STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107, Complainant, vs. CLARK COUNTY, Respondent.	CASE NO. 2015-011 ORDER **ITEM NO. 810**

This matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board"), on November 17, 2015, for decision pursuant to the provisions of the Local Government Employee-Management Relations Act ("the Act"); NAC chapter 288 and NRS chapter 233B. The Board held a hearing on this matter on September 14, 2015. Afterwards the parties submitted post hearing briefs. The Board also permitted a number of amicus briefs in this case, which we have reviewed and considered.

Complainant Service Employees International Union Local 1107 ("SEIU") has alleged Respondent Clark County made an unlawful unilateral change when the County recalled SEIU President Martin Bassick from a full time union leave position and when the County suspended salary and benefit increases in early June of 2015. The County contends that its actions were justified under the newly enacted changes to the Act adopted in Senate Bill 241 ("SB 241").

SB 241 was passed by the legislature this previous session. The bill makes significant changes to the collective bargaining relationships subject to the Act, including a prohibition against the use of so-called evergreen clauses and a prohibition on increases in employee compensation following the expiration of a collective bargaining agreement. By its terms SB 241 became effective upon passage and approval. Approval was completed effective June 1, 2015. It is upon these amendments that the County contends its actions were justified. In

response SEIU argues that SB 241 was not applicable to the present situation. As the operative facts are not disputed by the County, this case largely turns on the applicability of SB 241. For the reasons set forth below the Board agrees with SEIU that the amendments of SB 241 did not apply so as to permit the County's actions under the facts of this case.

SB 241 Does Not Apply Retroactively

As SEIU correctly points out, statutory amendments are presumed to operate prospectively only, unless a clear indication to the contrary is apparent from the statutory text. A retroactive application of a statute occurs when it affects previously existing rights or obligations. See Sandpointe Apts. v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 87, 313 P.3d 849, (2013).

There is no indication embedded within the statutory text that SB 241 applies retroactively. Quite to the contrary, section 5 of the bill disclaims retroactive application and states that "...the amendatory provisions of this act do not apply during the current term of any contract of employment or collective bargaining agreement entered into before the effective date of this act..." Section 5 of the bill does specify that the provisions of the bill apply to a renewal or extension of an agreement and to any agreement entered into on or after the effective date. It is clear from this provision that any agreement that could be counted as establishing a new contract be it a renewal or extension of a prior contract or an entirely new agreement that is effective after June 1, 2015, is subject to the strictures of SB 241. However any contract or agreement that was effective prior to June 1, 2015 is not subject to SB 241 so long as it remains in effect. This understanding of SB 241 as operating prospectively only also comports with Article 1 section 15 of the Nevada Constitution, which prohibits statutory amendments from impairing the rights under existing agreements, but does permit statutory changes to affect those contracts that become effective after the statutory amendments are adopted. See Dunseath v. Nevada Industrial Commission, 52 Nev. 104, 282 P. 879 (1929).

This understanding results in somewhat of a gradual phase-in for the restrictions of SB 241. Under section 5 of SB 241 the legislature clearly contemplated that existing agreements would eventually end and new agreements would eventually be made. The legislature

specifically conditioned the application of SB 241 to the establishment of a new agreement. As each agreement is renewed, extended or succeeded by a new agreement after June 1, 2015, SB 241 will begin to apply at that time. Thus, for example, an agreement that was entered into prior to June 1, 2015 would continue unimpeded by SB 241 for the stated duration of the agreement. If that agreement were to contain an evergreen clause, the agreement would continue under that evergreen clause, so long as the clause applies, because it would pre-date the effective date of SB 241. However, an evergreen clause would be prohibited in any subsequent agreement under SB 241. The same result ensues for agreements for a specified term that ends prior to June 1, 2015 but contain an evergreen clause that extends the application of that agreement beyond June 1, 2015. That agreement would remain in effect until a new agreement is made either through negotiations or renewal or extension of the existing agreement. The Board notes that upon expiration of such agreements, both the employer and the bargaining agent are under a mutual duty to bargain in good faith to reach a successor agreement, and thus the Act already prevents any bad faith delays by either party when negotiating a new agreement.

