#12A Amicus Curiae of the Las Vegas Police Managers and Supervisors Association

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

In the matter of CLARK COUNTY's Petition for Declaratory Order	Case No.: 2024-016

AMICUS CURIAE BRIEF OF THE LAS VEGAS POLICE MANAGERS AND SUPERVISORS ASSOCIATION

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INTEREST OF AMICUS CURIAE LAS VEGAS POLICE MANAGERS AND SUPERVISORS ASSOCIATION

The Las Vegas Police Managers and Supervisors Association (hereafter "PMSA") is the recognized exclusive representative of the bargaining eligible police and corrections supervisors employed by the Las Vegas Metropolitan Police Department (hereafter "LVMPD").

Approximately 66% of LVMPD's police operations, and 100% of its Detention Services Division (corrections), are funded by the Petitioner Clark County. Clark County's representatives are part of the management negotiation team for LVMPD. Therefore, it is anticipated that the Board's decision in this case will directly impact PMSA's bargaining with LVMPD.

POSITION OF THE PMSA ON THE LEGAL ISSUES PRESENTED

The PMSA joins in the position asserted by the Clark County employee organizations in their Joint Answering Brief filed in this matter in all respects.

The issue of retroactivity was implicated by the impasse between PMSA and LVMPD for the year July 1, 2019 to June 30, 2020 over the issue of standby pay. Prior to impasse, LVMPD would place bargaining unit members into standby status whereby they had to be available to take telephone calls and respond on short notice, but without any compensation. The parties went to nonbinding fact-finding before Arbitrator Richard D. Fincher who issued a recommendation that some form of standby compensation be adopted, but further recommended that it not begin until fiscal year 2021.

LVMPD rejected the recommendation and the dispute moved to binding interest arbitration under NRS 288.215 before Arbitrator Betty Widgeon on January 18 and 20, 2021. NRS 288.215 requires the arbitrator adopt one party's proposal ("last best offer") in its entirety.

The PMSA's last best offer followed the recommendation of Arbitrator Fincher to become effective in fiscal year 2021. LVMPD's last best offer was to compensate Supervisors

for time actually worked when called in from standby status (something LVMPD was already obligated to do) and to provide a 2% raise to the Captains within the bargaining unit. LVMPD's proposal expressly provided that it was not retroactive. On April 23, 2021 Arbitrator Widgeon selected the PMSA's last best offer for standby leave to go into effect beginning in fiscal year 2021.

On June 22, 2021 LVMPD filed a Motion to Vacate the Arbitration Award with the district court alleging that the arbitrator had exceeded her authority within the meaning of NRS 38.241(d) by making the standby compensation prospective in light of NRS 288.215(10)'s language that "Any award of the arbitrator's retroactive to the expiration date of the last contract". PMSA opposed the Motion arguing inter alia that the contract itself was retroactive to July 1, 2019, but that nothing in contract law prohibited the parties from contracting for a future benefit. Alternatively, if the Court were to conclude otherwise it was required to remand the matter back to Arbitrator Widgeon under NRS 38.241(d) to make the standby compensation retroactive.

Following the completion of briefing, and while the matter was under advisement with the district court, PMSA and LVMPD reached a settlement on standby compensation. However, the parties forgot to inform the district court of this fact. Consequently, on November 23, 2021 the district court issued a minute order wherein the court granted PMSA's alternative relief request to remand the matter back to Arbitrator Widgeon – which would have required standby compensation to be retroactive. A copy of that minute order is attached hereto as Exhibit "A".[1]

[1] Because PMSA and LVMPD had settled the contract, LVMPD was not required to provide the retroactive compensation.

The take away is that while parties may *voluntarily agree* to non-retroactivity, if the matter proceeds to binding interest arbitration, the plain language of NRS 288.215(10) requires any compensation to be retroactive.

Dated this 17th day of December, 2024.

POLICE MANAGERS & SUPERVISORS ASSOCIATION

DANIEL COE, ESQ.
GENERAL COUNSEL PMSA

Exhibit “A”

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters	COURT MINUTES	November 23, 2021

A-21-836708-C Las Vegas Metropolitan Police Department, Plaintiff(s)
vs.
Las Vegas Police Managers & Supervisors Association, Inc., Defendant(s)

November 23, 2021 **3:00 AM** **Minute Order**

HEARD BY: Krall, Nadia **COURTROOM:** Chambers

COURT CLERK: April Wolverton

JOURNAL ENTRIES

- N.R.C.P. 1 and N.R.C.P. 1.10 state that the procedures in district court shall be administered to secure efficient, just and inexpensive determinations in every action and proceeding. Pursuant to E.D.C.R. 2.23(c), the judge may consider the motion on its merits at any time with or without oral argument, and grant or deny it.

Petitioner Las Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award filed 6/22/2021; Respondent Las Vegas Police Managers & Supervisors Association, Inc.'s Opposition to Petitioner Las Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award and Countermotion to Confirm Arbitration Award filed 8/9/2021; Appendix of Exhibits in Support of Las Vegas Police Managers and Supervisors Association, Inc.'s Opposition to Motion to Vacate Arbitration Award and Countermotion to Confirm Award Volume I of IV filed 8/9/2021; Appendix of Exhibits in Support of Las Vegas Police Managers and Supervisors Association, Inc.'s Opposition to Motion to Vacate Arbitration Award and Countermotion to Confirm Award Volume II of IV filed 8/9/2021; Appendix of Exhibits in Support of Las Vegas Police Managers and Supervisors Association, Inc.'s Opposition to Motion to Vacate Arbitration Award and Countermotion to Confirm Award Volume III of IV filed 8/9/2021; Appendix of Exhibits in Support of Las Vegas Police Managers and Supervisors Association, Inc.'s Opposition to Motion to Vacate Arbitration Award and Countermotion to Confirm Award Volume IV of IV filed 8/9/2021.

The Court reviewed all of the pleadings and attached exhibits regarding the pleadings on file.

COURT ORDERED, Petitioner Las Vegas Metropolitan Police Department s Motion to Vacate Arbitration Award filed 6/22/2021 is GRANTED in PART and DENIED in PART. Petitioner Las

Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award filed 6/22/2021 is GRANTED as to Respondent Las Vegas Police Managers & Supervisors Association, Inc.'s Request to Remand the Arbitration Award back to Arbitrator Widgeon pursuant to NRS 38.241(d). The motion is DENIED as to Petitioner Las Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award.

COURT FURTHER ORDERED Respondent Las Vegas Police Managers & Supervisors Association, Inc.'s Countermotion to Confirm Arbitration Award filed 8/9/2021 is DENIED.

COURT FURTHER ORDERED counsel for Petitioner Las Vegas Metropolitan Police Department to draft and circulate a proposed order for opposing counsel's signature prior to submitting it to the Department 4 inbox for the Judge's review and signature within fourteen (14) days and distribute a filed copy to all parties involved in this matter.

COURT FURTHER ORDERED Petitioner Las Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award filed 6/22/2021 scheduled for 12/2/2021 at 9:00 A.M. is VACATED.

COURT FURTHER ORDERED Respondent Las Vegas Police Managers & Supervisors Association, Inc.'s Opposition to Petitioner Las Vegas Metropolitan Police Department's Motion to Vacate Arbitration Award and Countermotion to Confirm Arbitration Award filed 8/9/2021 scheduled for 12/2/2021 at 9:00 A.M. is VACATED.

Clerks Note, This Minute Order has been served to all registered parties via Odyssey File and Serve. // ajw 11/23/21

#12B - Amicus Curiae Brief North Las Vegas Police Officers Association, et al.

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International Association of Firefighters, Local 1607
International Association of Firefighters, Local 1883

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

* * * *

In the matter of CLARK COUNTY's Petition for Declaratory Order	CASE NO.: 2024-016

AMICUS CURIAE BRIEF OF NORTH LAS VEGAS POLICE OFFICERS ASSOCIATION, LAS VEGAS CITY EMPLOYEES ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1285, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1607, AND INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1883

On behalf of the above referenced employee organizations, the undersigned hereby submits the following *Amicus Curiae* Brief pursuant to Nevada Administrative Code 288.245(2).

I. INTRODUCTION

On May 6, 2024, Clark County filed a Petition for Declaratory Order with this Board. Several employee organizations that represent various Clark County bargaining units filed a Joint Answering Brief on August 28, 2024. Clark County filed a Reply Brief on September 23, 2024. On October 8, 2024, this Board provided notice to all Nevada employee organizations and government employers that it was seeking the submittal of *amicus* briefs as to any of the five questions posed by Clark County in its Petition for Declaratory Order. This brief is submitted in

response thereto and addresses questions 1, 2 and 3.

Clark County has effectively petitioned this Board to both limit the application of retroactivity in labor agreements and to allow government employers to delay negotiations thereby creating a greater need for retroactivity and a greater loss to employees if the Board rules in Clark County's favor. How convenient for Clark County. Aside from being transparently self-serving, the arguments posed in Clark County's Petition are devoid of merit as will be discussed herein.

II. RESPONSE TO QUESTIONS NUMBER 1 AND 2

Question number 1 posed by Clark County is: "When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?"

Question number 2 posed by Clark County is: "When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact-finding?"

NAC 288.410(1)(a) states that this Board may refuse to issue a Declaratory Order if "the question is speculative or purely hypothetical and does not involve existing facts or facts that can reasonably be expected to exist in the near future." That is exactly the case here. Clark County's first two questions are improperly framed hypotheticals that are divorced from reality and practice. During labor negotiations, employee organizations represent entire bargaining units, not particular employees. Such representation is entirely unaffected by whether one or more employees separate their employment and/or transfer to another bargaining unit. Regardless of which particular employees are in a bargaining unit, the employee organization that serves as the bargaining agent is seeking to negotiate the best provisions for that bargaining unit. Thus, it doesn't even make sense to raise the question of whether an employee organization has standing to continue to represent a particular employee that separated employment or transferred to

another bargaining unit. Rather, it is a hypothetical that this Board need not address and can reject pursuant to NAC 288.410(1)(a).

NAC 288.410(1)(d) provides that this Board may refuse to issue a Declaratory Order if "the matter is not within the jurisdiction of the Board." To the extent that Clark County's first two questions are intended to limit retroactivity of labor agreements (as is clear from Clark County's Petition), it has raised a purely contractual issue. This Board has long ago held that it lacks the jurisdiction to resolve contractual disputes. *See, Reno Police Protective Association vs. City of Reno*, Item No. 16, EMRB Case No. 18273 (1974); *Airport Authority Employers Association v. Airport Authority of Washoe County*, Item No. 598, EMRB Case No. A1-045814 (2005). In the *City of Reno* matter, this Board held:

> "The entire statutory scheme of Chapter 288 of the Nevada Revised Statutes, which created this Board and delineates its powers, makes no reference to an executed collective bargaining agreement entered into by a local government employer and employee organization. From the express grants of jurisdiction to this Board to hear complaints and appeals arising from the initial attempts at recognition by an employee organization through the collective bargaining process and in certain areas of prohibited practice, it must be inferred that the Legislature intended to limit our jurisdiction to these instances. Without an express grant of jurisdiction to this Board to construe the provisions of an existing collective bargaining agreement at the local government level, no such jurisdiction can be presumed."

