STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NATIONAL LATINO PEACE OFFICERS ASSOCIATION, Petitioner, v. LAS VEGAS POLICE PROTECTIVE ASSOCIATION METRO, INC., LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondents.	Case No. 2020-033 **NOTICE OF ENTRY OF ORDER** **ITEM NO. 870**

TO: Complainants and their attorneys of record Mark H. Hutchings, Esq. and Stacy Norris, Esq., and Hutchings Law Group LLC;

TO: Respondent Las Vegas Police Protective Association Metro, Inc. and their attorney of record David Roger, Esq.;

TO: Respondent Las Vegas Metropolitan Police Department and their attorneys of record Nick Crosby, Esq. and Marquis Aurbach Coffing.

PLEASE TAKE NOTICE that the **DECLARATORY ORDER** was entered on the 25th day of February 2021, a copy of which is attached hereto.

DATED this 25th day of February 2021.

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 25th day of February 2021, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER by mailing a copy thereof, postage prepaid to:

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NATIONAL LATINO PEACE OFFICERS ASSOCIATION, Petitioner, v. LAS VEGAS POLICE PROTECTIVE ASSOCIATION METRO, INC., LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondents.	Case No. 2020-033 **DECLARATORY ORDER** **EN BANC** **ITEM NO. 870**

On February 18, 2021, 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 (EMRA, Chapter NRS 288) and NAC Chapter 288. At issue was Petitioner's, National Latino Peace Officers' Association, Petition for Declaratory Order.

Petitioner seeks a declaration that Petitioner, as a purported "non-rival organization" in relation to Las Vegas Police Protective Association (LVPPA), may act as a representative of the bargaining unit that has chosen LVPPA as its exclusive representative. Petitioner did not request a hearing.

In June 2020, this Board issued a declaratory order in *Nevada Highway Patrol Ass'n v. State of Nevada*, Case No. 2020-011, Item No. 865 (2020). This order is incorporated by reference as the Board reaffirms applicable portions of that order herein. The Board preliminarily noted that its jurisdiction is limited to matters arising out of the interpretation of, or performance under, the provisions of the EMRA. NRS 288.110(2). However, the Board additionally noted that while the Board does not have jurisdiction over NRS Chapter 289, since the argument was raised that there was a potential conflict between NRS Chapters 288 (EMRA) and 289, the Board was required by statutory rules of construction to examine if there was conflict. The Board concluded that NRS Chapter 289 did not appear to conflict with NRS Chapter 288 and can be read to render a harmonious result.

The order was based in part on Judge James Russell's decision in *Washoe Ed. Support Professionals v. State of Nevada, Local Government Employee-Management Relations Board*, Case No. 09 OC 00086 1B (2010) (District Court Decision).

The District Court Order concluded:

> Where, as here, an employee organization has been recognized as the bargaining agent for a bargaining unit, the bargaining agent's representative status is *exclusive* and no rival employee organization may purport to 'represent' any employee in the unit in any grievance proceeding or in any other aspect of collective bargaining. Any 'representation' of this nature is fundamentally inconsistent with the status and function of the recognized bargaining agent. *See, e.g., UMC Physicians' Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. [84, 178 P.3d 709, 715 (2008)] ("the interests of employees whose bargaining units are exclusively represented by one employee organization cannot be simultaneously represented by another employee organization"); *Operating Engineers Local Union No. 3 v. City of Reno*, Item No. 7 (1972) (rejecting contention that Chapter 288 'permits an employer to 'recognize' a minority employees organization ..., not negotiation per se, but for purposes other than negotiation such as grievance processing....;).
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> A local government employer who knowingly allows 'representation' of this kind or knowingly participates in a grievance proceeding with an agent or employee of a rival employee organization, *acting as such*, thereby fails to bargain in good faith with the recognized bargaining agent and commits a prohibit practice within the meaning of NRS 288.270(1)(e). *Federal Tel. and Radio Co.*, 107 NLRB 649 (1953) (applying corresponding provisions of the National Labor Relations Act); *Hughes Tool Co.*, 56 NLRB 981 (1944) (same).
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> In the challenged order and in at least one prior decision, the Board has ruled that if an employee in a bargaining unit is a *member* of the employee organization serving as recognized bargaining agent, the employee may *only* be represented in a grievance proceeding by an agent or employee of that organization. *Washoe Ed. Support Professionals v. Washoe County Sch. Dist.*, Item No. 681A, Case No. A1-045930 (EMRB 2009), Finding of Fact No. 4; *United We Stand Classified Employees/AFT v. Washoe County Sch. Dist.*, Item No. 641B, Case No. A1-045888 (EMRB 2007). This ruling has not been challenged. Nor does WESP dispute the right of such employee to retain the services of an attorney of the employee's choice, so long as the expense of this representation is borne by the employee.