The timing of events in this case is critical to determining the application of SB 241. The 2012-2013 collective bargaining agreement between SEIU and Clark County provided in Article 43 of that agreement that the agreement "...shall remain in effect until the last day of June, 2013, and shall continue from year to year thereafter..." until a subsequent agreement is made. The agreement is dated February 7, 2012 and quite obviously pre-dates the June 1, 2015 effective date. Testimony at the hearing established that after June 30, 2013 the County and SEIU had negotiated but had not reached a successor agreement.[1] In the absence of another agreement, the 2012-2013 agreement by its terms continued from year to year. Effectively, the contract rolled over on July 1, 2013, to June 30, 2014, and rolled over again on July 1, 2014, for the period of July 1, 2014 to June 30, 2015. Thus, on June 1, 2015, when SB 241 went into effect, the County and SEIU were subject to an agreement that had renewed for a one year period on July 1, 2014, and pre-dated SB 241. This agreement lasted through the end of the

[1] However, after the events of this case, the parties did reach a successor agreement in August of 2015.

fiscal year on June 30, 2015, when it then expired as provided for by NRS 288.155(1)(b) (providing that an agreement expires "at the end of the term stated in the agreement") (as amended by SB 241). When such an agreement is in place, SB 241 does not apply. SB 241 § 5. It was not until July 1, 2015, when the agreement was set for renewal for another year period, or until a new agreement was reached through bargaining, that the provisions of SB 241 would even arguably begin to apply.

The County argued that SB 241 did apply because the agreement had expired. This position is untenable because the contractual language quite clearly provided otherwise and established the annual renewal of the agreement on July 1 of each year. Thus the County would have us apply the new provisions of SB 241 to an existing agreement that pre-dated June 1, 2015 merely because the term of the existing agreement was established by renewal. This position is untenable as it conflicts with the prospective application of SB 241 discussed above. SB 241 would apply to any post-June 1, 2015 renewal but could not apply to the July 1, 2014 renewal that extended the agreement through June 30, 2015.

The County did not wait until the expiration of the agreement before acting. On June 4, 2015 the County unilaterally ordered President Bassick to return to his ordinary position as a Plans Checker II. This was contrary to Article 8 § 8 of the agreement that was then in effect and allocated full time (40 hours per week) of paid time off to SEIU's president. In response SEIU notified the County that this was contrary to the agreement and contrary to SB 241. SEIU requested negotiations over union leave. The County rejected an offer made by SEIU that would have continued the existing unions leave provisions. The County's rationale was that the value offered by the SEIU's proposal did not equate to the full cost of the union leave time.

Then on June 9, 2015, the County wrote to President Bassick and informed him that it would suspend all salary and benefit increases to employees represented by SEIU due to the expired agreement. The County informed SEIU that this would be effective June 1, 2015. SEIU responded in much the same way, informing the County that this was not permissible under the agreement in effect and requesting negotiations over the issue.

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The County Committed A Unilateral Change When it Revoked Union Leave Time

It is well-established that an employer cannot unilaterally change the negotiated terms and conditions of an agreement that concern a mandatory subject of bargaining. City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 59 P.3d 1212 (2002). Doing so is a prohibited labor practice under the unilateral change theory when the change alters the written agreement, is taken without bargaining for the change with the recognized bargaining agent, has a generalized effect or continuing impact and concerns a mandatory subject of bargaining. Eason v. Clark County, Item No. 798, EMRB Case No. A1-046109 (Nov. 25, 2014). A unilateral change violates NRS 288.270(1)(a) and (e).