See, City of Reno, supra, at p. 3.

Whether or not an individual or entity is covered by a contract is a question of fact that is determined by the parties' intent, typically as revealed by the written language contained in the contract. *See, Floyd v. Cardinal Health*, 548 P.3d 427 (Nev. 2024); *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005). Labor agreements negotiated in Nevada typically have "Recognition Clauses" which specifically address who is covered and subject to the provisions therein. Presumably, the Recognition Clause for a particular labor agreement covers every employee in the bargaining unit. Labor agreements will obviously also have effective dates which typically, but not always, run in fiscal years. "Evergreen clauses" can extend the length of a labor agreement beyond the stated term. Moreover, and critical for the discussion here, when government employers and employee organizations reach an agreement on a successor labor agreement at a time when an Evergreen clause has extended the original labor

agreement (ie: after the expiration of the stated term of the original labor agreement), the common practice is for the successor labor agreement to be made retroactive to the end of the original labor agreement. If the successor labor agreement contains a cost of living adjustment or any other wage increase, the employees covered by the labor agreement are entitled to receive backpay. That this would include not only employees that are still employed with the government employer as of the date that the successor labor agreement was reached but any employees that had been employed at any point in the retroactive period (ie: from the date the original labor agreement ended through the date the successor agreement was reached) is an obvious consequence of retroactivity. Perhaps Clark County would somehow disagree with that assessment but regardless, the point is that it would be a question of fact to be assessed based on an interpretation of the labor agreement. Thus, any dispute as to whether a particular employee is covered by the successor labor agreement- including during the retroactive period- would simply be a contractual dispute. Given that this Board lacks the jurisdiction to resolve contractual disputes, it should refuse to issue a Declaratory Order in response to Clark County's first two questions pursuant to NAC 288.410(1)(d).

Of note, it is this Board's lack of jurisdiction to resolve contractual disputes that clearly explains this Board's ruling in *Bahlman v. Washoe County Fire Commissioners*, Item No. 107, EMRB Case No. A1-045340 (1980). In *Bahlman*, the Complainant, who was terminated on December 21, 1979, asked this Board to compel the government employer to provide him with backpay based on a labor agreement that was retroactive to July 1, 1979. Clark County infers without basis that this Board's ruling in *Bahlman* was the product of this Board agreeing that retroactivity somehow only applies to current government employees and not to those who separated before a successor agreement with a retroactive period is reached. *See*, Clark County's Petition, p. 10, lines 18-24. But this Board said no such thing in *Bahlman*. Rather, this Board simply agreed that the Complainant had not raised any issue under the Act that the Board had the jurisdiction to resolve. Given that the Complainant's claim implicated nothing but a contractual dispute- whether he was covered under the retroactive labor agreement- this makes perfect sense. The language in this Board's decision is quite clear that it was the jurisdictional limitation- not the

Complainant's status as a former government employee- that yielded the result. Specifically, this Board held:

> "The Respondent states that nowhere in Complaint does the Complainant allege any violation by the Respondent of the provisions of Chapter 288. Further, the Respondent believes that the provisions of any retroactive collective bargaining agreement apply only to individuals who are employees at the time settlement is reached. The Respondent's Motion to Dismiss, in so far as the Board lacks jurisdiction in that the Complaint contains no alleged violation of any provision of Chapter 288 by the Respondent, is well taken. Accordingly, it is ORDERED that the Complaint be, and the same hereby is, dismissed."
>
> *Balhman, supra*, p. 1-2.

Thus, the Board recounted how the Respondent's Motion to Dismiss was premised on multiple arguments, including (1) that the Complaint failed to implicate the Act; and (2) that the retroactive labor agreement only applied to current employees rather than those that had already separated such as the Complainant. The Board only referenced the jurisdictional argument- and not the argument that the Complainant lacked standing to enforce the labor agreement- in its rationale for granting the Respondent's Motion to Dismiss. Clark County's attempt to read in a pronouncement against retroactivity for separated employees is thus specious.

If this Board is inclined to answer Clark County's first two questions, the correct answer is manifest from both logic as well as this Board's established precedent: Bargaining agents have the authority to continue to represent separated or transferred employees during labor negotiations but only with respect to the period of time when the employee was still in the bargaining unit. This would be consistent with this Board's long held practice of allowing employees that have been separated and are no longer government employees to petition the Board. *See, e.g, Spannbauer vs. City of North Las Vegas*, Item No. 636C, EMRB Case No. A1-045885 (2008); *Boykin v. City of North Las Vegas*, Item No. 674E, Case No. A1-045921 (2010); *Wilson vs. North Las Vegas Police Department*, Item No. 677E, Case No. A1-045925 (2010); *Frabbiele v. City of North Las Vegas*, Item No. 680I, EMRB Case No. A1-044929 (2014). As these cases reveal, and as Clark County acknowledges in its Petition, this Board considers individuals who were separated from employment with a government employer to be covered under the Act with respect to claims intended to redress misconduct that occurred when the individuals were government employees. In other words, a "local government employee"

under NRS 288.050 includes not only individuals who are currently employed by a government employer but also individuals who were previously employed by the government employer at the time of the alleged misconduct. Again, Clark County acknowledges this fact in its petition. *See*, Clark County's Petition, p. 11, lines 15-24.

As pertaining to the issue at hand, there is simply no reason to depart from the logic that undergirds the above precedent: an employee organization's authority (and duty) to represent a particular individual depends on the timeframe of the person's employment. By way of example, if an individual was a government employee for the past three years but separates employment today, the relevant employee organization was and still is responsible for representing that individual for the period of time covering those three years. Whether the employee is terminated, retires or transfers to another bargaining unit simply does not change the equation. Either way, the employee organization representing the bargaining unit that the individual was previously a member of must represent that individual for all matters under the Act that occurred in the relevant time frame. This would certainly include the negotiation of a labor agreement that covers the period of time prior to when the individual separated employment.

Thus, the answer to Clark County's first two questions is clearly in the negative. That is, a bargaining agent does not lack standing to continue to represent a former employee through negotiations and fact-finding (so long as that former employee was in the relevant bargaining unit for at least part of the term of the successor labor agreement being negotiated). Similarly, the principle of exclusive representation affirms rather than prevents a former bargaining agent from continuing to represent an employee that has transferred out of the bargaining unit (so long as the employee was previously in the relevant bargaining unit for at least part of the term of the successor labor agreement being negotiated).

III. RESPONSE TO QUESTION NUMBER 3

Question number 3 posed by Clark County is: "When a prior agreement is unresolved before negotiations for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?"

Clark County's proposal for deferring negotiations runs counter to explicit language in the Act, particularly NRS 288.180(3) which states: "The parties shall *promptly* commence negotiations." That is, negotiating promptly certainly doesn't entail an undefined period of delay due to some sense of uncertainty that a government employer might claim because of a prior unsettled agreement. That the Act contemplates a timely negotiation and impasse litigation process unencumbered by delays is further evidenced by the timelines it specified for various proceedings, particularly mediation at March 1 (NRS 288.180) and fact-finding at April 1, (NRS 288.200). The employee organizations representing the various Clark County bargaining units did an excellent job of enumerating all of the various provisions in the Act that unequivocally reveal that the Legislature intended for impasse litigation to be expedited rather than protracted. *See*, Joint Answering Brief, p. 20-21. Given that Clark County's proposal for a lengthy period of delay flies in the face of clear Legislative intent for a speedy resolution of negotiations and impasse litigation, it is respectfully submitted that this Board should answer Clark County's third question in the negative.

Clark County's proposal in question number 3 should also be rejected by this Board because it constitutes bad policy. If a government employer were entitled to delay negotiations while a prior labor agreement was still being finalized (presumably through impasse litigation), the end result would simply be greater and greater delays for all potential successor agreements. By way of example, the undersigned is representing the International Association of Firefighters, Local 1285 in impasse litigation with the City of Las Vegas. The City did not want to litigate a multi-year contract and so only a labor agreement covering fiscal year 2025 is at issue. Pursuant to NRS 288.200, the parties conducted a non-binding fact-finding on August 6 and 7 of 2024 but, through no fault of either party (or the fact-finder), a decision has still not yet been provided. If the fact-finder's recommendations doesn't prompt the parties to resolve the impasse, they will proceed to binding arbitration pursuant to NRS 288.215. Given that the fact-finder's decision has not yet been produced, it would seem unlikely that the binding interest arbitration could even be scheduled until March or April of 2025. Unfortunately, most arbitrators' schedules are incredibly

tight with some having no availability for many months.[1] Assuming that the arbitrator doesn't instruct the parties to enter into negotiations for the allowable three week period, a final decision from the arbitrator would likely come no earlier than May or June 2025. While the impasse litigation proceeds, the undersigned expects the parties to begin negotiations for a labor agreement covering fiscal year 2026. Indeed, it is hoped that such negotiations will commence in January 2025, which is certainly consistent with the parties' normal practice. On the other hand, if the City of Las Vegas could delay negotiations in accordance with Clark County's proposal, they potentially wouldn't begin until May or June 2025. In that event, any future impasse would lead to impasse litigation that would extend even further into the normal timeline for the negotiations of labor agreements for subsequent years.

Given the reality of impasse litigation, it is clear that the delays sought by Clark County in its Petition would simply beget further delays and ultimately accomplish nothing more than to gum up the works so that public sector labor negotiations grind to a halt. This would certainly benefit government employers like Clark County who benefit from delays (because successor labor agreements typically include cost of living adjustments) and hence welcome them. This would especially be the case if government employers could evade having to provide backpay to employees that separate in the interim.

IV. CONCLUSION

The Legislative intent behind the Act was to level the playing field between labor and management and promote harmony in labor relations. Yet Clark County's proposals would simply reward a government employer when it delays the negotiation process. Employee organizations would be left with a choice between accepting inferior proposals or having to deal with an even more protracted and grinding negotiation process. Clark County claims that it wants to promote long term contracts rather than a "staccato series of year-long agreements." See, Clark County's Reply Brief, p. 15, lines 14-26. What Clark County means is that it favors long term contracts *on its terms*. Indeed, employee organizations also favor long term contracts, just

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[1] The undersigned has had a few arbitrators that couldn't provide dates for an arbitration within the year.

not inferior ones. Clark County's attempt herein to obtain leverage to force feed employee organizations inferior long term contracts in order to avoid months and years of delay along with no retroactivity should be rejected.

