. The

Complaint, as currently written, does not allege otherwise. Moreover, in *Local 1908*, the Board "heard evidence that the County's Fire Department persists in treating Tuke differently than the other EMS Coordinator …." However, here, there are no allegations that Complainant was treated differently than others. "The evidence also showed that the County did not negotiate with IAFF for the ability to treat Tuke differently than other bargaining unit members …." Yet, here, the CBA provides for a distinction and the complaint, as written, does allege otherwise. The Board held that pursuant to "NRS 288.270(1)(e) the County's Fire Department may not unilaterally apply different standards to Tuke than to the other members of the bargaining unit … [and] were an unlawful unilateral change in violation of NRS 288.270(1)(e)."

Furthermore, in *Local 1908*, the first issue was "whether the Act forbids the County from placing non-bargaining unit employees into bargaining unit positions without at least negotiating the matter with IAFF". IAFF contended that "any rights the County may hold under NRS 245.215 cannot encroach upon its bargaining obligations mandated by the Act…." Yet, here, the County and Local 1107 have already agreed to the language of the CBA. Regardless, the Board held that there was no encroachment in *Local 1908* – "Nor would we expect to see encroachment upon bargaining obligations in most instances … The decision of whom to hire or appoint to a particular position is a recognized management right under the Act. NRS 288.150(3)(a)." The Board concluded: "Since there is no obligation to negotiate over the issue of employee appointments, the good-faith bargaining requirements of NRS 288.150(1) and NRS 288.270(1)(e) do not attach to the issue of employee appointments."

As such, in *Local 1908*, the Board went on to explain that the issue in that case was "[w]hile the Act does not generally inhibit the County's authority to decide whom to hire or whom to appoint into a bargaining unit position, the Act does not allow the County to do so in a way that creates employee rights or obligations that differ with a negotiated agreement." Yet, the Amended Complaint does not currently allege as such.

In her Amended Complaint, Complainant alleges that the County violated NRS 288.270(1)(a) and (e). The Board has held that while an employee organization may appeal the determination of a bargaining unit pursuant to NRS 288.170(5), the employer has no duty to bargain with an employee organization as to the classification of employees that will be in a bargaining unit (thus an employer

cannot violate its duty to negotiate over the non-mandatory subject of an appropriate bargaining unit under NRS 288.150). *Int'l Brotherhood of Elec. Workers, Local 1245 v. City of Fernley*, Item No. 565A, Case No. A1-045779 (2005), citing *In the Matter of Int'l Ass'n of Fire Fighters, Local 1265 v. City of Sparks*, Item No. 136, Case No. A1-045362 (1982); *Nevada Classified Sch. Employees Ass'n, Ch. 6 v. Douglas County Sch. Dist.*, Item No. 339, A1-045551 (1994). In other words, it is the employer's prerogative to establish under NRS 288.170 which groups of employees constitute an appropriate bargaining unit, and the employer has no duty to bargain with the employee organization as to what classifications of employees will be included in the bargaining unit. *Id.* This is consistent with the principles established in *Local 1908* as detailed above.

NAC 288.375 provides that the Board may dismiss a matter if the Board determines that no probable cause exists for the complaint (subsection 1), or a complaint presents only issues that have been previously decided by the Board (subsection 5).

While the Amended Complaint as currently written requires dismissal, the Board will not foreclose the availability of filing a Second Amended Complaint.[1]

IT IS, THEREFORE, ORDERED that the Motion to Dismiss the Complaint is GRANTED WITHOUT PREJUDICE.

Dated this 27th day of September 2019.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
CAM WALKER, Board Member

By: _____
GARY COTTINO, Board Member

[1] The FAC made only a simple spelling change, and the Board expressly grants Complainant the right to file a SAC.