STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

PERSHING COUNTY LAW ENFORCEMENT ASSOCIATION & OPERATING ENGINEERS LOCAL UNION, NO. 3, Complainant, vs. PERSHING COUNTY, Respondent.	ITEM NO. 725C CASE NO. A1-045974 **ORDER**

For Complainant: Michael E. Langton, Esq.
Pershing County Law Enforcement Association & Operating Engineers Local No. 3.

For Respondents: Jim C. Shirley, Esq.
Pershing County

This matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board"), on May 8, 2013 for consideration and decision pursuant to the provisions of the Local Government Employee-Management Relations Act ("the Act"); NAC Chapter 288, NRS chapter 233B, and was properly noticed pursuant to Nevada's open meeting laws.

The Board originally decided this matter on November 15, 2010. Item No. 725A. Following a judicial review, the First Judicial District Court remanded this matter back to us after raising concerns about our finding that the complaint filed by Pershing County Law Enforcement Association & Operating Engineers Local No. 3 ("Association") was timely filed. The District Court did not categorically hold that the complaint was untimely but raised concerns about our application of the Nevada Supreme Court's decision in Cone v. Nevada Service Employees Union, 116 Nev. 473, 998 P.2d 1178 (2000) and remanded the matter for further proceedings in which the Board now reexamines our decision concerning the statute of limitations. In order to assist us, we directed the parties to submit additional briefing on this

issue and to discuss relevant legal authority, including the Nevada Supreme Court's decision in City of North Las Vegas v. State, Local Government Employee-Management Relations Board, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) which was issued after we had originally decided this case. The Board has considered the briefing submitted by the parties, and having looked to the briefing, the Nevada Supreme Court's decision in both Cone and City of North Las Vegas, and the district court's order we again conclude that the Association's complaint is not barred by the six month statute of limitation in NRS 288.110(4) as set forth below. [1]

NRS 288.110(4) requires that a complaint before this Board must be brought within six months "of the occurrence which is the subject of the complaint." The Board does not presume that a complaint is untimely, rather the statute of limitations is an affirmative defense for which the respondent bears the burden of proof. Mann v. Clark County School District, Item No. 721A, EMRB Case No. A1-045969 (Feb. 24, 2010); Broadway Volkswagen, 342 NLRB 1244, 1246 (2004). Thus the burden rests with the County to demonstrate that the Association's complaint was untimely.

The most recent pronouncement from the Nevada Supreme Court addressing NRS 288.110(4)'s statute of limitations was announced in City of North Las Vegas. In City of North Las Vegas the Supreme Court addressed the issue of whether the doctrine of equitable tolling applies to NRS 288.110(4) and confirmed that it does. The court's analysis of the statute of limitation question in City of North Las Vegas began by adopting the "unequivocal notice" rule about which the Supreme Court stated "...we interpret the NRS Chapter 288 limitations period to start running when the alleged victim receives unequivocal notice of a final adverse decision." City of North Las Vegas, 261 P.3d at 1077. The brief submitted by Respondent Pershing County agrees that this unequivocal notice is the correct standard to apply.

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[1] The statute of limitations question only affects one of the claims brought by the Association which alleged that the County had unilaterally changed a mandatory subject of bargaining. The Association had also raised a second claim against the County, asserting that the County had bargained in bad faith when it refused to follow the bargained for grievance procedure. The Board found in favor of the County on this claim, and neither the district court's order nor any of the briefing submitted by the parties addresses any timeliness issues concerning this second claim. Therefore we conclude that all are in accord that this second claim was in fact timely and the portion of our prior order concerning this second claim was not disturbed by the district court's order. As this portion of our order remains intact we do not address it further at this time.

In City of North Las Vegas the Nevada Supreme Court repeatedly referred to Cone as authority for the unequivocal notice rule. City of North Las Vegas at 1076-1077. In the Nevada Supreme Court's own words, footnote 2 of the Cone decision "indicat[es] that the six-month period is triggered when the complainant becomes aware that a prohibited practice actually happened." City of North Las Vegas at 1077.