Dated: December 30, 2024

By: _____

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International Association of Firefighters, Local 1285, International Association of Firefighters, Local 1607 and International Association of Firefighters, Local 1883

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 30, 2024, a copy of ***AMICUS CURIAE* BRIEF OF NORTH LAS VEGAS POLICE OFFICERS ASSOCIATION, LAS VEGAS CITY EMPLOYEES ASSOCIATION, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1285, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1607, AND INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1883** for the above captioned matter was served via e-mail on:

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#12C Amicus Brief (on behalf of Washoe County Employees Association)

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FILED
December 31, 2024
State of Nevada
E.M.R.B.
9:48 a.m.

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In the matter of CLARK COUNTY,) Case No. 2024-016
)
Petition For Declaratory Order.)
)

AMICUS BRIEF IN RE
CLARK COUNTY'S PETITION FOR DECLARATORY ORDER

COMES NOW WASHOE COUNTY EMPLOYEES ASSOCIATION, (hereinafter WCEA), and NEVADA CLASSIFIED SCHOOL EMPLOYEES ASSOCIATION, (herein after NCSEA), by and through their undersigned attorney, and pursuant to the Board's email dated October 8, 2024, seeking amicus briefs, WCEA and NCSEA hereby file an amicus brief on the issues presented to the Board in Clark County's Petition For Declaratory Order.

I.
INTRODUCTION

WCEA is an employee organization located in Washoe County and represents public persons employed by Washoe County in civilian positions. WCEA is a recognized bargaining agent by Washoe County for two bargaining units - one for non-supervisory employees and one for supervisory employees - and represents

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approximately 1300 Washoe County employees and has had a bargaining relationship with Washoe County for over 40 years. As an employee organization which represents public employees in the State of Nevada, WCEA has a strong interest in the outcome of Clark County's Petition For Declaratory Order as WCEA and its members may be directly affected by it.

NCSEA is an employee organization located in Northern Nevada and represents public persons employed primarily by School Districts in civilian positions. NCSEA has nine "Chapters" and represents over 600 public employees and has a bargaining relationship with seven school districts and two counties. As an employee organization which represents public employees in the State of Nevada, NCSEA has a strong interest in the outcome of Clark County's Petition For Declaratory Order as it and its members may be directly affected by it.

As stated hereinbelow, the undersigned attorney for WCEA and NCSEA has read the pleadings of Petitioner and Respondents and, in the interests of not unduly burdening the record, hereby states WCEA and NCSEA agree with and support Respondents' positions put forth within its well-written Joint Answering Brief In Response To Clark County's Petition For Declaratory Order on the issues presented to the Board.

Nevertheless, WCEA and NCSEA submit they must also expand on and reply to some of the issues and positions asserted and claimed by Clark County, even though Respondents may have also addressed the same issues.

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II.
CLARK COUNTY HAS MIS-INTERPRETED RPPA v. CITY OF RENO

On page 6 of its Petition, under the heading "The Gap Between Agreements," Clark County cites ***Reno Police Protective Association v. City of Reno***, Item No. 175, EMRB Case No. A1–045390 (1985), and claims this Board "has stated that during this gap, the parties must maintain the status quo as it concerns mandatory subjects of bargaining." And, in footnote 2 Clark County claims: "The implication within ***City of Reno*** is that the duty to maintain the status quo following impasse is a trade-off for the Act's regulation of the common law no-strike rule that applies to public-sector bargaining."

It is respectfully submitted that ***City of Reno*** did not address any "gap period" but involved, *inter alia*, the City of Reno's failure to honor its agreement "the that statutory deadline for mediation and factfinding would be waived," (Item No. 175, at 2), and "[the fact that City of Reno] implemented changes to the employees' health insurance program and special pay practices *without negotiating said subjects with [Reno Police Protective Association]*." (*Id.*, at 6; Emphasis added.) The Board thus found that the City "committed a prohibited practice violation" for each act as required by NRS 288.270(1)(e). (Item No. 175, at 5-6.)

III.
CLARK COUNTY HAS MIS-STATED AN EMPLOYEE ASSOCIATION'S DUTY OF FAIR REPRESENTATION

On pages 11-13, under the caption "Bargaining Obligations Do Not Attach To Former Employees" of its Petition, Clark County makes multiple erroneous statements concerning an Association's duty to represent its members.

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Specifically, on page 12, lines 7 to 10, Clark County contends: "As the scope of a bargaining agent's authority extends only to the employees in the unit, which are *current employees*, it loses its authority to negotiate on behalf of an individual upon separation." (Emphasis added.) In so arguing, Clark County fails to acknowledge that if it fires an employee the Association stll represents that person, even though it is no longer a "current employee". An employee who has been fired by the employer is still covered by the Act! In Nevada, the Association has a duty to represent such persons if they are members and that involves not simply protesting the discharge, but to negotiate on their behalf during open negotiations, if necessary, and/or if the outcome of the negotiations might affect that person. In doing so, the Association can propose provisions to be included in the collective bargaining agreement or successor agreement which will apply retroactively to all persons who may have been considered a "current employee" at any or all of the effective dates of the successor agreement. There is no law which prhibits such proposals or that forbids the parties from agreeing to such provisions.

In ***Weiner v. Beatty***, 121 Nev. 243, 249 (2005), the Court stated:

> ... we recognized in ***Cone v. Nevada Service Employees Union*** that local government employee organizations are subject to the duty of fair representation. And, we determined in ***Rosequist v. International Ass'n of Firefighters*** that "fair representation of an employee by a union *involving the implementation of the terms of a collective bargaining agreement* is a right arising under the [EMRA] and the failure of a union to fairly represent an employee interferes with that right." (Citations omitted; emphasis added.)

Continuing, the Court further stated:

> We take this opportunity to further address the scope of the duty

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> of fair representation under the EMRA. We agree with federal law that the duty of fair representation governs the relationship between union members and union representatives. When a collective bargaining agreement is in place, the union and its bargaining representatives *owe a duty of fair representation to its members.* The duty of fair representation requires that when the union represents *or negotiates* on behalf of a union member, it must conduct itself in a manner that is not "arbitrary, discriminatory, or in bad faith." If the union's conduct is deemed to be within the duty of fair representation, liability will not lie against the union for acts undertaken in representing a union member. (Citations omitted; emphasis added.)

This Board has recognized and held: "that it is proper to look toward the NLRB for guidance on issues involving the EMRB. The NLRB has been held to have exclusive jurisdiction over unfair labor practice issues, which arguably involve claims against a union for breach of the duty of fair representation." ***Rosequist v. International Association of Firefighters***, 118 Nevada 444, 449 (2002) (Citation omitted.).

"Where union and employer have renegotiated collective bargaining agreements governing a group or several groups of employees, the sole inquiry should be whether, under all the circumstances, the union has considered the interests of all whom it represents; regardless of whether employees represented by particular union constitute one or more units and whether they are covered by one or more agreements, union still has the duty to represent fairly all of its members." ***Ekas v. Carling Nat. Breweries, Inc***., C.A. 4 (Md.), 602 F.2d 644, cert denied 100 S.Ct. 669, 444 U.S. 1017 (1980).

Accordingly, it is respectfully submitted Clark County has erroneously argued an employee organization "loses its authority to negotiate on behalf of an individual upon separation."

///

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IV.

COLLECTIVE BARGAINING AGREEMENTS CAN BE MADE RETROACTIVE TO INCLUDE CERTAIN SEPARATED EMPLOYEES

At the bottom of page 12, lines 26–28, of its Petition, Clark County argues: "the end result that a contract that is formed after separation occurs ***cannot retroactively be made*** to include one for whom there was no bargaining authority at the time the agreement was reached." (Emphasis added.) And, at the top of page 13, lines 2–3, Clark County argues: "A former employee, being situated outside the parameters of the act at the time the agreement is being negotiated, **cannot lawfully be included in the agreement**." (Emphasis added.) However, the County does not provide any citation to support its argument, but only professes mere sophistry. As noted above, there is no Nevada law whatsoever, or any law anywhere in the country, that prohibits the parties from agreeing that a successor agreement to an expired collective bargaining cannot cover persons who were separated from employment voluntarily or involuntarily before the successor agreement was reached. Neither Clark County not any public employer can unilaterally dictate only "current employees" can be covered by a retroactive CBA.

On page 13, lines 15-20, of its Petition, Clark County also refers to ***Bahlman v. Washoe County Commissioners***, EMRB Case No. A1-045340, Item No. 107 (1981),[1] stating, in relevant part: "the County asks the Board to confirm its decision in ***Bahlman*** and to clarify that a bargaining agent is not authorized to continue bargaining on behalf

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1. As well as on page 9 where it wrongly argued: "This issue of bargaining on behalf of former employees during a gap has come before the ... Board once before ... [citing] ***Bahlman v. Washoe County Fire Commissioners.***"

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of former employees who voluntarily separate during the gap and before a successor agreement is reached." And arguing, obviously relying on ***Bahlman***: "A successor agreement, even a retroactive one, ***cannot encompass individuals who separate from employment before the successor agreement is finalized***." (Emphasis added.)

First, it is respectfully submitted the Board did not address the so-called "gap" or its affect on "individuals who separate from employment before the successor agreement is finalized" in ***Bahlman***, contrary to Clark County's arguments. The Order Dismissing Complaint in ***Bahlman*** clearly stated on page 1 the complaint was dismissed because "the Board lacks jurisdiction in that the Complaint contains no alleged violation of any provision of Chapter 288."

Second, as noted above, there is no law that prohibits the parties from agreeing "a successor agreement, even a retroactive one," to include/cover persons who separated from employment 'before the successor agreement is finalized."

As Senator Dodge stated in 1969 when he introduced SB-87 which became the Employee Management Relations Act, the "local government employee management relations board which is an administrative board – it's a Board of review – it's a board which will help evolve the guidelines and procedures under this piece of legislation." (Committee on Federal, State and Local Governments, minutes of meeting February 25, 1969, pages 4-5.)

So, to state the obvious, this Board **cannot make a rule or law** prohibiting an employee organization and a public employer from agreeing to include "individuals who separate from employment" in any agreement, including, but not limited to, "a successor

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agreement, [or] even a retroactive one," as Clark County is asking it to do.

V.
The Nevada Court's holding in Nevada Highway Patrol Ass'n

On pages 4 and 5 of its "Reply In Support Of Petition For Declaratory Order" Clark County references ***Nevada Highway Patrol Ass'n v. State, Dept. Of Motor Vehicles, etc.***, 107 Nev. 547, 815 P.2d 608 (1991), and argues "collective bargaining is only lawful and only when it occurs within the parameters of the EMRA." The County also referenced that case on page 12 of its Petition where it cited ***Bahlman***.