As set forth above, the 2012-2013 agreement was still in effect between the parties by virtue of Article 43 of the agreement. Leave time, including union leave time, is a mandatory subject of bargaining pursuant to NRS 288.150(2)(e). SB 241 amended this subsection to specify that union leave time is subject to the requirement that the equivalent full cost of the leave time must be bargained for, but SB 241 does not purport to remove this subject from the enumerated mandatory subjects of bargaining.

There is no factual dispute that the County decided to revoke union leave time without first bargaining with SEIU. The Board received into evidence the County's correspondence dated June 4, 2015 that establishes the County's unilateral action. This same correspondence shows a generalized impact because while it was addressed to President Bassick, it also stated that the County's action applied to SEIU stewards as well. While there was some attempt to bargain after the unilateral change had been made, subsequent bargaining does not retroactively validate a unilateral change. Therefore the facts of this case quite clearly demonstrated a prohibited labor practice on the part of the County for its actions during the effective period of the agreement prior to June 30, 2015.

After June 30, 2015 the agreement expired and SB 241 would apply at this point in time. SB 241 does not prohibit union leave but only permits an employer to allow for union leave time if the employer is reimbursed for the time or if the "full cost" of the leave time is offset by other concessions made during negotiations. The "full cost" of union leave time includes both

salary and other benefits for any employee utilizing union leave time whether on full-time release or not.

SEIU did not reimburse the County for leave time. Thus, as of July 1, 2015 the County could not permit union leave time unless it had received the equivalent of full cost in negotiations. SEIU argues that it met this condition because in prior negotiations it had made sufficient concessions in order to receive the union leave time stipulated in the agreement. SB 241 does not explicitly require a new round of concessions by an employee organization for each new agreement that provides for union leave. As stated above the aim of SB 241 is a prospective application. The full cost of union leave time can be agreed upon, and maintained from prior years, going forward without a new round of concessions required by an employee organization in each agreement so long as the equivalent of the full cost had been conceded through those prior concessions. Of course new increases in the amount of union leave time must be accompanied by the equivalent of the full cost of those increases in negotiation, and the Board would expect going forward that the parties will be able to demonstrate how the full cost requirement has been satisfied.

Whether SEIU made concessions to equate to the full cost of union leave time is a question of fact. On factual matters this Board has provided that we will generally follow the rules of evidence for this state. NAC 288.322(1). These rules in turn provide for a disputable presumption that will guide our review of this question. NRS 47.250(18)(d) provides for an applicable presumption stating that for contracts not subject to the Uniform Commercial Code, such as the agreement at issue in this case, we will presume that good and sufficient consideration has been given. We note that NRS 47.250(16) also requires us to presume that the law has been obeyed. Sufficient consideration is defined as the full cost of union leave identified in SB 241. Accordingly, under these legal requirements we will presume that sufficient consideration has already been given through the negotiations process for the full cost of union leave in contracts that contain union leave provisions. We note that this is a disputable presumption under NRS 47.250 that can be rebutted with evidence. However, no evidence in this case overcomes this presumption. This Board has previously held that an employer is

obligated to maintain the status quo after the expiration of an agreement until a new agreement is reached. SB 241 creates some exceptions to this general standard, including the prohibition on union leave time if full cost concessions had not been made. Thus, had the County overcome the presumption and shown that full cost concessions had not in fact been previously made, then it would have acted within its rights under SB 241 to suspend union leave time after June 30, 2015. Concomitantly, where such concessions have been made, and we presume that they have as set forth above, then the County was not permitted to make this unilateral change. See Stationary Engineers Local 39 v. Airport Authority of Washoe County, Item No. 133, Case No. A1-045349 (July 12, 1982).

The Board did hear evidence that the parties did reach a successor agreement effective August 27, 2015. We also heard evidence that President Bassick used personal leave time during that period in order to comply with the County's unlawful directive to return to his Plans Checker II position. This Board is authorized to remedy prohibited labor practices by restoring to an aggrieved employee any benefit of which he has been deprived due to the prohibited practice. In order to remedy this violation the County shall restore to President Bassick, and any other affected officer or steward, any hours of personal leave time that were used between June 8, 2015, and the date of the successor agreement.

