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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NYE COUNTY,

Complainant,

v.

NYE COUNTY ASSOCIATION OF SHERIFF'S
SUPERVISORS and DAVID BORUCHOWITZ,

Respondents.

CASE NO. 2022-009

NOTICE OF ENTRY OF ORDER

ITEM NO. 887

NYE COUNTY ASSOCIATION OF SHERIFF'S
SUPERVISORS and DAVID BORUCHOWITZ,

Counter-Complainants,

v.

NYE COUNTY,

Counter-Respondent.

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TO: Complainants, by and through their attorneys, Mark J. Ricciardi, Esq. and Allison L. Kheel, Esq. of Fisher & Phillips LLP; and

TO: Respondents, by and through their attorneys, Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks.

PLEASE TAKE NOTICE that the **DECLARATORY ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON RESPONDENTS' COUNTERCLAIMS** was entered in the above-entitled matter on July 19, 2023.

A copy of said order is attached hereto.

DATED this 19th day of July 2023.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY Isabel Franco
ISABEL FRANCO
Administrative Assistant II

CERTIFICATE OF MAILING

1 I hereby certify that I am an employee of the Government Employee-Management Relations
2 Board, and that on the 19th day of July 2023, I served a copy of the foregoing **NOTICE OF ENTRY**
3 **OF ORDER** by mailing a copy thereof, postage prepaid to:
4

5 Law Office of Daniel Marks
6 Daniel Marks, Esq.
7 Adam Levine, Esq.
8 610 South Ninth Street
9 Las Vegas, NV 89101

10 Mark J. Ricciardi, Esq.
11 Allison L. Kheel, Esq.
12 Fisher & Phillips LLP
13 300 S. 4th St., Suite 1500
14 Las Vegas, NV 89101

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16 _____
17 ISABEL FRANCO
18 Administrative Assistant II
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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NYE COUNTY,

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NYE COUNTY ASSOCIATION OF SHERIFF'S
SUPERVISORS and DAVID BORUCHOWITZ,

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CASE NO. 2022-009

**DECLARATORY ORDER, FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AND ORDER ON RESPONDENTS'
COUNTERCLAIMS**

PANEL C

ITEM NO. 887

NYE COUNTY ASSOCIATION OF SHERIFF'S
SUPERVISORS and DAVID BORUCHOWITZ,

Counter-Complainants,

v.

NYE COUNTY,

Counter-Respondent.

On June 13, 2023, this matter came before the State of Nevada, Government Employee-Management Relations Board ("Board") for consideration and decision on Respondent's Petition for Declaratory Order and Respondent's Counterclaims relating to Bad Faith Negotiations and Unilateral Change pursuant to the provision of the Employee-Management Relations Act (the Act), NRS Chapter 233B, and NAC Chapter 288. According to the Amended Notice of Hearing filed January 4, 2023, the issues in this case can be summarized as follows: (1) whether Respondent Boruchowitz can be a member of the Nye County Association of Sheriff's Supervisors bargaining unit; and (2) whether Nye

1 County engaged in bad faith bargaining and/or a unilateral change.

2
3 **I. BACKGROUND.**

4 In January of 2016, Petitioner Nye County filed a Petition with the Board to decertify the Nye
5 County Law Enforcement Management Association (“NCLEMA”) which represented Lieutenants in
6 the Nye County Sheriff’s Office. The Board granted the request on the grounds that there were “zero
7 members of NCLEMA due to retirements, resignations and general attrition.” *Nye County v. Nye*
8 *County Law Enforcement Management Association*, Case No. 2016-005, Item No. 815 (2016).

9 Subsequent to the decertification of NCLEMA in 2017, the Nye County Sheriff promoted two
10 sergeants to Lieutenant, including Respondent Boruchowitz (hereafter “Boruchowitz”). After he was
11 promoted, Boruchowitz formed the Nye County Association of Sheriff’s Supervisors (“Respondent” or
12 “Respondent NCASS”) that was eventually recognized by Nye County as the exclusive representative
13 for the Nye County Sheriff’s Office (“NCSO”) lieutenants. Boruchowitz was promoted to
14 Administrative Captain in 2019 and Nye County agreed to include the position in Respondent’s
15 bargaining unit for the July 1, 2020 through June 30, 2022, Collective Bargaining Agreement that was
16 ratified by Petitioner Nye County and Respondent.