In doing so, the County attacks Respondents' "Brief In Response To The Petition For Declaratory Order," arguing:

> [T]he Unions' opposition fails to comprehend the significance of ***Nevada Highway Patrol Ass'n***. Indeed, the opposition contains only a single sentence addressing Nevada Highway Patrol Ass'n; and that single sentence only serves to misrepresent the actual holding in ***Nevada Highway Patrol Ass'n*** by slicing off half of the court's holding and artificially limiting the holding to the point that bargaining for state employees must occur with a state–recognized representative. (Reply, at 4:14-19.)

Immediately thereafter, Clark County quotes "the other half of the court's holding" which, as the Board can observe, stated, in relevant part, "that absent express statutory authority, Nevada public officials and state agencies do not have the authority to enter into collective bargaining agreements with public employees ..." (Emphasis supplied.)

As all parties clearly recognize, that quote comes from a 1991 Nevada Supreme Court decision and clearly only addressed the ability of STATE EMPLOYEES to collectively bargain and had no impact on the ability of other PUBLIC EMPLOYEES's to collectively bargain.

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However, in 2019 the Legislature enacted NRS 288.400 which (a) "Grant[ed] certain state employees the right to associate with others in organizing and choosing representatives for the purpose of engaging in collective bargaining and (b) "Requir[ers] the State to recognize and negotiate wages, hours and other terms and conditions of employment with labor organizations that represent state employees and to enter into written agreements evidencing the result of collective bargaining." (Emphasis added.)

Accordingly, it is respectfully submitted ***Nevada Highway Patrol Ass'n*** did not issue "a clear doctrinal pronouncement of Nevada law affecting public sector collective bargaining," (Reply, 4:13-14), that prohibits a local government employer from entering into collective bargaining agreements with employee organizations that represent local government employees or that "former employees" are not covered by the EMRA as Clark County opines.

VI.
CONCLUSION

As stated above, WCEA and NCSEA agree with the positions clearly stated by the Unions and Associations concerning the five specific questions presented to the Board in Clark County's Petition For Declaratory Order and respectfully request the Board to adopt those positions in issuing its Order.

Respectfully submitted this 30th day of December, 2024.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on this 31st day of December 2024, I served a true and correct copy of the foregoing AMICUS BRIEF IN RE CLARK COUNTY'S PETITION FOR DECLARATORY ORDER by emailing the same to the following recipients. Service of the foregoing documents by email is in place of service via the United States Postal Service.

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#12D LVMPD's Amicus Brief

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In the Matter of CLARK COUNTY,	
Petition for Declaratory Order,	Case No.: 2024-016

LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S AMICUS BRIEF

Las Vegas Metropolitan Police Department ("LVMPD"), by and through its attorney of record, Marquis Aurbach, hereby files its Amicus Brief in the above-referenced matter, pursuant to the Board's October 8, 2024 Call for Amicus Briefs.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

LVMPD is in support of Clark County's Petition for Declaratory Order and encourages the Board to issue a Declaratory Order on the five issues presented in the Petition in alignment with the arguments advanced by the County. While LVMPD may not necessarily have encountered all of the bargaining challenges identified by the County in its Petition, the arguments advanced by the County support the underlying purpose of the Employee Management Relations Act ("EMRA") of promoting legitimate and fair collective bargaining. From a pragmatic perspective, the application of the impasse procedures outlined in the EMRA, can (and according to the Couty) do create a gap period for separated employees between the successor agreement and a new agreement. Additionally, the County is correct is its presentation

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that the realistic application of the impasse procedures outlined in the creates overlap in negotiations which can impede collective bargaining.

II. LEGAL ARGUMENT

A. BARGAINING ON BEHALF OF EMPLOYEES WHO CEAE TO BE AN "EMPLOYEE" DURING A GAP PERIOD.

In the Petition, the County's first question is, "When an employee separates from employment after a collective bargaining agreement expires and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?" (Pet. at p. 3:5-8). Nevada Revised Statute 288.050 defines a "local government employee" as "any person employed by a local government employer." NRS 288.050. By its plain language, a person must actively be employed by a local government employer in order to be considered an "employee" for purposes of the EMRA. Because a bargaining agent is only statutorily authorized to represent "local government employees" during collective bargaining, it is axiomatic that in order to be represented by a bargaining agent, one must also be an active local government employee at the time of bargaining.

B. SIMLUTANEOUS REPRESNTATION ACROSS MULTIPLE BARGAINING UNITS.

The County's second issue presented asks whether an employee can be simultaneously represented by two different bargaining agents. (Pet. at p. 3:9-12). Specifically, the County poses the scenario when an employee transfers from one bargaining unit to another and, in that scenario, can the employee be represented by two different bargaining agents. Again, the plain language of the EMRA supports the County's position on this issue. Pursuant to Nevada Revised Statute 288.133, a "bargaining agent" is an "employee organization recognized by the local government employer as the *exclusive* representative of all local government employees *in the bargaining unit* for purposes of collective bargaining." NRS 288.133. The statutory concept of exclusivity in representation for purposes of collective bargaining, as argued by the County, dictates that once an employee leaves one bargaining unit, s/he cannot be represented by his/her

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former bargaining agent, as a finding to the contrary would render the plain language of NRS 233.133 meaningless.

C. DEFERRAL OF NEGOTIATIONS ON CERTAIN ISSUES FOR A SUCCESSOR AGREEMENT, PENDING FINALIZATION OF A PRIOR AGREEMENT.

The County next raises the question of whether a party can defer negotiations on a successor agreement on subjects that a derivative of unsettled terms until a prior agreement is finalized. (Pet. at p. 3:13-16). The County's concern in this respect surrounds a temporary uncertainty which impedes the parties' ability to engaging in meaningful negotiations over a successor contract. To this end, the County presents an important question, as it is not hard to envision a scenario where unsettled terms in a prior contract, for all intents and purposes, prevent the parties from discussing related terms in a successor contract. As such, the Board should declare that, in the case of overlapping negotiations create material uncertainties affecting the successor contract, a party is permitted to defer negotiations on the second contract until such time as the first contract is finalized. Such a decision will foster good-faith and fair collective bargaining, while recognizing the pragmatic hurdles presented in situations where there is overlapping bargaining.

III. CONCLUSION

The County's Petition presents issues of statewide importance, as designated by the Board, and the Board should side with the County on these issues.

Dated this 31st day of December, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S AMICUS BRIEF** was submitted electronically for filing with the State of Nevada Government Employee-Management Relations Board on the 31st day of December, 2024.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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#12E Amicus Brief of Carson City, et al.

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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

IN THE MATTER OF CLARK COUNTY, PETITION FOR DECLARATORY ORDER	Case No. 2024-016 **AMICUS BRIEF OF CARSON CITY, CITY OF NORTH LAS VEGAS, CLARK COUNTY WATER RECLAMATION DISTRICT, DOUGLAS COUNTY, NYE COUNTY, NYE COUNTY SCHOOL DISTRICT, REGIONAL TRANSPORTATION COMMISSION OF SOUTHERN NEVADA, CITY OF SPARKS AND UNIVERSITY MEDICAL CENTER**

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER ON MATTERS OF STATEWIDE SIGNIFICANCE ARISING DURING IMPASSE PROCEEDINGS

Carson City, City of North Las Vegas, Clark County Water Reclamation District, Douglas County, Nye County, Nye County School District, Regional Transportation Commission of Southern Nevada, City of Sparks and University Medical Center (hereinafter collectively "Amici") hereby file this brief to aid the Employee-Management Relations Board ("EMRB" or "Board") to address complex areas of law and issues of

first impression regarding five matters of statewide significance pursuant to NAC 288.2715 arising during impasse proceedings in collective bargaining.

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Other Authorities

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I. STATEMENT OF THE ISSUES

1. **When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and factfinding?**
2. **When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and factfinding?**
3. **When a prior agreement is unresolved before negotiations for a successor agreement begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?**
4. **Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a party's final offer that included specified effective dates?**
5. **When the parties agree to a reopener during the term of an agreement, do the factfinding procedures automatically apply to reopener negotiations?**

II. INTEREST OF THE AMICI

The Amici in this matter are all local government employers with one or more bargaining units of employees represented by an employee organization as defined by NRS Chapter 288. All the Amici are subject to the statutory procedures governing collective bargaining pursuant to NRS 288.200, 288.215, and/or 288.217[1] — i.e. those procedures which apply at impasse. Carson City has 9 bargaining units. The City of North Las Vegas has a total of 9 bargaining units. Douglas County has a total of 4 bargaining units. The City of Sparks has a total of 7 bargaining units. Nye County has a total of 5 bargaining units. Clark County Water Reclamation District has 2 bargaining units, University Medical Center has 2 bargaining units, and the Regional Transportation Commission of Southern Nevada has 1 bargaining unit. Nye County School District has

[1] Although the Petitioner only referenced NRS 288.215(10) in its Petition, the identical language appears in NRS 288.217(8) and its meaning is of concern to the school districts across the state.

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3 bargaining units. All of the Amici either have previously faced one or more of the above issues at impasse or can readily foresee circumstances where they might face one or more of the above issues arising at impasse. As such, the Amici each have an interest in this matter.

III. INTRODUCTION

When a local government employer ("Employer") engages in collective bargaining with one or more employee organizations ("Union(s)") representing a bargaining unit of employees, such negotiations are subject to the statutory procedures of NRS 288.200, 288.215, and/or 288.217. The Employer and the Union set forth the agreed-upon terms and conditions of employment in a collective bargaining agreement ("CBA") covering a specified time period. Typically, negotiations for a successor CBA begin several months prior to the expiration of the current (predecessor) CBA. Where the Employer and the Union (together "the Parties") reach agreement prior to the expiration date of the current CBA, there is a seamless transition from the current CBA to the terms of the new (successor) CBA. However, when the negotiations for the successor agreement extend beyond the expiration date of the current CBA, and/or the Parties cannot reach agreement and have declared impasse in negotiations of the successor CBA, issues can arise during this gap period.

Upon contract expiration, Employers are obligated to maintain the status quo by continuing to apply the terms and conditions of employment contained in the expired CBA until a new agreement is reached with the Union. For example, employees continue to accrue and take PTO at the old rate, employees still receive a paycheck and health insurance, employees can still be disciplined for violations of the old CBA, and employees can still file grievances. When the Parties finally reach agreement upon a successor CBA, the Parties will often agree — but are not required to agree — to make a payment for "retroactive" salary increases as if those increases took effect during the

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gap period. However, it is also common to see CBAs that specify the effective date(s) for a salary increase and may make the salary change effective upon approval or ratification or some other later effective date.