The County Committed a Unilateral Change When It Suspended Pay Increases

Employee pay is a mandatory subject of bargaining. NRS 288.150(2)(a). On June 9, 2015 the County announced to SEIU that it would no longer process any salary or benefit increases for SEIU-represented employees effective June 1, 2015. For the reasons set forth above, the County was precluded from taking this action under the terms of the agreement which remained in effect through June 30, 2015. The testimony at the hearing established that this change was not preceded by negotiations, and the scope of the suspension demonstrates the widespread effect that elevates this change above an isolated breach of the agreement. The elements of a unilateral change are established as to the suspensions of pay increases prior to June 30, 2015, and the Board will order the County to institute any pay increases pursuant to the 2012-2013 agreement that were omitted between June 1, 2015, and June 30, 2015.

As stated above the agreement was set to expire after June 30, 2015. At that point in time SB 241 would apply, including the restriction contained in section 1.3 of the bill stating "...upon 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." NRS 288.155(2) (as amended by SB 241).

After June 30, 2015 SB 241 did apply and did permit the County to suspend pay increases that were "greater than the amount in effect as of the expiration of the collective bargaining agreement." The words "in effect" refer to the amounts of pay established by the terms of the agreement itself, the amounts having been previously negotiated pursuant to NRS 288.150(2)(a). The agreement establishes a system of pay reflected in pay schedules that have not been changed since the agreement was signed in 2013 despite the two renewal terms. NRS 288.155(2) prohibited the County from increasing the amounts specified under that system of pay that was in effect as to June 30, 2015 until such time as a successor agreement was reached. However, NRS 288.155(2) does not restrict the County from adhering to that system of pay that was in effect as of the expiration of the agreement. While the County could not increase the systems of pay in effect, it was still obligated to apply those pay systems to the employees in the bargaining unit. See LCB Letter to Assemblywoman Kirkpatrick (June 11, 2015) (stating that that SB 241 does not provide that the prior CBA expires for all purposes or is otherwise of no force and effect) (Complainant Ex. 19). Thus, the restrictions of NRS 288.155(2) prevent pay increases that go beyond the negotiated pay systems in effect as of the expiration of the agreement. A majority of the Board does not find that the language of NRS 288.155(2) restricts an employer from following even the negotiated pay schedules that were in effect as of the expiration of the agreement. SB 241 freezes the pay schedules, but does not preclude employees from moving up or being appropriately placed within the parameters of those negotiated pay schedules. Had the legislature intended to simply freeze employee salaries and the amounts actually paid to employees, it could have said so in SB 241. Instead the legislature included

language that directs us to consider the "amounts in effect," which when read in conjunction with NRS 288.150(2)(a) indicate the amounts in effect under the agreement. We cannot elevate a vague notion of SB 241's intent above the actual text enacted.[2]

SB 241 does not preclude pay increases to employees that are due under the amounts of pay under the agreement that were in effect. Thus, an employee would still receive step increases that conform to the pay schedules in effect as the expiration of an agreement, but increases in other amounts not reflected in a negotiated system of pay and in effect of the expiration date, such as cost of living adjustments, are prevented by NRS 288.155(2). In addition to the pay increases inuring under terms of the agreement through June 30, 2015 the County must also restore any pay increases for the time period after June 30, 2015 that would have been processed under the systems of pay in effect as of the expiration of the agreement, and that were not provided for under the subsequent agreement.

Based upon the foregoing the Board finds and concludes as follows:

FINDINGS OF FACT

1. SEIU and Clark County were parties to a collective bargaining agreement with a specified term of February 7, 2012, to June 30 2012.

2. Article 43 of that agreement specifies that the agreement renews for a year period (July 1- June 30) until replaced by a successor agreement.