17 On or about September of 2021, the parties began negotiating a new collective bargaining
18 agreement and it appears that some progress was being made until an “in person” meeting which took
19 place on or about May 6, 2022. At the “in person” meeting, the new legal counsel for Petitioner stated
20 that Boruchowitz, who was Respondent’s chief negotiator, could not legally be a member of
21 Respondent NCASS and as such could not bargain on its behalf.

22 Petitioner subsequently filed a Petition for Declaratory Order on May 24, 2022, seeking to have
23 the Board clarify whether Boruchowitz could legally be a member of Respondent NCASS under NRS
24 288.173(a). On June 24, 2022, Respondents filed a Reply and Counterclaim which argued that
25 Boruchowitz was not a “supervisor” for the purposes of NRS 288.138(a) as set forth in the Petition, and
26 that Petitioner halting negotiations until the matter was resolved was tantamount to negotiating in bad
27 faith and constituted a unilateral change. On the same date, June 24, 2022, Petitioner filed a Motion to
28 Amend the Petition for Declaratory Order which added NRS 288.138(b) as another basis that allegedly

1 prevented Boruchowitz from legally being a member of NCASS. Petitioner’s Motion to Amend was
2 granted by the Board on July 27, 2022. A hearing was held on the matter, and the Board deliberated
3 and decided the issue at a meeting held on June 13, 2023.

4 II. DISCUSSION.

5 A. Is Boruchowitz a Supervisor for the Purposes of NRS 288.173(a) or (b)?

6 All the issues presented in the Petition for Declaratory Order and the Counterclaims turn on
7 whether or not Respondent Boruchowitz can lawfully be a member of Respondent NCASS. Under
8 NAC 288.380, the Board can render a decision “...regarding the applicability or interpretation of any
9 statutory provision or of any regulation or decision of the Board.” This process leads to a Declaratory
10 Order like the one requested by Petitioner.

11 Under NRS 288.140(4), a person meeting the definition of a supervisory employee under NRS
12 288.138(b) may not be a member of an employee organization.

13 Petitioner, in its Amended Petition for Declaratory Order argued that Boruchowitz is a
14 supervisory employee under NRS 288.138(b).

15 The Board has determined that NRS 288.138(b), is the most applicable to the facts of this case.
16 Under NRS 288.138(b) a supervisory employee includes:

17 (b) Any individual or class of individuals appointed by the employer and having
18 authority on behalf of the employer to:

19 (1) Hire, transfer, suspend, lay off, recall, terminate, promote, discharge, assign,
20 reward or discipline other employees or responsibility to direct them, to adjust
21 their grievances or to effectively recommend such action;

22 (2) Make budgetary decisions; and

23 (3) Be consulted on decisions relating to collective bargaining,

24 if, in connection with the foregoing, the exercise of such authority is not of a
25 merely routine or clerical nature, but requires the use of independent judgment.
26 The exercise of such authority shall not be deemed to place the employee in
27 supervisory employee status unless the exercise of such authority occupies a
28 significant portion of the employee’s workday.

25 In this matter, numerous documents, exhibits, witnesses and briefs were presented to the Board which
26 set out what duties Respondent Boruchowitz performed for the NCSO. The question is whether
27 factually Boruchowitz met the requisite tests of a supervisory employee under NRS 288.138(b).

28 As pointed out by both parties, the Board had already examined the exact language contained in

1 NRS 288.138(b) in *City of Reno v. Reno Firefighters, Local 731*, EMRB Case No. A1-046049, Item
2 777-B (2012). In *Reno*, the Board stated quite clearly that “as a general rule, the determination of
3 whether a particular employee or class of employees is a supervisory employee must be made on a
4 case-by-case basis.” *Reno* at 7. The Board also set forth a framework to examine whether an employee
5 is a “supervisory employee” which is set forth below:

- 6 1. The employee must be an appointed employee;
- 7 2. The employee must have the authority on behalf of the employer to hire transfer
8 suspend, lay off, recall, terminate, promote, discharge, assign, reward o discipline
9 other employees or responsibility to direct them, to adjust their grievances or to
10 effectively to recommend such action;
- 11 3. The employee must have the authority to make budgetary decisions;
- 12 4. The employee must have the authority to be consulted on decisions related to
collective bargaining on behalf of the employer;
- 13 5. The exercise of the foregoing authority must not be of a routine or clerical nature but
14 require the use of independent judgment; and
- 15 6. The exercise of the foregoing authority must occupy a significant portion of the
employee's workday.