The Respondent asserts that NRS 288.215(10)'s requirement that "[a]ny award of the arbitrator is retroactive to the expiration date of the last contract" requires salary increases and other monetary awards to be made retroactive to the expiration date of the predecessor CBA. Many times, a Party's final offer includes proposed language on multiple topics, including, wages. And many times, the proposals contained in a Party's final offer could include different effective dates for different topics. Respondent's interpretation of NRS 288.215(10) effectively authorizes the arbitrator to change the terms of one or more components of the final offer of any Employer. That is because the Employer may have included effective dates for portions of the final offer that occur after expiration of the prior CBA. Therefore, if NRS 288.215(10) is interpreted as argued by Respondents, the Employer will lose the right to decide on the terms of its proposal. Indeed, a Union may propose in bargaining that any wage increase in the new CBA be retroactive to the ending date of the expired CBA. But NRS 288.032 provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Therefore, Respondent's interpretation of NRS 288.215(10) is wrong.

The statutory reference to retroactivity is only designed to prevent any gaps between the expiration date of a CBA and the effective date of the new CBA. Respondent's interpretation would inject the arbitrator into the negotiation process and remove the Parties' authority to craft their own respective final offers. Respondent's interpretation would further force the arbitrator to adjust the effective date of all of the components of the Party's final offer to the expiration date of the prior CBA. That adjustment could drastically increase the cost of the offer.

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Moreover, the operations of the Employer do not cease upon expiration of the (current/predecessor CBA) and employees are still hired, terminated, promoted, and transferred during the gap period. But when an employee leaves the bargaining unit (whether due to termination, retirement, promotion to a non-bargaining unit position, transfer to a position outside of the bargaining unit, etc.) during the gap period, the employee ceases to belong to the bargaining unit and the Union ceases to represent that employee (just like the Union begins to represent new employees upon the date of hire). The EMRB's past precedent has repeatedly held that a union cannot negotiate on behalf of former bargaining unit members. While the Parties can agree to a "retroactive" salary increase (or "retro check") covering current members of the bargaining unit still employed in the bargaining unit upon the effective date of the new (successor) CBA, the Parties cannot negotiate for or agree to any term covering an individual or employee outside of the defined bargaining unit. Stated differently, a Union cannot negotiate for a terminated employee (former bargaining unit member) any more than it could negotiate on behalf of an individual who never worked for the Employer.

Therefore, the EMRB should logically interpret the retroactivity language in NRS 288.215(10) to allow a party to include specific effective dates for one or more components in its final offer. The EMRB should also reaffirm its prior decisions holding that a bargaining agent lacks standing to represent or negotiate on behalf of former bargaining unit members.

IV. ARGUMENT

A. The Board Should Not Interpret The Retroactivity Clause In NRS 288.215(10) As Permitting The Arbitrator In Binding Factfinding To Change The Terms Of The Party's Final Offer

By way of background, when Parties engage in negotiations for a successor CBA, negotiations frequently extend beyond the term (expiration date) of the prior CBA. If the negotiations stall and the Parties reach impasse, the factfinding provisions of NRS

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288.200 allow the Parties to utilize a 2-step factfinding process to resolve the outstanding issues for the CBA. Except for the teachers and educational support personnel, the first step is non-binding factfinding where the factfinder hears the presentation of both the Union and the Employer and then makes a recommendation based on the criteria in NRS 288.200(7). If the first step does not lead to an adopted CBA, the Parties move to the second step of binding factfinding under NRS 288.200(6);[2] which is often referred to as "binding impasse arbitration." The key distinction between the two steps is that the second step of binding factfinding requires each Party to submit a "final offer" and the arbitrator must select either the Union's offer or the Employer's offer ***in its entirety***.[3] The arbitrator is not permitted to modify either Party's final offer nor pick and choose parts of each final offer and put them together in one decision. This style of binding factfinding/arbitration is often referred to as "baseball style" arbitration.

Because the impasse procedures can take many months, an Employer with an interest in encouraging a Union to settle the CBA as quickly as possible may make the effective date of one or more components of its proposal(s) "effective the later of July [year] or upon ratification by the governing board" or some other date that might, depending on the date the Parties agree or receive a binding fact finding award, occur ***after*** the expiration date of the prior CBA. Use of this perfectly legal negotiation technique could provide one Party or the other with strong motivation to settle the contract so the wage increases can take effect as soon as possible.

While the Union may argue that the lack of retroactivity is unfair to the employees that have to wait with no wage increases during the gap period, the statute does not prevent the Union from making its final offer retroactive. The arbitrator is required to

[2] Police officers and firefighters proceed from the non-binding factfinding procedures in NRS 288.200 to the binding arbitration procedures in NRS 288.215. Teachers and educational support personnel proceed from impasse directly to binding arbitration pursuant to the procedures in NRS 288.217.

[3] NRS 288.200(6) incorporates the binding factfinding procedures set forth in NRS 288.215(8)–(13). NRS 288.215(9) describes the "final offers" as a "single written statement containing its final offer for each of the unresolved issues." Colloquially this written statement is simply referred to as the Party's "Final Offer."

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pick the more reasonable of the two final offers based on NRS 288.200(7)(b). Thus, if the Union's final offer is selected as more reasonable, then there is no harm to the employees from the delay due to impasse proceedings. Conversely, if the Employer's non-retroactive offer is selected, that is because the arbitrator considered the Employer's offer to be the more reasonable option despite the lack of retroactivity. Allowing the Parties to determine the effective dates of their respective final offers allows the arbitrator to consider fairness and necessity of a retroactive offer versus a non-retroactive offer when assessing the overall reasonableness of each offer. By choosing the more reasonable option, the arbitrator is effectively assigning fault for the impasse (and resultant delay) to the losing Party who failed to agree to the winning Party's more reasonable offer during negotiations. Additionally, allowing each Party to set forth the effective dates for provisions in the final offer allows the Parties to spread out the effective dates of various wage increases.[4] This is a very common occurrence in multi-year CBAs.

Question 4 of the Petition asks: "Does the retroactive provision in NRS 288.215(10) authorize a factfinder to change the terms of a Party's final offer that included specified effective dates?" Pet. p.3. The Respondent has taken the position that the language in NRS 288.215(10) which states "[a]ny award of the arbitrator is retroactive to the expiration date of the last contract" (hereinafter "retroactivity language") authorizes (or actually requires) the arbitrator to change the effective dates of the Employer's final wage offer to the expiration date of the last CBA — effectively changing a non-retroactive offer into a fully retroactive one. *See* Joint Ans. p.25. The Board should reject the Respondent's interpretation of NRS 288.215(10) and find that the retroactivity language only controls the "term" or start date of the successor CBA.

[4] For example, presume the prior CBA expired on June 30, 2023, and there is a gap period due to impasse proceedings of 1 year. Instead of a 4% wage increase effective July 1, 2023, the proposal could be quarterly with four 1% wage increases at the beginning of each quarter. The difference would be a few dollars to an individual employee but could represent huge cost savings to an Employer with a very large bargaining unit.

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1. An arbitrator does not have the authority to modify a Party's final offer.

A final offer is designed to be the offer that the Party selects and believes is fair and reasonable. By changing the effective dates of one or more components contained in a final offer, the arbitrator would be fundamentally changing the offer itself. A primary consideration for all Employers when negotiating a CBA is always the cost of the proposals and the impact on the local government's budget. *See* NRS 288.200(7)(a). Changing the effective dates of a final offer could drastically change the costs of the offer.

For example, presume the prior CBA expired on June 30, 2023, and the final offer is for a 2-year deal (July 1, 2023 – June 30, 2025), and the Employer's final offer is a 4% wage increase effective July 1, 2024. Now assume there are 1,000 employees in the bargaining unit, each employee makes $1,000 each pay period, and there are 26 pay periods in a year. Simply making the final offer "retroactive" — i.e. changing the effective date of the Employer's final offer from July 1, 2024 to July 1, 2023 — results in a $1,040,000[5] increase in the cost of the Employer's final offer.

Allowing the arbitrator to unilaterally increase the cost of the Employer's final offer would dramatically alter the Employer's final offer to one that the Employer never anticipated making. Permitting surprise increases in the cost of the final offer would fly in the face of NRS 288.200(7)(a)'s requirement that the factfinder must make "[a] preliminary determination . . . as to the financial ability of the local government employer" to pay the final offer of each Party. By definition, this "preliminary determination" must occur before the arbitrator chooses either offer, i.e. before factoring in the arbitrator imposed retroactivity.

Additionally, the binding factfinding procedures of NRS 288.215(10) are designed so that an arbitrator must choose between the final offers of the Employer and

[5] $1,000 per employee per pay period * 0.04 = $40 salary increase per employee, per pay period $40 salary increase per pay period * 26 pay periods per year = $1,040 per employee per year $1,040 per employee per year * 1,000 employees = $1,040,000 per year.

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the Union. Unlike the non-binding factfinding where the factfinder can recommend an amount between the two proposals, the arbitrator in binding factfinding has no power to alter the terms of the two final offers and can only select between the two final offers. NRS 288. 215(9)-(10). Therefore, the Parties should be able to include specific effective dates for various increases in their final offers.

Notably, allowing the Parties to select the effective dates of their respective final offers is one factor the arbitrator can consider when selecting between the two offers — e.g., if Union's final offer was 4% retroactive and Employer's final offer was 4% non-retroactive, retroactivity would be the only factor the Arbitrator had to choose between when selecting the more reasonable final offer. This is fair to the overall process because the Union is ***always free to make its offer retroactive*** and if the arbitrator finds the Union's offer to be more reasonable, the arbitrator is curing any harm[6] to the party judged to be the more reasonable party and is implicitly finding that any delay caused by the factfinding was the "fault" of the Employer. On the other hand, if the Employer's non-retroactive offer is selected, it is because the arbitrator has judged the non-retroactive offer to be the more reasonable offer. In doing so the arbitrator could implicitly be finding that the delay caused by factfinding was attributable to the fact that the Union did not accept the Employer's reasonable offer sooner. Prominent factfinders in both binding and non-binding factfinding have awarded non-retroactive wage increases. *See Service Employees Int'l Union, Local 1107 v. Clark County*, Binding Award, p.7 (Susan Grody Ruben Dec. 3, 2018) (a copy of which is attached hereto as **Exhibit 1**); *Boulder City Prof'l Fire Fighters Assoc., Local 5073 v. City of Boulder City*, Non-Binding Recommendation Re: Retroactivity Date, p.4 (Sara Adler March 4, 2019) (a copy of

[6] Respondent incorrectly asserts that retroactivity is necessary to counteract the anti-strike requirement. Joint Ans. p.25. Rather it is the risk that the outcome at binding factfinding ***could be*** retroactive that will drive the Parties towards their bottom-line during negotiations, and ensure the Employer is not driven purely by the potential to "enjoy an economic gain." *Id*.

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which is attached as **Exhibit 2**). Giving the Parties control over the final offers is necessary to allow the arbitrator to fully evaluate which offer is more reasonable.

2. Each Party should be permitted to decide the effective dates of its final offer as a method to avoid protracted impasse/factfinding proceedings.