Cone was a case that originated before this Board. The facts in Cone were developed by a stipulation of the parties filed with this Board and detailed that a service fee provision had first appeared in a collective bargaining agreement adopted on September 6, 1988 between Service Employees International Union Local 1107 ("SEIU") and University Medical Center ("UMC"). Cone v. Nevada Service Employees Union/SEIU Local 1107, Item No. 361-A, EMRB Case No. A1-045582, p. 8. The service fee provision recognized the right of SEIU "to charge nonmembers of the union a reasonable service fee for representation in appeals, grievance and hearing." Item No. 361-A at p. 3. The complaint before the EMRB was filed on March 7, 1995, challenging the legality of the service fee clause. The fact which precipitated the EMRB complaint was that this provision of the agreement was "implemented in October 1994." Item No. 361-A at p. 23, Finding of Fact # 9. The specific actions which implemented the policy were that SEIU began to post a notice of this policy on bulletin boards and "disseminated to bargaining unit employees in the UMC bargaining unit" in October of 1994. Item No. 361-A at p. 5, recounting Stipulation of Fact # 1.

UMC argued to this Board that the complainants had waived their right to contest the legality of the service fee provisions because those provisions had been contained in the collective bargaining agreements dating back to September 6, 1988. Item No. 361-A at p. 11. The Board accepted those arguments and found that complainants had waived their right to object to the provisions of the collective bargaining agreement. Item No. 361-A at p. 23.

It was this finding which the Nevada Supreme Court addressed and reversed in footnote 2 of Cone. There, the Nevada Supreme Court determined that this Board had erred because the complainants had "filed their claim within six months of the policy's enactment." Cone at 477, 998 P.2d at 1181, n. 2. Given the facts of Cone which are more fully developed in the

administrative decision, the "policy's enactment" to which the Supreme Court refers occurred not when the policy was first established in September of 1988, but when SIEU began to implement the policy by notifying the employees that it would be taking effect which event occurred in October of 1994. In other words, this was when the complainant has reason to know that the supposed prohibited labor practice had actually happened. This is entirely consistent with the unequivocal notice rule.

Under the facts of this case the County cannot show unequivocal notice of a final adverse action at any time prior to September 18, 2009. As we have already found, the evidence presented at the hearing indicated that the County Commissioners initially approved a take home vehicle policy in March of 2009 but the policy was far from being in its final form. The policy was subject to a grievance filed by the Association where it underwent revisions. An amended policy was approved by the Pershing County Commissioners in May of 2009, but was not actually drafted until June of 2009. During this time, an internal dispute within the County took place between the County Commissioners and the Sheriff about whether the Sheriff would actually implement the take home vehicle policy. See Item No. 725A. This intra-County squabble is significant in our mind because, as we have previously noted, it indicates that the take home vehicle policy was not at that time actually implemented against the employees represented by the Association. This dispute stretched throughout the summer of 2009, and as we have already stated, it is conclusively established by the evidence presented at the hearing that as of August 19, 2009 the Sheriff was still resisting the County Commissioners' demands to implement the take home vehicle policy. As we have previously found, it was not until September 18, 2009 that the Sheriff notified the affected employees that the take home vehicle policy was actually being implemented. The statute of limitations does not begin to run while management dickers amongst itself about whether a policy is going to be implemented. Whatever else this intra-County equivocation between the Sheriff and the County Commissioners over the take home vehicle policy may have conveyed, it did not, in any sense of the word, convey "unequivocal" notice to the affected employees that the take home vehicle

policy was final and was actually going to be implemented in the affected bargaining unit. The County cannot show that that occurred until September 18, 2009.

We reject the County's contention that the mere approval of a take home vehicle policy by the County Commission constitutes unequivocal notice for two reasons. First, it does not automatically follow that approval by the County Commissioners means that a policy will actually be in effect. O'Brien v. Trousdale, 41 Nev. 90, 167 P. 1007 (1917). Second, in this case the Sheriff asserted that the County Commissioners' take home vehicle policy did not apply to the Sheriff's office as the Sheriff was an elected position and claimed authority to operate his department independent of the County Commission. Exhibit 5. As stated above, this fight with the County Commission lasted throughout the summer with the Sheriff finally relenting and taking steps to implement the policy on September 18, 2009. The County offers no evidence or argument to indicate that under these circumstances the Association knew or even should have known whether the elected County Commissioners or the elected Sheriff had the final authority to determine if the take home vehicle policy was actually going to be implemented against the bargaining unit. Instead the unequivocal notice rule serves to protect the Association during the time that the County Commissioners and the Sheriff squared off with each other and the dispute remained unresolved. As stated in City of North Las Vegas, the unequivocal notice rule requires unequivocal notice of a "final adverse action." City of North Las Vegas at 1077. The County does not offer any credible reason to suppose that this adverse action was "final" for purposes of NRS 288.110(4) until the Sheriff agreed to implement the vehicle policy against the affected deputies on September 18, 2009.