16 Reno at 11, Ordering Provision 9. The Board will discuss each of the requirements of NRS 288.138(b)
17 below.

18 **1. Appointed Employee.**

19 Under NRS 288.138(b), the supervisory employee must be “appointed.” The Board finds that
20 the Administrative Captain’s position is an appointed position under NRS 248.040(1)(a). *See Elko*
21 *County Sheriff Employee’s Organization, Inc. v. County of Elko*, EMRB Case No. A1-045424, Item No.
22 208 at p.4 (1988).

23 **2. Authority on Behalf of the Employer to Hire Transfer Suspend, Lay Off, Recall,**
24 **Terminate, Promote, Discharge, Assign, Reward or Discipline Other Employees or**
25 **Responsibility to Direct Them, to Adjust Their Grievances or to Effectively to**
26 **Recommend Such Action.**

27 The Board examined Boruchowitz’ job description and determined that it met the requirements
28 of NRS 288.138(b)(1). Some general duties in the job description include coordinating and directing
law enforcement activities and operations, supervising law enforcement operations and administering
all office policies and procedures, reviewing performance of subordinates and performing other work as
assigned. *See Nye County’s Hearing Exhibit 2* at p. 1 under heading of “Basic Function.” Specifically,

1 the relevant “Representative Duties” set out in Boruchowitz’ Job Description are:¹

2 ***

- 3 1. Directs operations and reviews requests for assistance, staffing and equipment;
4 develops financial status and other reports and submits to management; determines
5 the effectiveness of work units in meeting the goals and objectives of the departments
6 and divisions.
- 7 2. Reviews requests for services and assigns to the appropriate division, section or unit
8 ensuring proper staffing and resources are available; coordinates assignments based
9 on changes in priorities, equipment and resources in relation to current assignments
10 and activities, available personnel, and budgetary constraints.
- 11 3. Directs Lieutenants, Sergeants, Deputies and Dispatchers in law enforcement
12 activities by planning, organizing and reviewing operations and paperwork generated.
13 Provides management oversight and guidance to the Operations Division, Detention
14 Division and others as assigned.
- 15 4. Performs spot checks and patrols designated areas monitoring and supervising
16 subordinates to insure law enforcement services are provided.
- 17 5. Directs operations and takes command of personnel during demonstrations.
- 18 6. Assists in preparation of Sheriff’s Office budget, monitors budget, and attends all
19 budget hearings as requested by the Sheriff.
- 20 7. Prepares specifications for bids, prepares notifications for the securing of bids for
21 items to be purchased by Sheriff’s Office.

22 ***

- 23 11. In the absence or incapacity of I.A. Investigators, performs I.A.’s as required and/or
24 recommends appropriate disciplinary action when assigned.

25 ***

- 26 13. Reviews applications for employment, assigns background investigations, interview
27 applicants, conducts pre-testing of applicants, and provides recommendations to Sheriff.

28 ***

16. Reviews and analyzes statistical data and records regarding division activities;
participates in the development of department and division goals and objectives, long-
range plans and programs, budgets, department and division policy and procedure, and
legislation and its implementation.

¹ The Job Description expressly states that performance of the ‘Representative Duties’ is the reason the job exists.

1 17. Trains, supervises and evaluates the performance of subordinate staff; participates in
2 the applicant screening process; assess staff development and training needs and counsels
staff in work-related activities, professional growth, and career development.

3 18. Receives and adjusts complaints from the public, in coordination with or in the
4 absence of the Undersheriff, when needed, conducts investigations and/or recommends
5 appropriate disciplinary action in situations where employees fail to meet standards or
comply with agency policies and regulations.

6 19. Attends variety of meetings on behalf of Sheriff and provides updates as directed.

7 20. Performs peace officer and other related duties as assigned.

8 Nye County's Hearing Exhibit 2 at pp. 1 – 2.

9 Based on the job description alone, it is clear that Boruchowitz meets the supervisory employee
10 test under NRS 288.138(b)(1). The fact that Boruchowitz did not have the sole authority to hire, fire or
11 approve a budget is irrelevant since the elected Sheriff obviously has the final authority in these areas
12 and NRS 288.138(b)(1) only requires Boruchowitz to “effectively recommend such action.” The
13 evidence presented to the Board showed that Boruchowitz made recommendations to the Sheriff about
14 whom to hire, fire and discipline, etc. as required under NRS 288.138(b)(1). The evidence also clearly
15 showed that Boruchowitz had the authority to supervise department operations and personnel.

