STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NYE COUNTY LAW ENFORCEMENT ASSOCIATION, Complainant, v. NYE COUNTY, Respondent.	Case No. 2020-025 **NOTICE OF ENTRY OF ORDER** **ITEM NO. 872**

TO: Complainant and its attorney, Brent D. Huntley, Esq., of Huntley Law; and

TO: Respondent and its attorney, Nick D. Crosby, Esq., of Marquis Aurbach Coffing;

PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on July 20, 2021.

A copy of said order is attached hereto.

DATED this 20th day of July 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 20th day of July 2021, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof to:

Brent D. Huntley, Esq.
Huntley Law
8275 South Eastern Avenue, Suite 200-220
Las Vegas, NV 89123

Nick D. Crosby, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, NV 89145

MARISU ROMUALDEZ ABELLAR
Executive Assistant

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NYE COUNTY LAW ENFORCEMENT ASSOCIATION, Complainant, v. NYE COUNTY, Respondent.	Case No. 2020-025 **ORDER** **PANEL E** **ITEM NO. 872**

On May 27, 2021, this matter came before the State of Nevada, Government Employee-Management Relations Board (Board) for consideration and decision pursuant to the provisions of NRS Chapter 288, the Employee-Management Relations Act (EMRA); NAC Chapter 288 and NRS Chapter 233B. The Board held an administrative hearing in this matter in March and accepted post-hearing briefs from the parties.

The operative complaint asserts two primary violations. First, Complainant asserts that Respondent interfered, restrained and coerced Complainant's members and Board Members in the exercise of their rights under NRS 288, NRS 289, and the applicable CBA in violation of NRS 288.270(1)(a).[1] Specifically, by improperly sending out investigation notices to Complainant's members identifying Complainant's members and board members as their accusers and by falsifying the actual allegations made, Respondent is alleged to have attempted to interfere, restrain and coerce Complainant's members from actively defending members in the disciplinary process. Complainant also asserts that by actively spying on and notifying Complainant's members that their union activities

[1] The Board does not have jurisdiction to find a violation of NRS 289 or breach of contract. This is well established. NRS 288.110(2); *see also, e.g., Nevada Highway Patrol Ass'n v. State of Nevada Dep't of Public Safety*, Case No. 2020-011, Item No. 865 (2020); *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); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018).

are monitored by the Nye County Sherriff's Office (NCSO), Respondent interfered, restrained and coerced Complainant's members in their ability to exercise their rights.

Second, Complainant contends that Respondent interfered in the administration of Complainant by purposefully publishing inaccurate and inappropriate notices to Complainant's members attacking Complainant's board members on the eve of a Complainant board election in violation of NRS 288.270(1)(b). Complainant asserts that Respondent dominated and interfered in the administration of Complainant by spying on its confidential and protected activities and by sending correspondence to Complainant members notifying them that confidential union communications are being monitored, responding to union business and attacking union board members.

On June 16, 2020 and June 18, 2020, pre-disciplinary hearings for Detectives Parra and Cox, respectively, were conducted following a recommendation for termination of the officers. Those present at the June 16th hearing included Undersheriff Michael Eisenlofeel, Sheriff Sharon Wehrly, Deputy District Attorney Brad Richardson, Association Vice President Morgan Dillon, Complainant's attorney Brent Huntly, and Detective Parra. At the pre-disciplinary hearing, Det. Logan Gibbs requested the Sheriff to open an investigation into the investigator, Harry Means.

Following the pre-disciplinary hearing for Det. Parra, an internal investigation was started based on the arguments made during the pre-disciplinary hearing. Capt. David Boruchowitz explained that following the pre-disciplinary hearing, he was provided with the information about the allegations of improper conduct and request for an investigation by the Sherriff and Undersheriff. Specifically, there was what amounted to an allegation of a conspiracy (the allegations and contents of the hearing were provided to Capt. Boruchowitz by the Sherriff and Undersheriff who were at the pre-disciplinary hearing).

After his conversation with the Sherriff and Undersheriff, Capt. Boruchowitz drafted language for investigation notices to Means, James Brainard, and Joey Marshall. Capt. Boruchowitz directed Lt. Thomas Kelnczar to send the Notices. The Notices stated:

> Pursuant to the NCLEA collective bargaining Agreement Article 13 subsection 6.a.i please accept this as notice that a complaint has been lodged against you and investigation is being initiated in reference to allegations of conspiracy and untruthfulness in the performance of your duties. It has been alleged by NCLEA

Representatives Det. Gibbs, Det. Meade, Det. Dillon, Attorney Huntley, and NCLEA Members Cox and Parra that the three of you conspired and unethically used your position within the Nye County's Sheriff's Office to dishonestly fabricate allegations against Det. Cox and Parra in violation of NCSO Policy #0068.

On June 18, 2020, notices were also sent to Trevor Meade and Morgan, which stated that, pursuant to the CBA, complaints were lodged and an investigation initiated "in reference to allegation You (sic) are to be a witness in Means, Marshall and Brainard [sic] alleged conspiracy and untruthfulness in the performance of their duties." On June 22, 2020, John Powell sent an informal grievance to Lt. Klenczar, Undersheriff Eisenloffel and Sheriff Wehrly. Complainant stated therein that attempting to compel Complainant "Officials in their official Union Capacity, under threat of public employee discipline, to act against the interest of NCLEA members, incorrect statements attributed to board members and union member in IA notice, improper naming of board members and union member in IA Notice. Violations of CBA Article 7, NCSO Policy 0068, state and federal law." Complainant grieved the employee representatives being noticed for an investigation when they were acting in their capacities as union representatives, rather than public employees. The Informal Grievance also took issue with the characterization of the allegations in the Notices, the inclusion of Brainard and Marshall as subject employees, and that only one person requested the investigation.

On June 29, 2020, Capt. Boruchowitz responded to the Informal Grievance on behalf of the NCSO. Capt. Boruchowitz responded to the narrative provided in the Informal Grievance. Capt. Boruchowitz agreed that Complainant Representatives Dillon, Gibbs, and Meade were not involved in the original incident. Capt. Boruchowitz indicated that "subsequent allegations described behavior which painted a picture of a conspiracy." Further, "there [was] no question in [their] mind after listening to the description presented that the NCLEA purported Det. Marshall, Det. Brainard and Det. Means did conduct an investigation that was dishonest and were involved in a conspiracy of some sort with Judge Chamlee and DA Arabia."

Additionally, the arguments presented by Complainant during the pre-disciplinary hearings "left no question in the mind of the Sheriff or Undersheriff that [NCLEA was] alleging a conspiracy between several individuals during the conduct of this investigation." "In addition, the defense did not only address the alleged issues by Inv. Means, but also with Inv. Brainard, and Inv. Marshall. This was not a defense focused at only one Sheriff's Office employee. There were three personnel involved, although

only one was not an NCLEA member." Capt. Boruchowitz explained that the Sherriff obliged Complainant's request for an investigation, adding that Complainant could not ask NCSO to investigate only one person when the allegations clearly implicated other employees. Capt. Boruchowitz noted, "At the end of the day this investigation was initiated at the request of the NCLEA." "We apologize that you only wanted us looking at one individual and not the other two, but that is not how fair and appropriate investigation are conducted." "The defense included allegations made against all three individuals, thus the investigation must be made into all three."

Capt. Boruchowitz agreed that the Notices were not in conformity with past practice. However, he also explained that the Notices were "unlike any that [have] been sent prior, thus there was not past practice that is the same or similar. This is the first time the NCLEA has requested an investigation as part of a pre-disciplinary hearing." Captain Boruchowitz further explained that the inclusion of the names was attributed to Complainant's belief that it was "essential to ensure that the suspect officers knew who they could and could not use as representatives in this matter". Capt. Boruchowitz indicated this was in an attempt to be compliant with NRS 289.080.