Contrary to Respondent's assertion, permitting a non-retroactive final offer does not create an incentive for the Employer to make "bad offers" or attempt to force the Parties into impasse factfinding. Joint Ans. p.26. Rather the opposite is true since interpreting NRS 288.215(10) as requiring mandatory retroactivity creates an incentive for the Union to insist on unreasonably high "bad offers" and force every negotiation into impasse factfinding.[7]

The statute is designed to promote good faith negotiations and efficient settlement of CBAs. NRS 288.150. Submitting matters to binding impasse arbitration should be the rare exception, not the norm. Elkouri & Elkouri: *HOW ARBITRATION WORKS*, Chapter 22, § 22.3 (Elizabeth J. Fabrizio ed., 2021) (BNA ebook) (*citing United States Postal Service*, 83 BNA LA 1105, at 1109 (Kerr, Simon, Kheel, Nash & Mahon, Dec. 24, 1984)) ("Arbitration of interests, if it becomes the practice, instead of the occasional exception, can become lethal in the long run."). Final offer impasse arbitration is designed to encourage the Parties to negotiate toward the middle ground rather than staking out polar positions because the Parties know that that the arbitrator must choose the more reasonable of the Parties' final proposals. Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 Ohio State J. Disp. Res. 1, at 16 (2013).

Under NRS 288.200, there is currently a 5-month window for negotiations to occur (February 1 through June 30), and one of the Employer's greatest tools for motivating a Union to settle the CBA before the expiration date of the prior CBA is to

[7] A Party could always bring a prohibited practice claim that an unreasonable "bad offer" constituted bad faith surface bargaining where that Party had no intention of reaching an agreement. *See City of Reno v. Int'l Ass'n of Firefighters, Local 731*, Item No. 253-A (Feb. 8, 1991).

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propose that the increases will not be retroactive and bargaining unit members will not receive any wage increases during the gap period.[8] This motivation drives the Parties to reach their true "bottom line" prior to declaring impasse. Without the risk that the arbitrator could choose a non-retroactive wage increase, the Union would have no incentive to make an early deal and avoid factfinding because the worst deal the Union can receive at factfinding is whatever was the Employer's last proposal on the table at the time of impasse. If there is no potential downside for the Union to take the matter to binding factfinding, the Union will always have an incentive to gamble and see if it can get more from the arbitrator at factfinding. Interpreting the language as suggested by the Respondent removes any incentive for Unions to negotiate in good faith and settle contracts efficiently (i.e., before the expiration of the prior CBA).

The importance of this motivation was clearly seen when the amendments to NRS 288.155 resulting from the 2015 SB 241 — prohibiting the payment of any increased compensation during the gap period[9] — was in effect. *See Serv. Employees Int' Union, Local 1107 v. Clark County*, Item 810, EMRB Case No. 2015-011, p.9 at n.2 (Nov. 24, 2015) ("the intent behind SB 241 to place some pressure on employee organizations to expeditiously reach an agreement"). Sec. 1.3(2) of 2015 SB 241 amended NRS 288.155 effective June 1, 2015 and the same language was repealed by 2019 SB 153 effective June 6, 2019.[10] While SB 241 was in effect, the Amici saw a significant increase in the speed and number of CBAs that were settled prior to the beginning of the new fiscal year. This shows that non-retroactivity is a very important and effective tool to facilitate settling contracts without prolonged negotiations.

---

[8] Other than annual step increases if the CBA so provides.

[9] Section 1.3(2) of the bill amended NRS 288.155 to state "Except as otherwise provided in subsection 3 and notwithstanding any provision of the collective bargaining agreement to the contrary, upon the expiration of a collective bargaining agreement, if no successor agreement is effective and until a successor agreement becomes effective, a local government employer shall not pay to or on behalf of any employee in the affected bargaining unit ***any compensation or monetary benefits in any amount greater than the amount in effect as of the expiration of the collective bargaining agreement***." 2015 Stat. of NV. 1596.

[10] 2019 Stat. of NV. 2677.

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It is also important to note that SB 241 was designed to invalidate "evergreen clauses" in collective bargaining agreements (which were interpreted to require continue the payment of annual step increases after the expiration of the CBA). If the retroactivity language of NRS 288.215(10) was understood to automatically make all wage increases retroactive to the expiration date of the expired CBA, then evergreen clauses would never be necessary. Moreover, during the 4 years that SB 241 was in effect (prohibiting wage increases post expiration), NRS 288.215(10)'s retroactivity language never changed despite the fact that Respondent's interpretation of the retroactivity language would have been illegal under SB 241. This is further proof that the retroactivity language has never been interpreted as proposed by Respondent.

The basic rule in collective bargaining is to maintain the *status quo* of the prior CBA during the gap period — i.e., the default terms during the gap period are the terms and conditions of employment contained in the expired CBA, not the unknown future CBA. *SEIU v. Clark County*, Item 810, at p.11; *Stationary Engineers, Local 39 vs. Airport Authority of Washoe County*, Item No. 133, EMRB Case No. A1-045349, p.5 (July 12, 1982). As with any contract, the Parties can change the default terms by agreement. For example, the parties could agree to a retroactivity clause in successor CBA (applying new terms/wage increases during the gap period). But, absent an agreement to change the default terms, the status quo remains. *Id.* Therefore, non-retroactive effective dates are consistent with a contractual understanding of collective bargaining negotiations.

In reviewing the statutes for the 28 states that have some form of public sector binding impasse arbitration, only 4 other states have any reference to retroactivity in the statute. *See* 5 Ill. Compiled Stat. 315 Sec. 14(j); Mich. Compiled Laws Sec. 423.281; Ohio Rev. Code 4117.14; Oregon Rev. Stat. 243.752. In Michigan and Oregon the statutes are permissive and allow the arbitrator to choose whether to make the award

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retroactive. Mich. Compiled Laws Sec. 423.281; Oregon Rev. Stat. 243.752. Ohio and Illinois only permit the monetary increases to take effect at the start of the fiscal year following the date of the award. Ohio. Rev. Code 4117.14; 5 Ill. Compiled Stat. 315 Sec. 14(j). However, in Illinois, the arbitrator can make the award retroactive if the delay in commencing arbitration was attributable to one party. 5 Ill. Compiled Stat. 315 Sec. 14(j). No other state statutes with retroactivity language have been interpreted to require the award (pay increases) to be retroactive to the expiration date of the prior CBA. Without additional indication from the Legislature that the monetary increases were intended to take effect retroactively, the Board should not interpret the retroactivity language as limiting the Parties' ability to control the effective dates in their offers.

Statutory interpretation further supports the Amici's position. NRS 288.215(10) uses the language "is" which is a passive, rather than language commanding an action such as "shall" or "must." This suggests that the retroactivity language in the statute was designed to have the passive effect of preventing gaps between the effective dates of the CBAs — so benefits such as health insurance would continue seamlessly from one period to the next without any gaps in coverage. If the Legislature wanted to mandate a retroactive wage increase, the statute would have specified "compensation or monetary benefits" and included active language like "shall" or "shall not" as it did when drafting SB 241.

Additionally, while it might appear that the concept of mandatory retroactivity can be smoothly applied to wage increase, that is far from the truth. Even a simple base wage increase, when applied retroactively, could require an employer to make multiple complex computations regarding retroactive overtime pay, call-back pay, specialty pay, vacation pay, sick pay and compensatory time pay and other pay or benefits tied to the base wage rate. Even non-economic changes to topics like health insurance, vacation

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pay, sick pay, scheduling, seniority would wreak havoc if they needed to be imposed after many weeks or months have passed.

Respondents would likely oppose the application of their interpretation of retroactivity in situations where a concession is being negotiated. Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 Ohio State J. Disp. Res. 1, at 25 (2013). NRS 288.215(10) says "any award is" and the language is not limited to just wage proposals or just increases. The interpretation must apply in all scenarios and Respondent's interpretation of retroactivity would be difficult if not impossible to implement is the scenarios discussed above. Therefore, the Board should reject Respondent's interpretation of retroactivity.

Finally, to the extent that non-retroactive proposals were awarded by a factfinder, interpreting NRS 288.215(10) as proposed by the Respondent would invalidate those awards, effectively unraveling CBAs that have already been settled. For all the above reasons, the Board should not interpret the retroactivity language as prohibiting the Parties from including later effective dates in their final offers for binding factfinding.

B. A Party Should Be Able To Defer Negotiations On Subjects In A Successor Agreement Where Those Subjects Derive From Unsettled Terms In A Prior Agreement.

Question 3 of the petition asks "When a prior agreement is unresolved before negotiations for a successor agreement to begin, such that there are two negotiations simultaneously occurring, can a party temporarily defer negotiations on the successor agreement on subjects that are derivative of the unsettled terms until the prior agreement is finalized?" Due to the length of time that the factfinding process can take it is readily foreseeable that negotiations for a successor agreement could commence prior to the conclusion of factfinding for the prior CBA.

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For example, if the predecessor CBA expired June 30, 2023, and impasse was reached for the FY 2024 CBA (effective July 1, 2023 through June 30, 2024) and submitted to binding factfinding, then negotiations for the FY 2025 CBA (effective from July 1, 2024 through June 30, 2025)[11] would already be in the gap period before the Parties receive a factfinding award and can ascertain the starting point for negotiations and the financial costs of various proposals.

Presume in the above example that the final offers at binding factfinding for the FY 2024 CBA are between the Employer's 3% COLA offer and the Union's 8% COLA offer, the Employer's proposal in the FY 2025 CBA could drastically change depending on the decision of the factfinder. While a 3% COLA offer for FY 2025 might be reasonable if the Employer's 3% offer for FY 2024 is accepted by the factfinder (for a 2-year total of a 6% COLA), the same 3% proposal might be financially prohibitive if the Union's offer of 8% COLA is selected by the factfinder (for a 2-year total of 11% COLA). Forcing the Employer to make a proposal in such a situation would force the Employer to either make an uncooperative/ineffective offer (i.e., 0% or ask for a concession) or potentially engage in regressive bargaining by changing its proposal if the Union's final offer is chosen by the factfinder in the prior proceedings.

The primary criteria in NRS 288.200(7) that a factfinder must evaluate at impasse is "ability to pay" the cost of the final offer. However, the Parties cannot assess the financial impact of the FY 2025 proposals without knowing the starting point for the increases (i.e., the outcome of the FY 2024 factfinding). If the Parties cannot defer negotiations of the FY 2025 CBA until receiving the decision on the FY 2024 CBA, the term(s) in the FY 2025 CBA will remain open and likely result in impasse and another round of factfinding. The Parties should be able to avoid wasting time and effort

[11] Pursuant to NRS 288.180, negotiations for a CBA must commence with a demand for negotiations submitted on or before February 1. Therefore, negotiations for the FY 2025 CBA [July 1, 2024 – June 30, 2025] would commence on or before February 1, 2024.