16 The Board also heard testimony indicating Boruchowitz was acting like a supervisory employee
17 under NRS 288.138(b). The Board found the testimony presented by Nye County compelling and
18 credible. Conversely, the Board found the testimony attempting to downplay Boruchowitz' supervisory
19 role in the department less than credible. For example, some of the testimony provided by Boruchowitz
20 seemed to indicate that he did not perform all of the tasks in the job description. However, in a
21 November 22, 2019, e-mail sent by Boruchowitz, he stated “I have provided what I think would be an
22 accurate job description for what I do and I believe it is accurate...” Nye County's Hearing Exhibit 9 at
23 p. 1.² It defies logic to hire an Administrative Captain to manage departmental affairs and then try to
24 claim that person does not perform any of those duties that he was hired to perform, and which also
25 serve as the basis for his higher pay. Nye County's Post Hearing Brief also described precisely how
26 Boruchowitz engages in the activities of a supervisory employee and the Board found the information
27

28 ² It is the same job description currently posted on Nye County's website for an Administrative Captain and what was
presented to the Board for consideration.

1 to be useful and relevant when making its determination. *See* Nye County’s Post Hearing Brief at pp.
2 12-23.

3 The Board accordingly finds that Boruchowitz meets the personnel test under NRS
4 288.138(b)(1).

5 **3. Authority to Make Budgetary Decisions.**

6 The administrative captain position is clearly not a line employee position, but rather one at the
7 top of the NCSO. Included in the positions responsibilities is budgetary responsibility and authority.
8 *See* e.g., Boruchowitz’ Job Description, *supra*. Respondents admitted that Boruchowitz has this type of
9 authority in their response to the original Petition for Declaratory Order at p. 5:17-19. The conflict
10 between having the authority to recommend budgets for the NCSO while at the same time negotiating a
11 significant portion of that same budget related to personnel costs via a collective bargaining agreement
12 cannot be overstated. There was other evidence presented which clearly indicated that Boruchowitz has
13 budgetary authority and made budgetary recommendations. *See also* Nye County’s Post Hearing Brief
14 at p. 22. The Board accordingly finds that Boruchowitz meets the budgetary decision test under NRS
15 288.138(b)(2).

16 **4. Authority to be Consulted on Collective Bargaining on Behalf of Employer.**

17 Per the definition of collective bargaining under NRS 288.032(3), being assigned to handle
18 grievances is equivalent to, and beyond, the scope of being consulted on decisions relating to collective
19 bargaining under NRS 288.138(b)(2). Boruchowitz acted on behalf of the NCSO to resolve more than
20 one grievance. Specifically, this Board has previously determined that Boruchowitz responded to an
21 informal grievance on behalf of the NCSO. *See Nye County Law Enforcement Association v. Nye*
22 *County, EMRB Case No. 2020-025, Item 872* at *3:16-17. Furthermore, in an e-mail Boruchowitz
23 admitted that he was assigned by Sheriff Wehrly to respond to a grievance filed by the Nye County
24 Law Enforcement association regarding the use of dash cameras. Nye County’s Hearing Exhibit 10 at
25 p.2. The Board finds that Boruchowitz meets the “consulted on collective bargaining” test under NRS
26 288.138(b)(3).

27 ...

28 ...

- 1 2. It appears to the Board that some progress was being made during the negotiations.
- 2 3. On or about May 6, 2022, an in-person meeting was held between the parties and during this
- 3 meeting Petitioner informed Respondents that Boruchowitz could not lawfully be a member
- 4 of Respondent NCASS because he was a supervisory employee under NRS 288.138 and
- 5 therefore could not bargain on their behalf.
- 6 4. Under NRS 288.140(4), a person meeting the definition of a supervisory employee under
- 7 NRS 288.138(b) may not be a member of an employee organization.
- 8 5. The Board determined that NRS 288.138(b), is the most applicable to the facts of this case.
- 9 6. Under NRS 288.138(b) in order to be classified as a supervisory employee an person must
- 10 meet the following criteria:
 - 11 • The employee must be an appointed employee;
 - 12 • The employee must have the authority on behalf of the employer to hire transfer
 - 13 suspend, lay off, recall, terminate, promote, discharge, assign, reward o discipline
 - 14 other employees or responsibility to direct them, to adjust their grievances or to
 - 15 effectively to recommend such action;
 - 16 • The employee must have the authority to make budgetary decisions;
 - 17 • The employee must have the authority to be consulted on decisions related to
 - 18 collective bargaining on behalf of the employer;
 - 19 • The exercise of the foregoing authority must not be of a routine or clerical nature
 - 20 but require the use of independent judgment; and
 - 21 • The exercise of the foregoing authority must occupy a significant portion of the
 - 22 employee's workday.
- 23 7. The Board finds Boruchowitz' Administrative Captain's position is an appointed position
- 24 under NRS 248.040(1)(a).
- 25 8. Based on the evidence presented, Boruchowitz had the authority on behalf on behalf of the
- 26 NCSO to hire transfer suspend, lay off, recall, terminate, promote, discharge, assign, reward
- 27 o discipline other employees or responsibility to direct them, to adjust their grievances or to
- 28 effectively to recommend such action.