Complainant also alleged that "news of the inaccurate and inappropriate notices will surely spread throughout the membership" and was a way to "falsely convince the NCLEA membership that their own Executive Board is against them." Capt. Boruchowitz explained the notices were confidential communications, and the NCSO "administration had not shared this information outside of the formal notification processes." Capt. Boruchowitz stated that it was false that the intent of the investigation was "to convince the NCLEA membership that the board is against them". "This administration responded to the NCLEA request to conduct an investigation" and "has respected their position in all cases." Capt. Boruchowitz explained that "[i]n all the years the Sheriff had been a member or officer in a collective bargaining union, this is the first time she ever experienced a request for an investigation during a pre-disciplinary hearing." "However, the Sheriff obliged the NCLEA's request and started this investigation." Further, the "County Sheriff and staff had no knowledge of an NCLEA election nor would it have had any bearing on the decision to conduct an investigation." Capt. Boruchowitz reiterated that the NCSO "simply obliged the NCLEA's request and started this investigation."

Capt. Boruchowitz additionally explained that the NCSO was "not attempting to have NCLEA

officials divulge protected union speech." NSCO "management is not attempting to control the protected activities of the union and we agree we cannot do so under threat of departmental discipline." Further, Capt. Boruchowitz explained that certain emails "to NCLEA representative [were] withdrawn at [their] request" and NSCO would "continue the investigation using the record made in the pre-disciplinary hearing." Capt. Boruchowitz apologized, indicating: "The Sheriff and staff are sorry a notice was sent if these individuals were Peace Officers in accordance with NRS 289 instead of NCLEA representatives." Capt. Boruchowitz explained that they understood the statements were made in defense of Complainant members; however, NCSO was "simply conducting an investigation as requested by the NCLEA." Further, the intent of the investigation is to "look into allegations at the request of the NCLEA." Capt. Boruchowitz assured that there "was no intention to intimate and harass union representatives and sew discord within the union."

On July 6, 2020, Complainant sent an email to its members regarding the investigation requested at the pre-disciplinary hearing. The email stated the "rumor that members of the NCLEA Executive Board have filed Internal Affairs charges against NCLEA members" was "completely and wholeheartedly untrue." The emailed noted that "[w]hile it is not fun or ideal, at times, members are in conflict with each other" and "[a] statement from one member may be the basis for the discipline against the other member." Further, the union would defend the member facing discipline, and "[u]nfortunately, this type of situation has always been around and always will be." The NCLEA Board noted: "In a recent IA Notice, three Union Representatives were listed by Internal Affairs as the Complainants against two NCLEA members." It was disclaimed that there was a request for investigation made against those two members. The NCLEA Board also noted that a grievance was lodged and indicated it was "currently being resolved." Part of the grievance was that the Union Reps could not be compelled to participate at IA against Complainant's members, and the "NCSO has no right to control the activities of the union, and they have no control over Union Officials when they are in their Official Union Capacity." The NCLEA Board noted that this "portion of the grievance has almost been resolved already as Admin has acknowledged they cannot force Union Officials to testify against members in their Union Capacity." The NCLEA Board stated that this would set the record straight and apologized if the rumor "created any discontent." The email also alleged that "[a]ctions

like these are classic examples of Union Busting."

The next day, Capt. Boruchowitz sent an email to NCSO staff in part addressing the allegations of "union busting" contained in the July 6th email. Capt. Boruchowitz stated the administration's position including a denial of any attempt to "union bust".

At the hearing, Capt. Boruchowitz testified that he had never actually seen the July 6th email, and instead was told about its contents by Sgt. Augustine, possibly Sgt. Fowles, and through general conversations overhead in the workplace. Capt. Boruchowitz did not solicit this information. Capt. Boruchowitz was questioned on why he listened to the employees, and Capt. Boruchowitz explained that employees came to "the management team and advised that the union was purporting dishonest statements about the administration to the employees of our agency." Further, "when an employee comes forward and purports that the union board has sent an email to our employees with inappropriate or dishonest statements, the question as to why I would listen because it's pertinent to the fact that our employees are being told lies and I felt it was important to listen and relay to the sheriff what I was being told."

Sherriff Wehrly confirmed Capt. Boruchowitz's email was sent at her direction and explained that it was in reference to the contents of the July 6th email. She explained that she believed she was told about the contents of said email from Lt. Klenczar and Capt. Boruchowitz, who relayed to her that they had been advised of the contents from other employees, consistent with Capt. Boruchowitz's testimony. Sherriff Wehrly further explained that she would never approve any action of "union busting" and added that Complainant used to be her union, so there is "no way that [she would] do that."

DISCUSSION

As indicated, Complainant asserts two primary violations.

It is a prohibited practice for a local government employer "willfully to" "[i]nterfere, restrain or coerce any employee in the exercise of any right guaranteed under [the EMRA]." A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right

guaranteed under the EMRA.[2] It is of critical importance when analyzing applicable NLRB related precedent to not confuse or conflate the rights upon which a NRS 288.270(1)(a) (or similarly Sec. 8(a)(1) under the NLRA) violation is found.[3]

NRS 288.270(1)(a) provides that it is a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA. While it is not entirely clear from the Complaint or Complainant's subsequent submissions, we find that Complainant sufficiently pled that the employees' NRS 288.140(1) rights were violated.[4]

As we have explained, pursuant to NRS 288.270(1)(a), "[t]he test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Juvenile Justice Supervisors Ass'n v. County of Clark*, Case No. 2017-020, Item No. 834 (2018), *citing Clark Cty. Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item 237 (1989). There are three elements to a claim of interference with a protected right: "(1) the employer's action can be reasonably viewed as tending to interfere with, coerce, or deter; (2) the exercise of protected activity [by NRS Chapter 288]; and (3) the employer fails to justify the action with a

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[2] *See, e.g.*, *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-B (2021); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-B (2021); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 100, 715 P.2d 1321, 1323 (1986); *Ormsby County Teachers Ass'n v. Carson City Sch. Dist.*, Case No. A1-045405, Item No. 197 (1987); *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 476, 998 P.2d 1178, 1180 (2000); *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 678, 119 P.3d 1259, 1261 (2005); *Nevada Serv. Employees Union, Local 1107, AFL-CIO v. Clark County*, Case No. A1-045759, Item No. 540B(2005); *Kilgore v. City of Henderson*, Case No. A1-045763, Item No. 550H (2005); *Reno Police Supervisory and Employees Ass'n v. City of Reno*, Case No. A1-045923, Item No. 694 (2009); *Eason v. Clark County*, Case No. A1-046109, Item No. 798; *Am. Ship Bldg. Co. v. N. L. R. B.*, 380 U.S. 300, 308, 85 S. Ct. 955, 962, 13 L. Ed. 2d 855 (1965) ("To establish that this practice is a violation of s 8(a)(1), it must be shown that the employer has interfered with, restrained, or coerced employees in the exercise of some right protected by s 7 of the Act."); *N. L. R. B. v. Transp. Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971) ("Sections 8(a)(1) and 8(a)(3) implement the rights guaranteed to employees by § 7.")

[3] We note that Complainant did not allege a violation of NRS 288.270(1)(c) (Sec. 8(a)(3) equivalent under the NLRA) or NRS 288.270(1)(d). As such, those claims are not at issue in this case as we are limited to the complaint in this respect. This is important when analyzing the various case applications. *See AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-B (2021); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-B (2021); *Cardinale v. City of N. Las Vegas*, Case No. 2019-010 (2021); *Int'l Ass'n of Fire Fighters, Local 5046 v. Elko County Fire Prot. Dist.*, Case No. 2019-011, Item No. 847-A, at 21 n. 5 (2020), *citing Nye County Management Employees Ass'n v. Nye County*, Case No. 2018-012 (2019), *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 308, 721 P.2d 378 (1986); NRS 233B.121(9), *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1253, 78 Cal. Rptr. 3d 372, 381-82 (2008); *Hutton v. Fid. Nat'l Title Co.*, 213 Cal. App. 4th 486, 493, 152 Cal. Rptr. 3d 584, 590 (2013); *Bonner v. City of North Las Vegas*, Docket No. 76408, 2020 WL 3571914, at 3, n. 2, filed June 30, 2020, unpublished deposition (Nev. 2020).