Id. at 2-4 (*emphasis* in original). The District Court Order further opined:

> Where, however, a unit employee is *not a member* of the employee organization serving as recognized bargaining agent, NRS 288.140(2) provides that the employee may 'act for himself' in any grievance proceeding – *i.e.*, on his own behalf and without a representative. *Cone v. Nevada Serv. Employees Union*, 116 Nev. 473, 998 P.2d 1178 (2000) (noting that statute 'authorized a nonunion member to act on his own behalf [and] forgo union representation').

> In addition, the Board has ruled that such an employee may be represented by 'counsel', a term that the Board apparently interprets to include a friend, relative or co-worker, or an attorney retained by the employee. *Washoe Ed. Support Professionals v. Washoe County Sch. Dist.*, Item No. 681A, Conclusion of Law No. 15. With the exception noted below, WESP likewise has not challenged this aspect of the Board's ruling.
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> In any matter involving a non-member employee, NRS 288.140(2) provides that 'any action taken on a request or in adjustment of a grievance shall be consistent with the terms of an applicable negotiated agreement, if any.' Accordingly, in any such case, the Board has ruled that the recognized bargaining agent is also entitled to be present '[t]o monitor ... compliance with the applicable [negotiated agreement] and the provisions of NRS chapter 288'. *Washoe Ed. Support Professionals v. Washoe County Sch. Dist.*, Item No. 681A, Conclusion of Law No. 15. Again, this aspect of the Board's ruling has not been challenged.

Id. at 4-5 (*emphasis* in original) (internal citations omitted).

Judge Russell additionally noted: "Where the representative of a non-member employee is also an employee or agent of a rival employee organization, the parties have opposing views on the result that should follow." *Id.* at 5. Moreover, "[b]oth parties agree, in any case, that an *attorney* who is retained by the employee to act as his representative in such proceeding should be allowed to represent the employee, even if the attorney also represents a rival employee organization. To the extent that the Board has so held, its order is affirmed." *Id.* at 6, note 5 (*emphasis* in original). The District Court further found:

> If, as WESP agrees, a non-member employee may lawfully be represented by a friend, relative or co-worked, the fact that the representative also happens to be an agent or employee of a rival employee organization should not disqualify him from serving as representative if in fact he is functionally independently of his role as an agent of the union. On the other hand, if the representative in fact is overtly or covertly attempting to function on behalf of both the employee and the rival employee organization (or solely on behalf of the union), the representative's participation effectively undercuts the status of the recognized bargaining agent and cannot knowingly be permitted by the employer.
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> Accordingly, in any grievance proceeding involving an employee representative who is also an agent or employee of a rival employee organization, the representative cannot function as such – and hence cannot participate in the proceeding .... Where, however, the employer knows or reasonably believes that the representative is serving *entirely independently* of the rival organization as (for example) a friend, relative or co-worker of the employee, the representative's participation is permissible.

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Id. at 6 (*emphasis* in original). The District Court denied the petition for judicial review, as requested by WESP, "to hold that an agent or employee of a rival employee organization is, solely by virtue of that status, precluded from representing an employee in any grievance proceeding...." *Id.* at 7.

In addition, the Board explained: "Allowing this kind of representation would impair the efficiency and utility of the grievance and collective bargaining process, undermine the position of the recognized bargaining agent, and effectively destabilize employee-management relations in the public sector. This is consistent with the exceptions noted above. The exclusivity of representation is a key element in ensuring labor stability in the workplace (one of the important reasons for the adoption of NRS Chapter 288 in 1969) and in allowing a properly recognized union to do its job." Board's Declaratory Order, at 7 (citations omitted). We explained: "Designating one union as the exclusive representation of all employees allows them to speak with one voice, pooling economic strength, ensure their rights are not watered down by divisiveness, respond with institutional knowledge when employers disparately treat them, and allowing this carve out would tend to dilute that strength contrary to the purposes and policies of the EMRA." *Id.* at 8 (citations omitted). Furthermore, "[i]f the Legislature wishes to provide that an agent or employee of a rival labor organization serving in that capacity, may purport to represent any employee in a bargaining unit with a recognized representation, then that is their legislative prerogative. It is not for the Board to make the law, that is for the Legislature, and the Board is required to follow the law regardless of the result." *Id* (citations omitted).

Based on the above as well as additional mandates of statutory construction, the Board held that a harmonious and reasonable reading could be achieved between NRS Chapters 288 and 289. *Id.* at 8-11.