- 1 9. Boruchowitz has the authority to make budgetary decisions and recommendations and he
2 did so on numerous occasions given the evidence presented.
- 3 10. Boruchowitz was consulted on collective bargaining issues.
- 4 11. Boruchowitz' authority is not clerical or routine and his position is quite senior.
- 5 12. Boruchowitz' duties have been discussed at length herein and said duties occupy a
6 significant portion of his day.
- 7 13. The Board finds that Boruchowitz is a supervisory employee for the purposes of NRS
8 288.138(b).
- 9 14. If any of the foregoing findings is more appropriately construed as a conclusion of law, it
10 may be so construed.

11 IV. CONCLUSIONS OF LAW

- 12 1. The Board finds that Boruchowitz was appointed to his position under NRS 248.040(1)(a).
13 *See Elko County Sheriff Employee's Organization, Inc. v. County of Elko*, EMRB Case No.
14 A1-045424, Item No. 208 at p.4 (1988).
- 15 2. The Board finds that NRS 288.138(b) is the most correct statute to use in determining
16 whether Boruchowitz is a supervisory employee given the facts of this case.
- 17 3. Even if the analysis were conducted under NRS 288.138(b), the result would have been the
18 same.
- 19 4. NRS 288.140 states that a "supervisory employee described in paragraph (b) of subsection 1
20 of NRS 288.138..." may not be a member of an employee organization.
- 21 5. In examining the facts of the case the Board determined that Boruchowitz is a supervisory
22 employee under NRS 288.138(b). Given this finding, Boruchowitz cannot be a member of
23 Respondent NCASS.
- 24 6. If Boruchowitz cannot be a member of Respondent NCASS, he cannot therefore be its
25 President nor can he lawfully bargain on their behalf.
- 26 7. It was reasonable for Petitioner to refuse to bargain with Boruchowitz given the findings
27 herein, and as such, no bad faith bargaining occurred nor was there a unilateral change.
28

1 8. If any of the foregoing findings is more appropriately construed as a finding of fact, it may
2 be so construed.

3 **V. CONCLUSION**

4 It is clear to the Board that Respondent Boruchowitz is a senior member of the Nye County
5 Sheriff's Office having supervisory control and management responsibilities closely related to the
6 duties of the elected Sheriff and Undersheriff. Thus, the Board finds that given his job description, his
7 actual duties as described in the testimony and other evidence presented, and as admitted by
8 Boruchowitz in his November 22, 2019 e-mail, the evidence presented relative to Boruchowitz'
9 budgetary authority, the role Boruchowitz played on behalf of Nye County relative to grievances and
10 other factors contained in the record of this case, Boruchowitz is a supervisory employee for the
11 purposes of NRS 288.138(b) and cannot lawfully be a member of Petitioner NCASS.³

12 Based on the foregoing, it is hereby **ORDERED** that Nye County's Petition for Declaratory
13 Order is **GRANTED**.

14 It is further **ORDERED** that the Respondent's Counterclaims for bad faith bargaining, and
15 unilateral change are hereby **DENIED**.⁴

16 Dated this 19th day of July, 2023.

17 GOVERNMENT EMPLOYEE-
18 MANAGEMENT RELATIONS BOARD

19
20 By: 
BRENT ECKERSLEY, ESQ., Chair

21 By: 
22 SANDRA MASTERS, Vice-Chair

23 By: 
24 TAMMARA M. WILLIAMS, Board
25 Member

26 ³ The Board also notes that Boruchowitz would meet the test of a Supervisory Employee under NRS 288.138(a)(1) since he
27 performed all the duties specified, or was able to recommend such, and notes that the test is more stringent under NRS
288.138(b) with the inclusion of the grievance element.

28 ⁴ The Board notes that Respondent's caption lays out a singular counterclaim while asserting two separate claims, i.e., bad
faith bargaining and unilateral change. The Board has responded to both claims in this Order.