[4] NRS 288.140(1) provides: "It is the right of every local government employee … to join any employee organization of the employee's choice or to refrain from joining any employee organization." *Compare with* 29 U.S.C. § 158(a)(1) (Sec. 8) ("to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]"), 29 U.S.C. § 157 (Sec. 7) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, … and to engage in other concerted activities for the purpose of … other mutual aid or protection….").

substantial and legitimate business reason." *Billings and Brown v. Clark County*, Item No. 751 (2012); *citing Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1988); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 101, 715 P.2d 1321, 1323 (1986); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-B (2021); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-B (2021).[5]

In *Medco*, when dealing with the Section 8(a)(3) discrimination claim, the Fourth Circuit noted that "an employer violates this section 'only if its actions are motivated by anti-union animus.'" *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 741 (4th Cir. 1998). In contrast, when analyzing the distinct Section 8(a)(1) interference of Section 7 rights claim, the Court explained, "If protected activity is implicated, the well-settled test for Section 8(a)(1) violations is whether, "under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees." *Id.* at 745. "It matters 'not whether the [employer's] language or acts were coercive in actual fact.' Our inquiry instead focuses on 'whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate.' This question of '[w]hether particular conduct is coercive is a 'question essentially for the specialized experience of the NLRB,' and we grant considerable deference to its determinations." *Id.* (internal citations omitted).

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[5] *Contra Reno Police Protective Ass'n*, 102 Nev. at 101, 715 P.2d at 1323 (applying the burden shifting approach common in cases of discrimination), *citing N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394, 103 S. Ct. 2469, 2470–71, 76 L. Ed. 2d 667 (1983), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994) (noting the "complaint alleg[ed] that an employee was discharged because of his union activities"); NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) ("by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"); *N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 909 (1st Cir. 1981), *abrogated on other grounds by N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983) ("Wright Line discharged Lamoureux because of his union activity, in violation of section 8(a)(3) of the Act."); *Champion Parts Rebuilders, Inc., Ne. Div. v. N.L.R.B.*, 717 F.2d 845, 853 (3d Cir. 1983) ("Under the Board's *Wright Line* analysis, the Company's failure to meet its burden of persuasion that it had a non-discriminatory reason for its action results in a finding for the General Counsel."); *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980) ("In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1)", "After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act."); *N.L.R.B. v. United Sanitation Serv., Div. of Sanitas Serv. Corp.*, 737 F.2d 936, 939 (11th Cir. 1984) ("The question of an employer's motivation in section 8(a)(3) cases is a question of fact to be resolved by the Board from a consideration of all the evidence."); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, at 2, filed June 30, 2020, unpublished deposition (Nev. 2020); *Napleton 1050, Inc. v. Nat'l Lab. Rels. Bd.*, 976 F.3d 30, 39 (D.C. Cir. 2020) (explaining that "[t]he finding of a violation of Section 8(a)(3) would also trigger a violation of Section 8(a)(1)").

The Court continued: "We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement. '[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated.'" *Id.* "This determination is also squarely within the expertise of the Board. '[I]t is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Id.* As such, the Court explained: "Consequently, an independent violation of § 8(a)(1) exists when (1) an employer's action can be reasonably viewed as tending to interfere with, coerce, or deter (2) the exercise of protected activity, and (3) the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's § 7 rights." *Id.*

Further, pursuant to NRS 288.270(1)(b), it is a prohibited practice for a local government employer willfully to "[d]ominate, interfere or assist in the formation or administration of any employee organization." *See also* 29 U.S.C. § 158(a)(2) (Sec. 8) ("to dominate or interfere with the formation or administration of any labor organization"). The Board has refused to find a violation of NRS 288.270(1)(b) where the employer's conduct cannot reasonably be construed as dominating or interfering with an employee organization. *Las Vegas City Employees' Ass'n v. City of Las Vegas*, Case No. A1-046108, Item No. 804 (2015).

In *Las Vegas City Employees' Ass'n*, the Board found that the City's action could not reasonably said to interfere with protected rights or with the association's administration because the City's actions were prompted by the association's invitation for the City to discipline Sharp. *Id.*; *see also Hertzka & Knowles v. N.L.R.B.*, 503 F.2d 625, 630 (9th Cir. 1974) ("The sum of this is that a § 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue."); *Goody's Family Clothing, Inc.*, 21 NLRB AMR 31018; *Gibbs, Robert*, 109 NLRB 410, 416 (1954); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1016 (9th Cir. 1990) ("It is not the potential for but the reality of domination that these statutes are intended to prevent.").[6]

[6] While Complainant previously asserted in its Pre-Hearing Statement that an issue before the Board was "[w]hether Nye County and NCSO assisted in the formation of a competing union when Capt. Boruchowitz provided assistance to sergeants in forming a separate union", Complainant subsequently withdrew this portion of the claim at the hearing.

Complainant failed to put forth credible evidence that Respondent took any adverse action against any Complainant members because of their representation of Detectives Cox or Parra in the pre-disciplinary hearings. The Board finds it credible that the complained-of notices were issued because an internal investigation was requested by Complainant's team during the pre-disciplinary hearing. The transcript from Det. Cox's disciplinary hearing clearly provided that: "Sherriff, I'm just – I'm humbling – I'm humbling requesting that (Means) be investigated for these lies. This shouldn't stand." As Det. Gibbs testified, he asked the Sherriff investigate Means "[d]ue to multiple discrepancies." It was credibly shown that it was the request for investigation which prompted the issuance of the notices of an internal investigation. Respondent also showed that it was reasonable to notice to investigate all individuals which were implicated even if only one had been requested based on the totality of the circumstances as specified above and further below.

Regarding the contents of the notices, while Capt. Boruchowitz agreed the inclusion of the names of the accusers in an internal investigation is not normal, this was credibly shown to be due to this not previously occurring (*i.e.*, someone with Complainant requesting an internal investigation into another during a pre-disciplinary hearing). Capt. Boruchowitz also credibly explained the purpose behind the inclusion, at least in terms of why he believed it was important. Moreover, Complainant failed to show that this was otherwise prohibited. While Complainant pointed out that the Response to the Grievance could in part be inaccurate as Lt. Klenczar did not feel it was important that the subject employees knew who was "connected to" the investigation to ensure they did not waste their time talking to a representative who would ultimately not be able to participate in the interview, Lt. Klenczar noted it was inaccurate only if it was referring to him as the IA representative. The Response also noted prior thereto that the "names of the NCLEA representatives were included in the notice because the Nye County Sheriff's Office felt it essential to ensure that the suspect officers knew who they could and could not use as representatives in" that matter. Moreover, as indicated, the Response and testimony indicated that they were also trying to comply with NRS 289 and this was unlike prior situations. In responding to a question regarding the specific language in NRS 289, Capt. Boruchowitz clarified that he had "never been in this situation like I was this time." Moreover, Sheriff Wehrly testified that most of the union board was involved in the pre-disciplinary hearing. Capt. Boruchowitz

is also president of his union and used to be the president of NCLEA - Capt. Boruchowitz described himself as "definitely a union guy."

Complainant also contends it was inappropriate with how Respondent framed the situation including that a conspiracy was alleged. However, we find it credible the Respondent reasonably believed that it was in essence being alleged based on the totality of the circumstances including the statements made by all those present at the hearings. The Board finds Sheriff Wehrly credible in her explanation related thereto including basing the statement on what was said during the pre-disciplinary hearings. The Sheriff felt that a conspiracy was essentially alleged based not only on what was said at the hearings but also the mood thereat. We find the Sheriff credible. The Sheriff based this on the totality of the events at the hearings, and she agreed "to see if there was more to it and had three people investigated to see if there was any truth that [she] could find." While Complainant argued that some of the individuals did not make direct allegations, clearly the Sherriff felt based on the totality of events that improper conduct was attributed to those three investigated. Respondent, when presented the possibly of improper conduct, reasonably choose to at least investigate to determine, as the Sheriff credibly indicated, whether any improper conduct did in fact occur.