Petitioner claims that the purpose of the instant Petition was as follows: "The June 17, 2020 Declaratory Order is silent on whether a non-rival employee organization may represent a member employee in a grievance proceeding as a friend, co-worker, or fellow peace officer. The June 17, 2020 Declaratory Order is silent on whether an exclusive representative may prohibit a non-rival employee organization from representing a member employee in a grievance proceeding as a friend, co-worker, or fellow peace officer."

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The Board reaffirms applicable portions of our prior declaratory order including the distinctions explained therein. The Board notes that Petitioner did not request a hearing to have an opportunity to present evidence (nor did Petitioner file a reply in support of their Petition in order to contest LVPPA's assertions). Thus, the Board can neither resolve issues as to whether the distinctions are applicable[1], nor can the Board resolve all issues and fully explore the dispute. For example, LVPPA asserted that Petitioner was in fact averse.

LVPPA states that "rival association" was simply a term of art used by Judge Russell to distinguish an exclusive representative from others (in other words, minority unions lacking majority support). Further, NRS 288.133 does not provide for multiple bargaining agents. NRS Chapter 289 additionally provides for "a representative of a labor union," and if the Legislature intended to include a minority union, it would have said so.

As the Board cited to in our prior declaratory order, the NLRB supports these assertions as related to the EMRA (in addition to the plain language and purposes and polices of the EMRA). For example, in *Federal Telephone and Radio Co*, 107 NLRB 649, 651 (1953), "[t]he question of law here is whether or not under Section 9(a) an employee may present an individual grievance to his employer through a rival union of his choice when there exists a certified bargaining representative for the unit in which he is included."[2] The NLRB explained: "The legislative history of the original 1935 Act shows clearly that the earlier proviso was not intended to permit the defeated or minority union any rights to represent employees. Thus, the proposed bills in both House and Senate originally contained, at the end of the proviso, the words, 'through representatives of their own choosing.' These words were

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[1] For example, the conclusion, noted above, "Where, however, the employer knows or reasonably believes that the representative is serving *entirely independently* of the rival organization as (for example) a friend, relative or co-worker of the employee, the representative's participation is permissible."

[2] The EMRA was modeled after the NLRA, and it is the intent of the EMRA to apply the governing principles of the NLRA in implementing the EMRA. This is well established. *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). NRS 288.140, NRS 288.133, and 288.160 were modeled in part after Sec. 9 (§ 159), and as they are substantially similar, a presumption arises that the Legislature intended to adopt the construction by the NLRB. *State, Dep't of Bus. & Indus., Office of Labor Com'r v. Granite Const. Co.*, 118 Nev. 83, 88, 40 P.3d 423, 426 (2002) ("When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent."). Petitioner failed to provide any authority that there was a contrary intent.

eliminated in order to avoid the implication that the 'individual' or 'group might select any representative it wished." *Id.*[3]

The NLRB noted: "The U.S. Court of Appeals for the Fifth Circuit, enforcing in part the Board's order ... commented: It was not thought good to allow grievance hearings to become clashes between rival unions. We think an inexperienced or ignorant griever can ask a more experienced friend to assist him but he cannot present his grievance through any union except the [majority] representative." *Id.* at 652. Further, "Senator Taft stated: ... The revised language would make it clear that the employees right to present grievances exists independently of the rights of the bargaining representative, if the bargaining representative has been given an opportunity to be present at the adjustment, unless the adjustment is contrary to the terms of the collective bargaining agreement then in effect." *Id.* "It is thus clear that these changes were directed only toward assuring the individual griever the right to confer with his employer without participation of the certified bargaining agent. This conclusion is also borne out by the fact that the *North American Aviation* case, cited by Senator Taft as apparently inconsistent with the *Hughes* case, does not involve the **minority union** problem in issue here. Furthermore, the House Conference Report, like the Senate Report, discusses only limitation of the bargaining representative's role. Equally significant is the fact that the 1947 legislative history in no way refers to the intent which unequivocally emerged from the 1935 legislative history. It is clear, then, that the 80th Congress, with knowledge of the Board's construction of the old proviso in *Hughes Tool* and the Fifth Circuit's support of that construction, gave no indication of rejecting that construction or of a different intent." *Id.* at 653 (**emphasis** added). "However, as the General Counsel correctly argues, these provisos could not have been intended to confer rights upon the **minority union**. Indeed, to read such a broad meaning into the provisos would effectively disrupt the peaceful application of the majority rule inherent in the Board's certification and would lead to instability in industrial relations not consonant with the spirit and objectives of the 1947 amendments." *Id.* at 653 (**emphasis** added).