This conclusion is further bolstered by our decision in Glazier v. City of North Las Vegas, Item No. 624A, EMRB Case No. A1-045876 (March 13, 2007). In Glazier the Board accepted a compliant that was based upon the fact that a police officer had not been promoted. The complaint was filed within six months of the effective date of the promotion. In affirming our decision, the Nevada Supreme Court stated:

> CNLV asserts that Glazier's complaint is time-barred pursuant to NRS 288.110(4) because it was filed six months after Glazier learned that he would not be promoted. CNLV's argument fails.... Glazier filed his complaint on January 9, 2006. The subject of the complaint was that he was denied a promotion to

> lieutenant because of discriminatory reasons. Glazier knew his employer denied him a promotion when he became aware of the promotions of three other officers. The promotions of two officers became effective July 9, 2005, and the promotion of the third officer became effective January 7, 2006. The EMRB determined that Glazier's complaint was not time-barred and that Glazier should have been promoted on July 9, 2005. In so doing, it interpreted the statute of limitations set forth in NRS 288.110(4) to begin running on the effective date of the promotion of another, rather than the person alleging discrimination. Its decision was based on the fact that before July 9, 2005, evidence showed that Glazier only knew of his employer's *intent* to promote others and that on July 9, 2005, those promotions became official. Because we afford an administrative agency's interpretation of the law deference and, in the present case, the EMRB's decision was supported by substantial evidence, we agree and conclude that Glazier's complaint was not time-barred because it was filed within six months of the occurrence of the discriminatory act—the promotions of others over him.

City of North Las Vegas v. State, Local Government Employee-Management Relations Board, Nevada Supreme Court Case No. 50761, 2010 WL 3275968 (May 18, 2010).

This tends to indicate in our mind that our decision was correct in the first instance to look for a factual indication that is sufficient provide notice to the Association that the take home vehicle policy was actually being implemented against the bargaining unit it represents.

Based upon the reasoning stated above, and the circumstances presented by the evidence in this case we conclude that the County has failed to meet its burden to show that the Association had unequivocal notice of a final action that the take home vehicle policy would be implemented against the employees in the bargaining unit that it represents at any point prior to September 18, 2009. The complaint, having been filed on March 17, 2010, was filed within six months of the occurrence which is the subject of the complaint and is therefore timely under NRS 288.110(4).

Having considered the foregoing, and good cause appearing therefore, the Board now unanimously concludes as follows:

1. Respondent Pershing County bears the burden to demonstrate that the Association's complaint was filed outside of the six-month limitations period of NRS 288.110(4).

2. The six-month limitations period does not begin to run until the complainant has unequivocal notice of a final adverse action. City of North Las Vegas v. State, Local

Government Employee-Management Relations Board, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011).

3. Under the circumstances of this case stated above, and in particular the disagreement between the County Commissioners and the Pershing County Sheriff about whether the take home vehicle policy would be implemented against the employees in the bargaining unit, Pershing County has not met its burden to show that the Association had unequivocal notice of a final adverse action prior to September 18, 2009.

4. Pershing County has not established that the complaint is barred by NRS 288.110(4).

5. This decision does not disturb our decision in Item No. 725A including our findings of fact in that order beyond the statute of limitations issue discussed herein.

DATED this 17th day of May, 2013.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
SEATON J. CURRAN, ESQ., Chairman

BY: _____
PHILIP E. LARSON, Vice-Chairman

BY: _____
SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

PERSHING COUNTY LAW ENFORCEMENT ASSOCIATION & OPERATING ENGINEERS LOCAL UNION, NO. 3, Complainant, vs. PERSHING COUNTY, Respondent.	CASE NO. A1-045974 **NOTICE OF ENTRY OF ORDER**

To: Michael E. Langton, Esq.
Pershing County Law Enforcement Association & Operating Engineers Local No. 3

To: Jim C. Shirley, Esq.
Pershing County

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on May 17, 2013.

A copy of said order is attached hereto.

DATED this 17th day of May, 2013.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____
JOYCE HOLTZ, Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 17th day of May, 2013, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

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Pershing County District Attorney
400 Main Street
PO Box 934
Lovelock, NV 89419

JOYCE HOLTZ, Executive Assistant