Importantly, we do not find that Respondent's actions may reasonably viewed as tending to interfere with, coerce or deter the exercise of protected under the EMRA based on the totality of the circumstances, and Respondent justified their actions with a substantial and legitimate business reason. Moreover, we do not find that Respondent's action willfully dominated or interfered with the administration of Complainant. *See, e.g., Las Vegas City Employees' Ass'n v. City of Las Vegas*, Case No. A1-046108, Item No. 804 (2015); *see also Hertzka & Knowles v. N.L.R.B.*, 503 F.2d 625, 630 (9th Cir. 1974) ("The sum of this is that a § 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue."); *Goody's Family Clothing, Inc.*, 21 NLRB AMR 31018; *Gibbs, Robert*, 109 NLRB 410, 416 (1954); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1016 (9th Cir. 1990) ("It is not the potential for but the reality of domination that these statutes are intended to prevent.").

In the same vein, the Board also finds it credible that an NCLEA election had no bearing on the decision to conduct an investigation (even if they were theoretically aware of an election), cannot

reasonably viewed as tending to interfere with, coerce, or deter in the exercise of that protected activity, and Respondent, as indicated, justified its actions with a substantial and legitimate business reason.[7]

Capt. Boruchowitz reiterated that the NCSO "simply obliged the NCLEA's request and started this investigation." As indicated above, it was indisputably shown that the transcript from Det. Cox's disciplinary hearing provided that: "Sherriff, I'm just – I'm humbling – I'm humbling requesting that (Means) be investigated for these lies. This shouldn't stand." As Det. Gibbs testified, he asked the Sherriff investigate Means "[d]ue to multiple discrepancies." In response to the Informal Grievance, Capt. Boruchowitz indicated that "subsequent allegations described behavior which painted a picture of a conspiracy." This information was obtained through the Sheriff and Undersheriff who were present at the predisciplinary hearing.

Capt. Boruchowitz also credibly explained that he was voluntarily informed by others of information in Complainant's email to its members. Specifically, the union purportedly presented dishonest statements about the administration to the employees. Capt. Boruchowitz explained that Sheriff had always been clear that she will defend the employees and management from dishonest statements and will rebut them. Capt. Boruchowitz credibly explained that he would have never known about this communication if it had not been volunteered.

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[7] Moreover, while the evidence showed that it was possible that the administration was aware of the pending election, Lt. Klenczar explained that he didn't "want to assume they all did" but believed they talked about it. Lt. Klenczar also testified that it was "possible" he had a conversation with Cpt. Buruchowitz. Regardless, even if Cpt. Buruchowitz could have been aware of the election or did have actual knowledge, credible evidence was not presented that Respondent willfully dominated or interfered in the administration of Complainant. *See, e.g., Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1016 (9th Cir. 1990) ("It is not the potential for but the reality of domination that these statutes are intended to prevent."). In other words, Respondent credibly explained the timing of their actions was unrelated to union activity or coercing the employees in their choice regarding the internal union election. Furthermore, Complainant's contention in this regard was unsupported by authority which would support to a violation. *See, e.g., Rhyne v. State*, 118 Nev. 1, 12, 38 P.3d 163, 170 (2002) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal."); *T.L. Townsend Builders, LLC v. Nevada State Contractors Bd.*, Docket No. 80518, 2021 WL 1530073, filed April 16, 2021, at 1 n. 2 (Nev. 2021), *citing Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (requiring parties to support arguments with salient authority); *City Plan Dev., Inc. v. Off. of Lab. Com'r*, 121 Nev. 419, 428, 117 P.3d 182, 188 (2005). Complainant cited to the 1941 decision of *N.L.R.B. v. Grower-Shipper Vegetable Ass'n of Cent. California*, 122 F.2d 368 (9th Cir. 1941). However, the 9th Circuit dealt with a violation of a the duty to bargain in good faith (not alleged in this case – *see supra* note 3), espionage, and interference generally which was unrelated to interference with internal elections (and instead "were all found by the Board to constitute an interference with the union's efforts to bargain collectively."). *Id.* at 376. In the same vein, Complainant's citation to *Santa Fe Drilling Co. v. N.L.R.B.*, 416 F.2d 725, 728-29 (9th Cir. 1969) is not on point regarding whether Complainant interfered with Complainant's internal election – instead detailing a situation involving "threatening or coercive" "interrogation of employees concerning their union activities", the employees' choice to unionize, and conduct occurring after the election in response thereto for voting for the union.

Det. Gibbs requested an investigation into Investigator Means who was a non-dues paying member of the bargaining unit (Det. Gibbs believed the dues paying members were not implicated). As Capt. Boruchowitz explained, "the reality is your allegations encompassed two of your dues paying members". As such, based off the information received from the Undersheriff and Sheriff including their reasonable interpretations from the disciplinary hearings, all three bargaining unit members were investigated regardless of their dues paying status. Even Det. Gibbs agreed that Complainant, in its defense of Officer Cox, was attempting to paint a connection between Justice of the Peace Chamlee, Det. Marshall, Means, Brainard, and District Attorney Arabia. As Det. Gibbs explained, he had never previously requested at a pre-disciplinary hearing that an internal affairs investigation be conducted on the investigating detective. While Capt. Boruchowitz could not recall the specifics of the entirety of the transcripts at the hearing, as indicated, he credibly explained that his information came from the Undersheriff's and Sheriff's interpretations as to what was said at the pre-disciplinary hearing. Moreover, Det. Gibbs agreed that the notices only went out to the people that received them, and the only way the membership at large would have learned about a notice of an internal investigation interview is if the person receiving the notice disclosed it. While it was evident that information is often widely disseminated at the NCSO, Det. Gibbs conceded that there was no evidence that they were sent to anyone besides the Dets. Means, Brainard, or Marshall.

Complainant decided, due to rumors members may have heard, to send the email to its members, which contents were volunteered to Capt. Boruchowitz. Capt. Boruchowitz clearly felt it necessary to respond to the information that was volunteered to him, not out of an effort to interfere with the free exercise of employee rights under the EMRA, but instead to disclaim that Respondent was involved in "union busting" as well as to address what Respondent reasonably perceived as false allegations made against the administration. As explained, the Sheriff had been consistent to offer a rebuttable policy. Respondent specifically said the actions they took were not "geared towards interfering, coercing, or inappropriately interfering with NCLEA's defense of its members." Respondent explained that due to the allegations alleged, even though an investigation was only

requested as to a non-dues paying bargaining unit member[8], the administration will conduct an investigation based on the allegations.

More importantly, we do not view Capt. Boruchowitz's July 7th email as reasonably tending to interfere with, coerce, or restrain in the exercise of protected activity. Capt. Boruchowitz justified the action with a substantial and legitimate business reason. In so finding, we balanced the employees' protected rights against the substantial and legitimate business justification given, and find that the business justification outweighed any potential interference with employees' rights under the EMRA.[9] We note, however that we found this to be a close call.

Next, as indicated, we do not find it credible that Capt. Boruchowitz or Respondent spied on union activities. "In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enfd.* 181 Fed. Appx. 85 (2d Cir. 2006). "The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activates. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the

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[8] We also note that a local government employer is prohibiting from discriminating among its employees on account of membership or nonmembership in an employee organization. NRS 288.140(1). As such, it would have been improper for Respondent to only investigate a non-dues paying member and refuse to investigate those dues paying members who were potentially implicated on account of their union membership. As Capt. Boruchowitz explained: "At the end of the day this investigation was initiated at the request of the NCLEA." "We apologize that you only wanted us looking at one individual and not the other two [dues paying members], but that is not how fair and appropriate investigation are conducted." "The defense included allegations made against all three individuals, thus the investigation must be made into all three." As Complainant agreed in their communication to their members, "[w]hile it is not fun or ideal, at times, members are in conflict with each other" and "[a] statement from one member may be the basis for the discipline against the other member."

[9] In the same vein, we do not find that Respondent willfully dominated or interfered with the administration of Complainant. As we have explained, we do not find a violation of NRS 288.270(1)(b) where the employer's conduct cannot reasonably be construed as dominating or interfering with an employee organization. *Las Vegas City Employees' Ass'n v. City of Las Vegas*, Case No. A1-046108, Item No. 804 (2015). *See also Hertzka & Knowles v. N.L.R.B.*, 503 F.2d 625, 630 (9th Cir. 1974) ("The sum of this is that a § 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue."); *Goody's Family Clothing, Inc.*, 21 NLRB AMR 31018; *Gibbs, Robert*, 109 NLRB 410, 416 (1954); *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1016 (9th Cir. 1990) ("It is not the potential for but the reality of domination that these statutes are intended to prevent.").

individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees." *Id.* (emphasis in original).