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negotiating a successor CBA until the outcome of the prior CBA is settled and the starting point known.

Other states have chosen to suspend bargaining obligations during periods of financial uncertainty. *See e.g., California Dept. of Personnel Admin*, 10 PERC ¶ 17089 (1986); *IBEW, Local 965 v. Public Utility Comm. Of the City of Richland Center*, MP-4655, Decision No. 33281-B, 2012 WL 2674296 at 4 (2012). The EMRB also chooses deferral in situations of uncertainty when there is substantial overlap in the issues of a pending case and a pending arbitration such that resolution of the arbitration could change the outcome of the pending case before the Board. *IAFF Local 2955 v. Reno-Tahoe Airport Authority,* Item No. 867, EMRB Case No. 2020-013, p.2 (June 26, 2020) (stating it is the practice of the Board to stay matters during the arbitration process). Even the statute acknowledges that the duty to bargain in good faith is suspended in situations of extreme uncertainty such as civil disorder, riots, crisis, etc. *See* NRS 288.150(6)(b).

The purpose of NRS 288.200 and its requirement for 6 bargaining sessions is to promote good faith negotiations and meaningful effort in bargaining "with a sincere desire to reach an agreement." *City of Reno v. IAFF Local 731*, Item No. 253-A, EMRB Case No. A1-045472, p.4 (Feb 8, 1991). The uncertain financial position of the overlapping successor negotiations means that the Parties cannot make solid proposals and cannot participate in a meaningful back and forth during their 6 bargaining sessions, much less ever reach agreement during these negotiations. *Id.* at p.6 (discussing surface bargaining). Therefore, the goal of good faith negotiations is not being accomplished by those overlapping bargaining sessions. *Id.*; *see also Washoe School Principals' Assoc. v. Washoe County School Dist.*, Item No 895, EMRB Case No. 2023-024, pp.3, 16 & 24 (March 29, 2024). Permitting a Party to stay/defer negotiations on the successor agreement pending the outcome of the prior negotiations or factfinding is the only means of accomplishing the statutory goal of encouraging good faith negotiations.

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C. The Board Should Reaffirm Its Position That The Union Does Not Have Standing To Negotiate On Behalf Of Individuals Who Are Not Current Members Of The Bargaining Unit

As Questions 1 and 2 are related, the following discussion will address these topics together. Question 1 asks "When an employee separates from employment after a collective bargaining agreement has expired and before a successor agreement is reached, does a bargaining agent lack standing to continue to represent the former employee through negotiations and fact-finding?" Question 2 asks "When an employee transfers from one bargaining unit to another after a collective bargaining agreement has expired and before a successor agreement is reached, does the principle of exclusive representation prevent the former bargaining agent from continuing to represent the employee through negotiations and fact-finding?" Pet. p.3. These questions both arise when an employee somehow leaves the bargaining unit (term, quit, transfer to another bargaining unit, etc.) in between the time that the prior CBA expired and the successor CBA takes effect (hereinafter "gap period"). These issues most frequently occur when a retroactive wage increase is negotiated for the bargaining unit applicable to the gap period (such that all current bargaining unit employees will receive a retro check) raising the question: is the former employee that left the bargaining unit also entitled to a retro check? Based on EMRB precedent, the answer to this question is No.

Prior EMRB decisions have consistently held that the Union (bargaining agent) can only represent current members of the bargaining unit, and the Union loses the authority to negotiate on behalf of an employee upon separation from the bargaining unit. *McElrath v. Clark County Sch. Dist.*, Item No. 423, EMRB Case No. A1-045634, p.2 (Feb 12, 1998). NRS 288.133 defines a "bargaining agent" as "an employee organization recognized by the local government employer as the ***exclusive*** representative of all local government ***employees in the bargaining unit*** for purposes of collective bargaining. NRS 288.133 (emphasis added); *see also* NRS 288.160(2) (". . . if the employee organization is recognized by the local government employer, it shall be the ***exclusive***

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bargaining agent of the local government ***employees in that bargaining unit***.") (emphasis added). Because the statute only applies to "local government employees[12]," "***in***" the defined bargaining unit, employees who were in the unit but are no longer currently employed in the unit cannot be represented by the bargaining agent. NRS 288.048; NRS 288.133; NRS 288.134; *Washoe County Sheriff's Deputies Assoc., et al v. County of Washoe*, Item No. 271, EMRB Case No. A1-045479, pp. 13-15 (July 25, 1991). When an employee leaves the bargaining unit, the Union no longer represents that employee and therefore does not have standing to negotiate any term or benefit (including compensation/retro check) on behalf of the former bargaining unit member. *McElrath v. Clark County Sch. Dist.*, Item No. 423, EMRB Case No. A1-045634, p.2 (Feb 12, 1998). This is only highlighted by the example of the employee who has transferred to a new bargaining unit, since the new bargaining unit clearly represents that employee as of the date of his or her transfer and the Employer should not be forced to bargain with two different Unions on behalf of the same employee at the same time. *See UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. 84, 93, 178 P.3d 709, 715 (2008) (cannot have exclusive representation by two employee organizations simultaneously); *Clark County Public Employees Ass'n, SEIU Local 1107 v. UMC*, Item No. 300, EMRB Case No. A1-045492, p.7 (Jan. 19, 1993) (case dismissed because union was not exclusive bargaining agent for the group of employees allegedly harmed).

Other jurisdictions also found that retirees are not employees within the bargaining unit. *Allied Chemical Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 172 (1971); *Garcia v. Hartford*, 292 Conn. 334, 345, 972 A.2d 706 (2009) ("like the meaning of employee under labor law, the currency of the relationship is paramount"); *Locs. 2863, 3042, 1303-052 & 1303-115, Council 4, AFSCME, AFL-CIO v. Town of Hamden*, 128 Conn. App. 741, 747–48, 17

[12] "Local government employee" is defined in NRS 288.050 as "any person ***employed*** by a local government employer."

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A.3d 1126, 1130 (2011) (finding "[o]nce an employee leaves the bargaining unit, the duty of a municipality to bargain under the act with that employee ceases.")

This is also consistent with the basic principles of contractual agency and authority — i.e., one cannot negotiate to bind a random stranger to a contract.[13] Restatement (Second) of Agency §§ 26-27; *IAFF Local 1265 v. City of Sparks*, Item No. 136, EMRB Case No. A1-045362, p.8 (Aug. 21, 1982) ("attempting to negotiate for employees who are outside of the bargaining unit and who may not wish to be represented" was prohibited practice). The method by which the employee ceased to be a bargaining unit member is irrelevant to the EMRB's longstanding precedent. *See Washoe County Sheriff's Deputies Assoc., et al v. County of Washoe*, Item No. 271 (Retired Employees); *IAFF Local 1265 v. City of Sparks*, Item No. 136 (Employees Promoted to Non-Union Management Position); *Ebarb v. Clark County*, Item No. 843-C, EMRB Case No. 2018-006, p.2 (Sept. 21, 2020) (Terminated Employee).

Even if the Board were to overturn its prior decisions, which it should not do, the Parties must still be permitted to include language in its proposal limiting those who will receive a retro check to employees still employed in the bargaining unit on the effective date of the CBA. The Parties are the masters of their own negotiations and decide what language to specifically include in their proposals when negotiating. The Union cannot be subject to a charge for breach of the duty of fair representation by individuals who are not currently represented in the bargaining unit. *Bramby Tollen v. Clark County Assoc. of School Administrators and Professional-Technical Employees*, Item No. 814, EMRB Case No. 2015-001, p.8 (May 6, 2016).

[13] The Union cannot negotiate a contract with the Employer that obligates Jeff Bezos to pay an employee $1,000,000. Nor can the Union negotiate a CBA that obligates the Employer to pay $1,000,000 to the mafia.

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D. Impasse Resolution And Factfinding Procedures Should Not Apply To Negotiations Pursuant To A Reopener Clause

The Amici agree with the Petitioner's position on Question 5. A re-opener clause is created by agreement in the CBA, and the procedures of NRS 288.200 only apply where "the parties have failed to reach agreement . . ." NRS 288.200(1)(a). Unlike full contract negotiations, a reopener is only designed to trigger further discussions on a topic and does not require the Parties to come to an agreement (make a change) to the CBA based on those negotiations. The express language of the statute indicates that the requirements for impasse factfinding should not apply to negotiations under a reopener.

V. CONCLUSION

The retroactivity language of NRS 288.215(10) should not prevent the Parties from including specific effective dates in their final offers. To hold otherwise would create an incentive for Unions to send all negotiations to factfinding. The Board should permit a stay or deferral of negotiations of a successor agreement in situations of overlapping collective bargaining as no meaningful negotiations can occur when the starting point of the successor negotiations remains uncertain. To hold otherwise would contradict the duty to bargain in good faith and will likely result in a perpetual cycle of fact-findings. Finally, the Board should reaffirm its past precedent holding that a bargaining agent may only negotiate on behalf of current employees in the bargaining unit and cannot represent former bargaining unit members.

Dated this 31st day of December, 2024.

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CERTIFICATE OF SERVICE

This is to certify that on the 31st day of December, 2024, the undersigned, an employee of Fisher & Phillips LLP, placed a true and correct copy of the foregoing **Amicus Brief**, addressed as follows:

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EXHIBIT 1

Susan Grody Ruben, Esq.
Labor Arbitrator

PURSUANT TO NRS 288.200

IN THE MATTER BETWEEN	)	
	)	
SERVICE EMPLOYEES	)	
INTERNATIONAL UNION	)	
LOCAL 1107	)	FACTFINDING REPORT
	)	AND AWARD
and	)	
	)	
CLARK COUNTY	)	

This Factfinding arises pursuant to NRS 288.200. The Parties, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107 ("the Union") and CLARK COUNTY ("the County"), selected Susan Grody Ruben to serve as sole, impartial Factfinder, whose binding Award is issued below.

Hearing was held July 20, 2018 in Las Vegas, Nevada. The Parties were represented by counsel and were afforded the opportunity for the presentation of positions and evidence. Both Parties submitted Post-Hearing Briefs and Final Offers.

APPEARANCES:

for the Union:

Michael A. Urban, Esq., The Urban Law Firm, Las Vegas, NV.

for the County:

Mark J. Ricciardi, Esq. and Holly E. Walker, Esq., Fisher & Phillips, LLP, Las Vegas, NV.