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[3] As is apparent, these decisions were made well before the EMRA was originally enacted. Moreover, in the same vein, we previously noted: "The EMRA had its genesis in Senate Bill 87 in 1969 sponsored by Senator Carl Dodge. SB 87 initially provided specifically for the recognition of more than one employee organization for any given 'negotiating unit'. *See* Sections 10, 11, 13. After it was passed in the Senate, objections were made that the bill's provisions for multiple bargaining agents was unworkable and would result in chaos. Accordingly, when the bill was heard in the Assembly, such language was removed from the bill. The amended language has not been materially changed since that time." Board's Declaratory Order, 8, n. 7 (citations omitted).

The NLRB held: "For the foregoing reasons, and on the record as a whole, we find, contrary to the Trial Examiner, that the Ernst grievance was presented to the Respondent by the IUE, and that the Respondent violated Section 8(a)(5) and (1) of the Act by accepting and considering a grievance presented and processed in behalf of an individual employee by a union other than the certified bargaining agent for the unit in which the griever was included." *Id.*

Thus, the NLRB made it clear that a minority union (regardless of being a self-purported "rival union" or not) may not represent an employee in a grievance proceeding (though again the Board notes that LVPPA contends that NLPOA is averse). This conclusion has received ample support throughout the years. *See, e.g., U.S. Postal Serv.*, 208 NLRB 145, 149 (1974) ("Yet the NLRA does not accord a minority union the right to represent employees on grievances when another union enjoys exclusive recognition as the representative of such employees."); *Nat'l Labor Rel. Bd. v. Kearney & Trecker Corp.*, 237 F.2d 416, 420 (7th Cir. 1956) ("Under the statute ... a grievance under Sec. 9(a) is not necessarily limited to minor matters, but may entail problems arising under a collective bargaining agreement, provided the collective bargaining representative be given an opportunity to be present. This is in conformity with the thought expressed in *N.L.R.B. v. North American Aviation Co.*, 9 Cir.,136 F.2d 898. Thus for the purposes of understanding the application of Sec. 9(a) in conjunction with Sec. 7 in relation to the problem before us, we need not be concerned with the distinction between a 'grievance' and a matter of 'collective bargaining.'")[4]; *Leather Goods Workers (Afl-Cio) Local 346 (Baronet of Puerto Rico, Inc.)*, 133 NLRB 1617, 1630 (1961) ("Any other conclusion would be equivalent to recognizing an uncertified union's right to adjust grievances in derogation of the certified union's exclusive representative status and would run counter to the Board's interpretation of Section 9(a) which defines the rights of a majority representative and the rights of employees to submit grievances."); *Youngstown Cartage Co. (Local 377, Teamsters)*, 146 NLRB 305, 307 (1964) ("The Board has held that the Act imposes no obligation upon, and generally precludes, an employer from

[4] It is easy (as it was for the NLRB) to envision scenarios in which a union could undermine the majority union's exclusive representation in grievance proceedings. For example, a minority union could argue to members of the bargaining unit that they have had greater success than the incumbent (and thus garner further support or undermine the incumbent). Or, in settling grievances, agree to terms that the recognized exclusive representative would not otherwise agree to as those terms may impair the collective bargaining process. *See also supra* note 1. Further, assuming *arguendo*, NLPOA is currently not averse to LVPPA, there are no assurance that they will not become so in the future.

entertaining a grievance on behalf of an individual employed in a bargaining unit other than that represented by the grieving union."); ¶ 2210.391 ANNOTATIONS TO PROCESSING OF GRIEVANCES NO. 3, Labor & Empl. L. P 2210.391 (2020) ("Individual employee has no right to have his grievance presented and processed by minority union."); *Operating Engineers Local Union No. 3 v. City of Reno*, Item No. 7 (1972) (rejecting contention that Chapter 288 'permits an employer to 'recognize' a minority employees organization …, not negotiation per se, but for purposes other than negotiation such as grievance processing….).

As such, based on not only the Legislative history and plain language of the EMRA, but also the purposes and policies of the EMRA, NLPOA may not represent employees of the bargaining unit in grievance proceedings.[5]

Dated this 25th day of February 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
GARY COTTINO, Board Member

By: _____
BRETT HARRIS, ESQ., Board Member

By: _____
MICHAEL J. SMITH, Board Member

[5] Again, due to the posture of this case, the Board could not analyze distinctions noted above. If NLPOA believes they have been improperly denied the ability to represent members, the Board encourages NLPOA to file a complaint with the Board.