Given the office culture of dissemination, we do not find that reasonable employees would assume from Respondent's action that their protected conduct had been place under surveillance. Capt. Boruchowitz credibly testified that he was not given a copy of the email in question and did not see it until the hearing before this Board. Moreover, witnesses conceded that it was possible for Capt. Boruchowitz to have heard of the contents from members. *See, e.g., Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enfd.* 181 Fed. Appx. 85 (2d Cir. 2006) ("To the contrary, we think that a reasonable employee would assume that Bakari lawfully learned of Albright's message exactly the way Bakari did—through public dissemination by another website subscriber."). There was no credible evidence presented at the hearing that Capt. Boruchowitz intercepted the July 6th email. In the same vein, it was admitted that it was possible a member of Complainant could have told Capt. Boruchowitz of the contents of said email. There was not credible evidence presented that Capt. Boruchowitz was spying on Complainant communications.

Complainant cites to *Nat'l Captioning Inst., Inc.*, 368 NLRB No. 105 (Oct. 29, 2019) in which the NLRB adopted the finding "that the Respondent engaged in unlawful surveillance of a private employee Facebook group, unlawfully disciplined Lukas, and unlawfully discharged Lukas and Hall because of their support for the organizing drive." However, in that case, the NLRB explained that the respondent violated the NLRA when it "repeatedly solicited and received from employee Anderson reports about the membership of the VW Bus Facebook group and the messages posted on the group's Facebook page." *Id.* at 7. The NLRB explained that "the Respondent encouraged an employee to report on a private, invitation-only Facebook group dedicated to discussions about unionizing the Respondent's employees." *Id.* Moreover, "Patterson followed up on Anderson's initial reports with requests for additional information on the membership of the group and its activities." *Id.* The NLRB put forth: "It is well settled that an employer commits unlawful surveillance if it acts in a way that is out of the ordinary in order to observe union activity." *Id.*

Here, based on the totality of the circumstances, we do not find that Respondent did anything out of the ordinary in order to observe union activity and instead this information was offered to

Respondent. As the Sheriff credibly explained, the NCSO is "pretty close". Capt. Boruchowitz credibly testified that "[t]hey came and volunteered it." Moreover, we were not presented with credible evidence that Capt. Boruchowitz attempted to "repeatedly solicite[]" private information. *See also, e.g.*, *Bellagio, LLC v. Nat'l Lab. Rels. Bd.*, 854 F.3d 703, 712 (D.C. Cir. 2017) (listing cases in which the Board has found unlawful surveillance and concluding they did not apply as "[a]ll Wiedmeyer did in this case was briefly observe Garner in a common area where Wiedmeyer had every right to be); *Metal Indus., Inc.*, 251 NLRB 1523, 1523 (1980) (observation of employees at place and time where management was often present was lawful); *see contra S.J.P.R., Inc. d/b/a Sands Hotel & Casino, San Juan & Union of Trabajadores De La Industria Gastronomica De Puerto Rico, Loc. 610, Hotel Emps. & Rest. Emps. Int'l Union, Afl-Cio*, 306 NLRB 172, 189 (1992), *enf'd sub nom. mem. S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993) (violation of Section 8(1)(a) of the Act as the "Company posted the two guards to observe and overhear the conversations of the four employees and any other kitchen employees who might be discussing strike action or other lawful response to the Company's requirement of continued temporary employment.").[10]

Next, Complainant also failed to present sufficient evidence that Respondent retaliated against Complainant's members. While it does not appear that this claim was properly before the Board at least pursuant NRS 288.270(1)(c) or (d) (*see supra* note 3)[11]), Respondent showed that the retirement of

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[10] Complainant additionally cited to the NLRB's decision in *Napleton 1050, Inc.*, 367 NLRB No. 6 (Sept. 28, 2018). The NLRB found that "that the Respondent violated Section 8(a)(1) by creating the impression, under the totality of the circumstances, that employees' union activities were under surveillance". *Id.* However, the NLRB, in adopting the ALJ's recommended order, based this on the finding that "[h]ere, as noted by the judge, 'the undisputed record evidence is that during the union campaign the [employees] did not openly discuss the [U]nion at work for fear that management would retaliate against them.' Hence, under all of the relevant circumstances, we find that Russell would have reasonably concluded that the only explanation for Inman's suspected knowledge of employees' union activity was that Inman was surveilling them." *Id.* As explained above, the same cannot be said in the current case. *See also Greater Omaha Packing Co. v. N.L.R.B.*, 790 F.3d 816, 824 (8th Cir. 2015) (noting "the distinction that it is only employer surveillance that is unlawful, not obtaining information volunteered by other employees").

[11] Retaliatory conduct (either pursuant to discriminatory conduct as specified NRS 288.270(1)(d) or (f)) is generally analyzed under the framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108 (2013). *See also Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, at 2, filed June 30, 2020, unpublished deposition (Nev. 2020); *D'Ambrosio v. Las Vegas Metropolitan Police Dep't*, Item No. 808, Case No. A1-046119 (2011); *Wilson v. City of No. Las Vegas*, Item No. 677E (2010); *Cardinale v. City of N. Las Vegas*, Case No. 2019-010 (2021). An aggrieved employee must make a prima facie showing sufficient to support the inference that the protected conduct was a motivating factor in the employer's decision. Under the revised framework, "it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed ....". *Bisch*, 302 P.3d at 1116. Once this is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have been taken place even in the absence of the protected conduct. *Id.* The

Powell's dog was due to medical reasons unrelated to union activities. Further, Capt. Boruchowitz testified that Lt. McRae had been pushing for the Sherriff to disband the entire K9 program due to a lack of results. Instead, the Sherriff explained that they would be replacing the dogs that had retired and get some new handlers but the "new handlers continued to fail the testing". During this process, the pandemic occurred and they still had not received the new dogs and handlers so it was "put on the back burner and it's just sitting in hiatus and certainly nothing to do with anything related to Mr. Collins (sic) in any capacity." Moreover, Respondent would not be seeking grants for new K9 dogs until they could get staffing up. We do not believe that Complainant's protected conduct was a motivating factor in Respondent's decision. Furthermore, Respondent demonstrated that it would have taken the same action regardless of the protected activity which was reasonable in light of the factual circumstances and protected rights at issue. Complainant failed to show that Respondent's reasons were merely pretextual. Additionally, we do not find that a violation can be found here under NRS 288.270(1)(a) or (b) pursuant to the tests previously elucidated.

Regarding Meade, Complainant failed to show that questioning his flex time was in any way motivated by protected activities. Capt. Boruchowitz explained that the NCSO was not aware of Meade's flex time until Lt. Williams brought it to the attention of the Sheriff's office. In the same vein, in regards to producing case files, Capt. Boruchowitz credibly testified that "Meade, along with a slew of others – he was not alone – had dozens … in Trevor's case nearly a hundred cases that spanned back years and years … So Lieutenant Williams, his supervisor, along with just about every lieutenant in our agency received an email from me directing them to clean up records." Finally, the Board was not presented with credible evidence that Capt. Boruchowitz's inquiry regarding Meade's work-from-home status was in any way motivated by protected conduct. Employees were not to be working from home anymore; however, Lt. Williams advised Capt. Boruchowitz that the Sheriff had approved Meade to work from home. The Sheriff explained that she probably authorized the return to work due to internet issues being resolved. In the same vein as above, we do not believe that the protected conduct was a

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employer's demonstration must meet "the test of reasonableness in light of the factual circumstances and protected rights at issue in [the] case." *Reno Police Protective Ass'n*, 102 Nev. at 101. The aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is merely pretextual. *Bisch*, 302 P.3d at 1116.

motivating factor in Respondent's decisions. Moreover, Respondent demonstrated that it would have taken the same actions regardless of the protected activity which was reasonable in light of the factual circumstances and protected rights at issue. Complainant failed to show that Respondent's reasons were merely pretextual.