FACTFINDER'S REPORT

Statutory Criteria

In reaching the Award on the open issue, the Factfinder has reviewed the Parties' submissions, the evidence and positions presented at the Factfinding Hearing, the Post-Hearing Briefs, and the Final Offers. The Factfinder has analyzed this information in the context of the statutory criteria found in NRS 288.200(7):

> 7. …any fact finder…shall base [the] award on the following criteria:
>
> (a) A preliminary determination must be made as to the financial ability of the local government employer based on all existing available revenues as established by the local government employer and within the limitations set forth in NRS 354.6241, with due regard for the obligation of the local government employer to provide facilities and services guaranteeing the health, welfare and safety of the people residing within the political subdivision.
>
> (b) Once the fact finder has determined in accordance with paragraph (a) that there is a current financial ability to grant monetary benefits, and subject to the provisions of paragraph (c), the fact finder shall consider, to the extent appropriate, compensation of other government employees, both in an out of the State and use normal criteria for interest disputes regarding the terms and provisions to be included in an agreement in assessing the reasonableness of the position of each party as to each issue in dispute….
>
> (c) A consideration of funding for the current year being negotiated. If the parties mutually agree to arbitrate a multiyear contract, the fact finder must consider the ability to pay over the life of the contract being…arbitrated.

Unresolved Issue

Article 15 – Compensation

The only issue before the Factfinder is the Article 15 Wage Reopener for the period July 1, 2018 through June 30, 2019.

Union Final Offer

> Effective July 1, 2018, the salary schedule for all employees covered in Appendix A will be increased by three percent (3.00%). The Salary Schedules and Ranges in Appendix C will reflect these changes. Additionally, there shall be a two percent (2%) increase to the top of all Salary Schedules and Ranges in Appendix C effective July 1, 2018.
>
> The retroactive increases set forth herein shall have retroactive application to all compensation in the Collective Bargaining Agreement affected by a compensation increase.

County Final Offer

> Effective July 1, 2018, there shall be a one percent (1%) increase to all Salary Schedules and Ranges in Appendix C.
>
> Effective upon issuance of the Factfinder's Report, the Salary Schedules for all employees covered in Appendix A will be increased by two percent (2%).
>
> The Salary Schedules and Ranges in Appendix C will reflect these changes.

Factfinder's Analysis

First, it must be expressly stated, pursuant to NRS 288.200, that the County has stated as part of the record that it has the financial ability to grant monetary benefits. Accordingly, I find the County has the ability to pay either Party's Final Offer. Pursuant to NRS 288.200(7)(c), "the facts upon which the

factfinder based the factfinder's determination of financial ability to grant monetary benefits" is the fact of the County's record statement that it can do so.

Second, it must be noted, also pursuant to NRS 288.200 and the April 16, 2018 Agreement for Binding Factfinding between the Parties, that the Factfinder must select one of the Party's Final Offer in its entirety; she does not have jurisdiction to combine elements of the two Final Offers. Nor does she have jurisdiction to craft a finding she finds most reasonable based on the record evidence. Pursuant to NRS 288.200(7)(b), the Factfinder must "assess[ ] the reasonableness of the position of each party." Accordingly, the Factfinder must select the Final Offer she finds most reasonable in its totality.

The Union's Final Offer is twofold:

1. A 3% increase to overall Salary Schedules; and
2. A 2% increase to the top of the Salary Schedules.

The County's Final Offer also is twofold, albeit with lesser increases:

1. A 2% increase to overall Salary Schedules; and
2. A 1% increase to the top of the Salary Schedules.

According to the County, the difference between the Parties' Final Offers is approximately $7 million.

1. <u>Overall Salary Schedules</u>

The County has the additional $7 million the Union seeks. The question is whether it is more reasonable for the County to allocate that $7 million to this bargaining unit's wages[1] or to other pressing County needs established in the

[1] Despite the Union's contention that different contractual wage increases should be considered separately, it is reasonable to consider that pursuant to Article 21, this

record such as infrastructure, capital needs[2], technology, long-term unfunded obligations, and additional employees[3].

The Union accurately notes County revenues have been increasing, that the County is successfully recovering from the recent national recession that began in approximately 2008. It also is true bargaining unit employees' wages and benefits suffered during the recession.[4]

The Union also points to the savings the County will reap from the 2015 Factfinding between the Parties due to longevity pay being eliminated for new hires. In that proceeding, according to Factfinder Runkel's Report, the County told the Factfinder if longevity were eliminated for new hires, the County would

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bargaining unit already will be receiving a 4% wage increase on each employee's anniversary date during the time period in question. (Pursuant to Article 21, employees must "Meet Performance Standards" for the previous year, in order to receive the 4% wage increase. The record shows it is unusual for a bargaining unit member not to receive the 4% wage increase.)

[2] In the most recent budget cycle, County Departments made $200 million in capital requests; the County determined it could fund only $65.4 million of those requests.

[3] Also in the most recent budget cycle, County Departments made 278 position requests; the County determined it could fund only 81 new positions.

[4] In its Post-Hearing Brief, the County disputes the Union's claim that the Union cooperated with the County in reducing wages and benefits during the recessionary collective bargaining agreements. The County contends concessions were a matter of state law. The Union points out, for example, it agreed to a concessionary contract for 2012-13, including a 0% wage increase, a 2-year freeze on merit adjustments, and a freeze in longevity pay increases. Whether the concessions were collaborative or required by the State, by either process, bargaining unit employees suffered. It is not unreasonable for them to ask to share in the better economy the County is now experiencing. At the same time, while much construction is taking place in the County, County revenues rise relatively slowly due in large part to property tax caps. (*See* 2015 Factfinding Report at p. 21.)

save $264,440,685 over a period of 30 years. (2015 Factfinding Report at p. 10.) This obviously is a significant savings. However, because new hires (those hired after August 25, 2015) have not currently reached the number of service years (8) that would have been required for longevity, those savings cannot be considered to have been realized yet.

The record demonstrates the County's 2% wage increase proposal for 2018 mirrors what was in the collective bargaining agreement for 2017. With regard to internal comparability, a 2% wage increase for 2018 also is consistent with most of the County's 11 other bargaining units (though some of those bargaining units are on a different negotiating cycle). The record also shows a 2% wage increase would keep this bargaining unit in a decent position with regard to external comparables.

Top of Salary Schedules

Pursuant to Article 21, once an employee has reached maximum salary within the employee's salary range, the employee is no longer eligible for a 4% anniversary adjustment. To address this stagnancy, the Union seeks a 2% increase to the top of each salary range. The County has offered a 1% increase to the top of each salary range.

The County points out that once an employee reaches the top of the employee's salary range, he or she can apply for an internal transfer to a position with a higher salary range. The record shows that since 2014, approximately 88% of the supervisory openings in the SEIU unit were filled through internal promotions.

Given that the opportunity for internal promotions is strong, as well as the fact that many employees who have reached the top of the salary range are still eligible for longevity pay, the Factfinder finds a 1% increase to the top of salary ranges is sufficient at this time.

Conclusion

The duty of a Factfinder has been described as a:

> search for what would be in light of all the relevant factors and circumstances, a fair and equitable answer to a problem which the parties have not been able to resolve themselves.

See New York Shipping Ass'n, 36 LA 44, 45 (Stein 1960), *quoted* in the Union's Post-Hearing Brief at p.6. The task here is difficult due to the requirement that the Factfinder select one Party's Final Offer in its entirety. Nevertheless, the task must be done.

AWARD

Based on the record as discussed above, the Factfinder finds the County Final Offer is more reasonable under all the statutory circumstances set out above. Accordingly, the following language will be added to Article 15:

> Effective July 1, 2018, there shall be a one percent (1%) increase to all Salary Schedules and Ranges in Appendix C.
>
> Effective upon issuance of the Factfinder's Report, the Salary Schedules for all employees covered in Appendix A will be increased by two percent (2%).
>
> The Salary Schedules and Ranges in Appendix C will reflect these changes.

DATED: December 3, 2018

Susan Grody Ruben
Susan Grody Ruben, Esq.
Factfinder

EXHIBIT 2

FACTFINDING PROCEDURE

In the Matter of Factfinding	)	
between	)	
BOULDER CITY PROFESSIONAL	)	
FIRE FIGHTERS ASSOCIATION	)	RECOMMENDATION
IAFF LOCAL 5073	)	
and	)	
CITY OF BOULDER CITY	)	
Re: Retroactivity date	)	

The Undersigned was selected by the parties, IAFF Local 5073 (Union) and City of Boulder City (City), to conduct a Factfinding hearing on December 19, 2018. The Union was represented by Jeffrey Fallen, Esq. Mark Ricciardi, Esq. and Holly Walker, Esq. represented the City. At the conclusion of the proceeding both parties elected to submit final arguments in writing. The matter was considered fully submitted upon my receipt of the post-hearing briefs.

During the course of the hearing the parties were able to reach agreement on all of the outstanding terms except for the date of a retroactive pay increase. The City proposed that the pay increase of 3% be retroactive to July 1, 2018. The Union

proposed that the pay increase be retroactive to July 1, 2017. The parties submitted solely this term of their tentative Collective Bargaining Agreement to this Factfinding.

DISCUSSION

The parties agree that this matter is to be considered according to the provisions of N.R.S. 288.200. Preliminarily, the City acknowledged that it has the ability to pay.

The relevant facts in this matter are not in dispute here. The bargaining unit had changed representation and had, with its current representative, negotiated one prior collective bargaining agreement. In early 2017 the Union notified the City of its intent to bargain. In May, 2017 the City offered all of its bargaining units the same deal - a 3% per year wage hike over a 5-year period beginning July 1, 2017. All but this Union accepted the City's proposal with relatively minimal bargaining. The parties here bargained somewhat sporadically over the next many months culminating in this Factfinding proceeding.

The Union argues that internal consistency mandates that the reasonable outcome here is to make the wage increase retroactive to July 1, 2017 that is the case for the City's other bargaining units. It further argues that the City's proposal is merely designed to punish it for engaging in lawful collective bargaining. Finally, it points out that, if forced to

move this dispute to arbitration, the pay increase will likely be found to be retroactive to July 1, 2017 pursuant to the dictates of the statute.

The City fundamentally argues that its generous offer to the City's unions was designed to induce labor peace, avoid the costs associated with bargaining and avoid the need with multiple bargaining units for extensive bargaining such as occurred here. If there is no loss associated with extended bargaining it will encourage this and other City unions to engage in repeated episodes of extended bargaining.

There is some truth to both positions. In this matter, however, this is a young bargaining representative that had a need to attempt to procure more contractual changes than the other bargaining units in the City. The length of the bargaining process clearly was not entirely due to the Union's actions. The statute does not mandate retroactivity to the end of the prior contract but suggests it is preferred - but only in the right circumstances.

The loss of a full year's retroactivity is not commensurate with the circumstances in this matter, but some loss of it is reasonable. A more reasonable outcome is for the wage increase to be retroactive to October 1, 2017.

RECOMMENDATION

Having carefully considered the evidence presented and the arguments made, it is the Recommendation of the Factfinder that:

The 3% wage increase should be retroactive to October 1, 2017.

DATED: March 4, 2019

Respectfully submitted,

Sara Adler, Factfinder