Furthermore, we also find that Respondent's conduct cannot reasonably be said to interfere, restrain, or coerce with the free exercise of the employees' rights based on the totality of the circumstances, and Respondent justified their actions with substantial and legitimate business reasons. In other words, in balancing the employees' protected rights against the business justifications, we find the rights did not outweigh those justifications. We also do not find that Respondent's conduct here cannot reasonably be construed as dominating or interfering with Complainant.

* * *

In summary, we found this to be a close case but given the totality of the circumstances as detailed above, we do not find any violations. In other words, while Respondent's conduct did not violate Complainant's, or their members, rights pursuant to the EMRA, it came close. 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. On June 16, 2020 and June 18, 2020, pre-disciplinary hearings for Detectives Parra and Cox, respectively, were conducted following a recommendation for termination of the officers.

2. Those present at the June 16th hearing included Undersheriff Michael Eisenlofeel, Sheriff Sharon Wehrly, Deputy District Attorney Brad Richardson, Association Vice President Morgan Dillon, Complainant's attorney Brent Huntly, and Detective Parra.

3. At the pre-disciplinary hearing, Det. Logan Gibbs requested the Sheriff to open an investigation into the investigator, Harry Means.

4. Following the pre-disciplinary hearing for Det. Parra, an internal investigation was started based on the arguments made during the pre-disciplinary hearing.

5. Capt. Boruchowitz explained that following the pre-disciplinary hearing, he was provided with the information about the allegations of improper conduct and request for an investigation by the Sherriff and Undersheriff.

6. Specifically, there was what amounted to an allegation of a conspiracy (the allegations and contents of the hearing were provided to Capt. Boruchowitz by the Sherriff and Undersheriff who were at the pre-disciplinary hearing).

7. After his conversation with the Sherriff and Undersheriff, Capt. Boruchowitz drafted language for investigation notices to Means, James Brainard, and Joey Marshall.

8. Capt. Boruchowitz directed Lt. Thomas Kelnczar to send the Notices.

9. On June 18, 2020, notices were also sent to Trevor Meade and Morgan, which stated that, pursuant to the CBA, complaints were lodged and an investigation initiated "in reference to allegation You (sic) are to be a witness in Means, Marshall and Brainard [sic] alleged conspiracy and untruthfulness in the performance of their duties."

10. On June 22, 2020, John Powell sent an informal grievance to Lt. Klenczar, Undersheriff Eisenloffel and Sheriff Wehrly.

11. Complainant stated therein that attempting to compel Complainant "Officials in their official Union Capacity, under threat of public employee discipline, to act against the interest of NCLEA members, incorrect statements attributed to board members and union member in IA notice, improper naming of board members and union member in IA Notice. Violations of CBA Article 7, NCSO Policy 0068, state and federal law."

12. Complainant grieved the employee representatives being noticed for an investigation when they were acting in their capacities as union representatives, rather than public employees.

13. The Informal Grievance also took issue with the characterization of the allegations in the Notices, the inclusion of Brainard and Marshall as subject employees, and that only one person requested the investigation.

14. On June 29, 2020, Capt. Boruchowitz responded to the Informal Grievance on behalf of the NCSO.

15. Capt. Boruchowitz responded to the narrative provided in the Informal Grievance. Capt. Boruchowitz agreed that Complainant Representatives Dillon, Gibbs, and Meade were not involved in the original incident.

16. Capt. Boruchowitz indicated that "subsequent allegations described behavior which painted a picture of a conspiracy."

17. Further, "there [was] no question in [their] mind after listening to the description presented that the NCLEA purported Det. Marshall, Det. Brainard and Det. Means did conduct an investigation that was dishonest and were involved in a conspiracy of some sort with Judge Chamlee and DA Arabia."

18. Additionally, the arguments presented by Complainant during the pre-disciplinary hearings "left no question in the mind of the Sheriff or Undersheriff that [NCLEA was] alleging a conspiracy between several individuals during the conduct of this investigation."

19. "In addition, the defense did not only address the alleged issues by Inv. Means, but also with Inv. Brainard, and Inv. Marshall. This was not a defense focused at only one Sheriff's Office employee. There were three personnel involved, although only one was not an NCLEA member."

20. Capt. Boruchowitz explained that the Sherriff obliged Complainant's request for an investigation, adding that Complainant could not ask NCSO to investigate only one person when the allegations clearly implicated other employees.

21. Capt. Boruchowitz noted, "At the end of the day this investigation was initiated at the request of the NCLEA."

22. "We apologize that you only wanted us looking at one individual and not the other two, but that is not how fair and appropriate investigation are conducted."

23. "The defense included allegations made against all three individuals, thus the investigation must be made into all three."

24. Capt. Boruchowitz agreed that the Notices were not in conformity with past practice.

25. However, he also explained that the Notices were "unlike any that [have] been sent prior, thus there was not past practice that is the same or similar. This is the first time the NCLEA has requested an investigation as part of a pre-disciplinary hearing."

26. Capt. Boruchowitz further explained that the inclusion of the names was attributed to Complainant's belief that it was "essential to ensure that the suspect officers knew who they could and could not use as representatives in this matter".

27. Capt. Boruchowitz indicated this was in an attempt to be compliant with NRS 289.080.

28. Complainant also alleged that "news of the inaccurate and inappropriate notices will surely spread throughout the membership" and was a way to "falsely convince the NCLEA membership that their own Executive Board is against them."

29. Capt. Boruchowitz explained the notices were confidential communications, and the NCSO "administration had not shared this information outside of the formal notification processes."

30. Capt. Boruchowitz stated that it was false that the intent of the investigation was "to convince the NCLEA membership that the board is against them".

31. "This administration responded to the NCLEA request to conduct an investigation" and "has respected their position in all cases."

32. Capt. Boruchowitz explained that "[i]n all the years the Sheriff had been a member or officer in a collective bargaining union, this is the first time she ever experienced a request for an investigation during a pre-disciplinary hearing."

33. "However, the Sheriff obliged the NCLEA's request and started this investigation."

34. Further, the "County Sheriff and staff had no knowledge of an NCLEA election nor would it have had any bearing on the decision to conduct an investigation."

35. Capt. Boruchowitz reiterated that the NCSO "simply obliged the NCLEA's request and started this investigation."

36. Capt. Boruchowitz additionally explained that the NCSO was "not attempting to have NCLEA officials divulge protected union speech."

37. NSCO "management is not attempting to control the protected activities of the union and we agree we cannot do so under threat of departmental discipline."

38. Further, Capt. Boruchowitz explained that certain emails "to NCLEA representative [were] withdrawn at [their] request" and NSCO would "continue the investigation using the record made in the pre-disciplinary hearing."

39. Capt. Boruchowitz apologized, indicating: "The Sheriff and staff are sorry a notice was sent if these individuals were Peace Officers in accordance with NRS 289 instead of NCLEA representatives."

40. Capt. Boruchowitz explained that they understood the statements were made in defense of Complainant members; however, NCSO was "simply conducting an investigation as requested by the NCLEA."

41. Further, the intent of the investigation is to "look into allegations at the request of the NCLEA."

42. Capt. Boruchowitz assured that there "was no intention to intimidate and harass union representatives and sew discord within the union."

43. On July 6, 2020, Complainant sent an email to its members regarding the investigation requested at the pre-disciplinary hearing.

44. The email stated the "rumor that members of the NCLEA Executive Board have filed Internal Affairs charges against NCLEA members" was "completely and wholeheartedly untrue."

45. The emailed noted that "[w]hile it is not fun or ideal, at times, members are in conflict with each other" and "[a] statement from one member may be the basis for the discipline against the other member."

46. Further, the union would defend the member facing discipline, and "[u]nfortunately, this type of situation has always been around and always will be."

47. The NCLEA Board noted: "In a recent IA Notice, three Union Representatives were listed by Internal Affairs as the Complainants against two NCLEA members."

48. It was disclaimed that there was a request for investigation made against those two members.

49. The NCLEA Board also noted that a grievance was lodged and indicated it was "currently being resolved."

50. Part of the grievance was that the Union Reps could not be compelled to participate at IA against Complainant's members, and the "NCSO has no right to control the activities of the union, and they have no control over Union Officials when they are in their Official Union Capacity."

51. The NCLEA Board noted that this "portion of the grievance has almost been resolved already as Admin has acknowledged they cannot force Union Officials to testify against members in their Union Capacity."

52. The NCLEA Board stated that this would set the record straight and apologized if the rumor "created any discontent."

53. The email also alleged that "[a]ctions like these are classic examples of Union Busting."

54. The next day, Capt. Boruchowitz sent an email to NCSO staff in part addressing the allegations of "union busting" contained in the July 6th email.

55. Capt. Boruchowitz stated the administration's position including a denial of any attempt to "union bust".

56. At the hearing, Capt. Boruchowitz testified that he had never actually seen the July 6th email, and instead was told about its contents by Sgt. Augustine, possibly Sgt. Fowles, and through general conversations overhead in the workplace.

57. Capt. Boruchowitz did not solicit this information.

58. Capt. Boruchowitz was questioned on why he listened to the employees, and Capt. Boruchowitz explained that employees came to "the management team and advised that the union was purporting dishonest statements about the administration to the employees of our agency."

59. Further, "when an employee comes forward and purports that the union board has sent an email to our employees with inappropriate or dishonest statements, the question as to why I would listen because it's pertinent to the fact that our employees are being told lies and I felt it was important to listen and relay to the sheriff what I was being told."

60. Sherriff Wehrly confirmed Capt. Boruchowitz's email was sent at her direction and explained that it was in reference to the contents of the July 6th email.

61. She explained that she believed she was told about the contents of said email from Lt. Klenczar and Capt. Boruchowitz, who relayed to her that they had been advised of the contents from other employees, consistent with Capt. Boruchowitz's testimony.

62. Sherriff Wehrly further explained that she would never approve any action of "union busting" and added that Complainant used to be her union, so there is "no way that [she would] do that."

63. Complainant failed to put forth credible evidence that Respondent took any adverse action against any Complainant members because of their representation of Detectives Cox or Parra in the pre-disciplinary hearings.

64. The Board finds it credible that the complained-of notices were issued because an internal investigation was requested by Complainant's team during the pre-disciplinary hearing.

65. The transcript from Det. Cox's disciplinary hearing clearly provided that: "Sherriff, I'm just – I'm humbling – I'm humbling requesting that (Means) be investigated for these lies. This shouldn't stand."

66. As Det. Gibbs testified, he asked the Sherriff investigate Means "[d]ue to multiple discrepancies."

67. It was credibly shown that it was the request for investigation which prompted the issuance of the notices of an internal investigation.

68. Respondent also showed that it was reasonable to notice to investigate all individuals which were implicated even if only one had been requested based on the totality of the circumstances as specified above and further below.

69. Regarding the contents of the notices, while Capt. Boruchowitz agreed the inclusion of the names of the accusers in an internal investigation is not normal, this was credibly shown to be due to this not previously occurring (*i.e.*, someone with Complainant requesting an internal investigation into another during a pre-disciplinary hearing).

70. Capt. Boruchowitz also credibly explained the purpose behind the inclusion, at least in terms of why he believed it was important.

71. Complainant failed to show that this was otherwise prohibited.

72. While Complainant pointed out that the Response to the Grievance could in part be inaccurate as Lt. Klenczar did not feel it was important that the subject employees knew who was "connected to" the investigation to ensure they did not waste their time talking to a representative who would ultimately not be able to participate in the interview, Lt. Klenczar noted it was inaccurate only if it was referring to him as the IA representative.

73. The Response also noted prior thereto that the "names of the NCLEA representatives were included in the notice because the Nye County Sheriff's Office felt it essential to ensure that the suspect officers knew who they could and could not use as representatives in" that matter.

74. The Response and testimony indicated that they were also trying to comply with NRS 289 and this was unlike prior situations.

75. In responding to a question regarding the specific language in NRS 289, Capt. Boruchowitz clarified that he had "never been in this situation like I was this time."

76. Sheriff Wehrly testified that most of the union board was involved in the pre-disciplinary hearing.

77. Capt. Boruchowitz is also president of his union and used to be the president of NCLEA - Capt. Boruchowitz described himself as "definitely a union guy."

78. We find it credible the Respondent reasonably believed that a conspiracy was in essence being alleged based on the totality of the circumstances including the statements made by all those present at the hearings.

79. The Board finds Sheriff Wehrly credible in her explanation related thereto including basing the statement on what was said during the pre-disciplinary hearings.

80. The Sheriff felt that a conspiracy was essentially alleged based not only on what was said at the hearings but also the mood thereat.

81. We find the Sheriff credible.

82. The Sheriff based this on the totality of the events at the hearings, and she agreed "to see if there was more to it and had three people investigated to see if there was any truth that [she] could find."

83. While Complainant argued that some of the individuals did not make direct allegations, clearly the Sherriff felt based on the totality of events that improper conduct was attributed to those three investigated.

84. Respondent, when presented the possibly of improper conduct, reasonably choose to at least investigate to determine, as the Sheriff credibly indicated, whether any improper conduct did in fact occur.

85. The Board also finds it credible that an NCLEA election had no bearing on the decision to conduct an investigation (even if they were theoretically aware of an election), cannot reasonably viewed as tending to interfere with, coerce, or deter in the exercise of that protected activity, and Respondent, as indicated, justified its actions with a substantial and legitimate business reason.

86. While the evidence showed that it was possible that the administration was aware of the pending election, Lt. Klenczar explained that he didn't "want to assume they all did" but believed they talked about it.

87. Lt. Klenczar also testified that it was "possible" he had a conversation with Cpt. Buruchowitz.

88. Regardless, even if Cpt. Buruchowitz could have been aware of the election or did have actual knowledge, credible evidence was not presented that Respondent willfully dominated or interfered in the administration of Complainant.

89. In other words, Respondent credibly explained the timing of their actions was unrelated to union activity or coercing the employees in their choice regarding the internal union election.

90. Capt. Boruchowitz reiterated that the NCSO "simply obliged the NCLEA's request and started this investigation."

91. As indicated above, it was indisputably shown that the transcript from Det. Cox's disciplinary hearing provided that: "Sherriff, I'm just – I'm humbling – I'm humbling requesting that (Means) be investigated for these lies. This shouldn't stand."

92. As Det. Gibbs testified, he asked the Sherriff investigate Means "[d]ue to multiple discrepancies."

93. In response to the Informal Grievance, Capt. Boruchowitz indicated that "subsequent allegations described behavior which painted a picture of a conspiracy."

94. This information was obtained through the Sheriff and Undersheriff who were present at the predisciplinary hearing.

95. Capt. Boruchowitz also credibly explained that he was voluntarily informed by others of information in Complainant's email to its members.

96. Specifically, the union purportedly presented dishonest statements about the administration to the employees.

97. Capt. Boruchowitz explained that Sheriff had always been clear that she will defend the employees and management from dishonest statements and will rebut them.

98. Capt. Boruchowitz credibly explained that he would have never known about this communication if it had not been volunteered.

99. Det. Gibbs requested an investigation into Investigator Means who was a non-dues paying member of the bargaining unit (Det. Gibbs believed the dues paying members were not implicated).

100. As Capt. Boruchowitz explained, "the reality is your allegations encompassed two of your due paying members".

101. As such, based off the information received from the Undersheriff and Sheriff including their reasonable interpretations from the disciplinary hearings, all three bargaining unit members were investigated regardless of their dues paying status.

102. Even Det. Gibbs agreed that Complainant, in its defense of Officer Cox, was attempting to paint a connection between Justice of the Peace Chamlee, Det. Marshall, Means, Brainard, and District Attorney Arabia.

103. As Det. Gibbs explained, he had never previously requested at a pre-disciplinary hearing that an internal affairs investigation be conducted on the investigating detective.

104. While Capt. Boruchowitz could not recall the specifics of the entirety of the transcripts at the hearing, as indicated, he credibly explained that his information came from the Undersheriff's and Sheriff's interpretations as to what was said at the pre-disciplinary hearing.

105. Moreover, Det. Gibbs agreed that the notices only went out to the people that received them, and the only way the membership at large would have learned about a notice of an internal investigation interview is if the person receiving disclosed it.

106. While it was evident that information is often widely disseminated at the NCSO, Det. Gibbs conceded that there was no evidence that they were sent to anyone besides the Dets. Means, Brainard, or Marshall.

107. Complainant decided, due to rumors members may have heard, to send the email to its members, which contents were volunteered to Capt. Boruchowitz.

108. Capt. Boruchowitz clearly felt it necessary to respond to the information that was volunteered to him, not out of an effort to interfere with the free exercise of employee rights under the EMRA, but instead to disclaim that Respondent was involved in "union busting" as well as to address what Respondent reasonably perceived as false allegations made against the administration.

109. As explained, the Sheriff had been consistent to offer a rebuttable policy.

110. Respondent specifically said the actions they took were not "geared towards interfering, coercing, or inappropriately interfering with NCLEA's defense of its members."

111. Respondent explained that due to the allegations alleged, even though an investigation was only requested as to a non-dues paying bargaining unit member, the administration will conduct an investigation based on the allegations.

112. As Capt. Boruchowitz explained: "At the end of the day this investigation was initiated at the request of the NCLEA."

113. "We apologize that you only wanted us looking at one individual and not the other two [dues paying members], but that is not how fair and appropriate investigation are conducted."

114. "The defense included allegations made against all three individuals, thus the investigation must be made into all three."

115. As Complainant agreed in their communication to their members, "[w]hile it is not fun or ideal, at times, members are in conflict with each other" and "[a] statement from one member may be the basis for the discipline against the other member."

116. Given the office culture of dissemination, we do not find that reasonable employees would assume from Respondent's action that their protected conduct had been place under surveillance.

117. Capt. Boruchowitz credibly testified that he was not given a copy of the email in question and did not see it until the hearing before this Board.

118. Moreover, witnesses conceded that it was possible for Capt. Boruchowitz to have heard of the contents from members.

119. There was no credible evidence presented at the hearing that Capt. Boruchowitz intercepted the July 6th email.

120. In the same vein, it was admitted that it was possible a member of Complainant could have told Capt. Boruchowitz of the contents of said email.

121. There was not credible evidence presented that Capt. Boruchowitz was spying on Complainant communications.

122. Based on the totality of the circumstances, we do not find that Respondent did anything out of the ordinary in order to observe union activity and instead this information was offered to Respondent.

123. As the Sheriff credibly explained, the NCSO is "pretty close".

124. Capt. Boruchowitz credibly testified that "[t]hey came and volunteered it."

125. Moreover, we were not presented with credible evidence that Capt. Boruchowitz attempted to "repeatedly solicite[]" private information.

126. Respondent showed that the retirement of Powell's dog was due to medical reasons unrelated to union activities.

127. Further, Capt. Boruchowitz testified that Lt. McRae had been pushing for the Sherriff to disband the entire K9 program due to a lack of results.

128. Instead, the Sherriff explained that they would be replacing the dogs that had retired and get some new handlers but the "new handlers continued to fail the testing".

129. During this process, the pandemic occurred and they still had not received the new dogs and handlers so it was "put on the back burner and it's just sitting in hiatus and certainly nothing to do with anything related to Mr. Collins (sic) in any capacity."

130. Moreover, Respondent would not be seeking grants for new K9 dogs until they could get staffing up.

131. Regarding Meade, Complainant failed to show that questioning his flex time was in any way motivated by protected activities.

132. Capt. Boruchowitz explained that the NCSO was not aware of Meade's flex time until Lt. Williams brought it to the attention of the Sheriff's office.

133. In the same vein, in regards to producing case files, Capt. Boruchowitz credibly testified that "Meade, along with a slew of others – he was not alone – had dozens … in Trevor's case nearly a hundred cases that spanned back years and years … So Lieutenant Williams, his supervisor, along with just about every lieutenant in our agency received an email from me directing them to clean up records."

134. The Board was not presented with credible evidence that Capt. Boruchowitz's inquiry regarding Meade's work-from-home status was in any way motivated by protected conduct.

135. Employees were not to be working from home anymore; however, Lt. Williams advised Capt. Boruchowitz that the Sheriff had approved Meade to work from home.

136. The Sheriff explained that she probably authorized the return to work due to internet issues being resolved.

137. 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 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. It is a prohibited practice for a local government employer "willfully to" "[i]nterfere, restrain or coerce any employee in the exercise of any right guaranteed under [the EMRA]."

4. A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

5. Complainant did not allege a violation of NRS 288.270(1)(c) (Sec. 8(a)(3) equivalent under the NLRA) or NRS 288.270(1)(d).

6. As such, those claims are not at issue in this case as we are limited to the complaint in this respect.

7. NRS 288.270(1)(a) provides that it is a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA.

8. While it is not entirely clear from the Complaint or Complainant's subsequent submissions, we find that Complainant sufficiently pled that the employees' NRS 288.140(1) rights were violated.

9. Pursuant to NRS 288.270(1)(a), "[t]he test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

10. There are three elements to a claim of interference with a protected right: "(1) the employer's action can be reasonably viewed as tending to interfere with, coerce, or deter; (2) the exercise of protected activity [by NRS Chapter 288]; and (3) the employer fails to justify the action with a substantial and legitimate business reason."

11. We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement.

12. It is only when the interference with employees' rights outweighs the business justification for the employer's action that a violation has occurred.

13. Pursuant to NRS 288.270(1)(b), it is a prohibited practice for a local government employer willfully to "[d]ominate, interfere or assist in the formation or administration of any employee organization."

14. The Board has refused to find a violation of NRS 288.270(1)(b) where the employer's conduct cannot reasonably be construed as dominating or interfering with an employee organization.

15. While Complainant previously asserted in its Pre-Hearing Statement that an issue before the Board was "[w]hether Nye County and NCSO assisted in the formation of a competing union when Capt. Boruchowitz provided assistance to sergeants in forming a separate union", Complainant subsequently withdrew this portion of the claim at the hearing.

16. We do not find that Respondent's actions may reasonably viewed as tending to interfere with, coerce or deter the exercise of protected under the EMRA based on the totality of the circumstances, and Respondent justified their actions with a substantial and legitimate business reason.

17. We do not find that Respondent's action willfully dominated or interfered with the administration of Complainant.

18. In regards to the internal election, Complainant's contention in this regard was unsupported by authority which would support a violation.

19. A local government employer is prohibiting from discriminating among its employees on account of membership or nonmembership in an employee organization.

20. We do not view see Capt. Boruchowitz's July 7th email as reasonably viewed as tending to interfere with, coerce, or restrain in the exercise of protected activity.

21. Capt. Boruchowitz justified the action with a substantial and legitimate business reason.

22. In so finding, we balanced the employees' protected rights against the substantial and legitimate business justification given, and find that the business justification outweighed any potential interference with employees' rights under the EMRA.

23. We do not find that Respondent willfully dominated or interfered with the administration of Complainant.

24. "In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance."

25. "The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activates. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees."

26. Complainant also failed to present sufficient evidence that Respondent retaliated against Complainant's members.

27. We do not believe that Complainant's protected conduct was a motivating factor in Respondent's decision.

28. Furthermore, Respondent demonstrated that it would have taken the same action regardless of the protected activity which was reasonable in light of the factual circumstances and protected rights at issue.

29. Complainant failed to show that Respondent's reasons were merely pretextual.

30. Additionally, we do not find that a violation can be found here under NRS 288.270(1)(a) or (b) pursuant to the tests previously elucidated.

31. Regarding Meade, we do not believe the protected conduct was a motivating factor in Respondent's decisions, and Respondent demonstrated it would have taken the same actions regardless of the protected activity which was reasonable in light of the factual circumstances and rights at issue.

32. Complainant failed to show that Respondent's reasons were merely pretextual.

33. We also find that Respondent's conduct cannot reasonably be said to interfere, restrain, or coerce with the free exercise of the employees' rights based on the totality of the circumstances, and Respondent justified their actions with substantial and legitimate business reasons.

34. In other words, in balancing the employees' protected rights against the business justifications, we find the rights did not outweigh those justifications.

35. We also do not find that Respondent's conduct here can reasonably be construed as dominating or interfering with Complainant.

36. An award of fees and costs is not warranted in this case.

37. 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 in favor of Respondent

Dated this 20th day of July 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
GARY COTTINO, Board Member