3. Article 8 of that agreement allows for the SEIU president to be on full time union leave.

4. On June 4, 2015, the County informed SEIU President Martin Bassick that it was cancelling union leave and instructed President Bassick to return to his position as a Plans

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[2] Although we do find that our interpretation does comport with the intent behind SB 241 to place some pressure on employee organizations to expeditiously reach an agreement if we were to adopt a view that prevented employees from being placed under the appropriate step under the negotiated pay schedules then the County would logically be prevented from paying newly hired employees and we would effectively be imposing an indefinite hiring freeze on the County from the time of expiration of an agreement until such time as SEIU agreed. The ability to hold the County's hiring activities hostage for an indefinite time until an agreement is reached is a powerful negotiating tool in the hands of an employee organization. We do not think SB 241 intended to place employee organizations in such a dominant posture.

Checker II. The County also informed President Bassick that it would not permit release time for SEIU stewards. The County did not negotiate this change with SEIU prior issuing this directive to President Bassick.

5. In order to comply with the County's directive, President Bassick was forced to use personal leave time in order to fulfill his duties as SEIU President.

6. On June 9, 2015 the County informed SEIU that it was suspending pay increases for all employees in the SEIU represented bargaining unit retroactive to June 1, 2015. The County did not negotiate this change with SEIU prior to issuing this directive.

7. If any of the foregoing findings is more appropriately construed as a conclusion of law, it may be so construed.

CONCLUSIONS OF LAW

1. The effective date for SB 241 is June 1, 2015.

2. SB 241 does not apply retroactively, and does not apply where an agreement is in place that predates June 1, 2015.

3. Under the terms of the agreement between SEIU and Clark County, the agreement was renewed on a date that predated June 1, 2015. The agreement was renewed for a year period effective July 1, 2014 and expired on June 30, 2015.

4. Union leave time is a mandatory subject of bargaining pursuant to NRS 288.150(2)(e).

5. The County's suspension of union leave time for SEIU President Bassick and for SEIU union stewards amounts to a change in policy.

6. Pursuant to NAC 288.322(1) and NRS 47.250(18)(d) we presume that the County has received sufficient consideration for the full cost of union leave time through concessions made by SEIU. As SB 241 applies prospectively it does not require new concessions for union leave time when sufficient consideration has previously been provided. No evidence was provided to overcome this presumption.

7. The County was not justified in suspending union leave time.

8. As a result of the County's unilateral change to suspend union leave time, President Bassick was deprived of the benefit of accrued leave time that he expended in order to comply with the County's unlawful directive to return to his ordinary position.

9. Employee pay is a mandatory subject of bargaining. NRS 288.150(2)(a).

10. SB 241's amendment to NRS 288.155(2) creates an exception to the general obligation to maintain the status quo pending expiration of a collective bargaining agreement.

11. Under NRS 288.155(2) an employer may not increase levels of pay that exceed the amounts in effect under a system of pay as of the date of the expiration of an agreement. NRS 288.155(2) does not prevent an employer from placing employees within the negotiated system of pay that was in effect following the expiration of a collective bargaining agreement.

12. The County's suspension of pay was a change in policy and affected the bargaining unit as a whole.

13. As a result of the County's unilateral change that suspended pay increases, employees that were due a pay increase prior to June 30, 2015 were deprived of that increase.

14. As a result of the County's unilateral change that suspended pay increases. Employees that would be due a pay increase after June 30, 2015 and which was within the system of pay in effect at the time the agreement expired, were deprived of that pay increase.

15. SEIU's complaint is well-taken.

16. The remedies identified in this decision and order are intended to effectuate the policies and purposes of the Act.

17. An award of costs or fees pursuant to NRS 288.110(6) is not warranted in this case.

18. If any of the foregoing conclusions is more appropriately construed a finding of fact, it may be so construed.

ORDER

Based upon the foregoing, and as stated above, it is hereby ordered that Respondent Clark County shall take the following affirmative action necessary to effectuate the policies and purposes of the Act:

1. Restore to Martin Bassick, and any affected union steward, the full amount of personal leave time that was expended in order to conduct SEIU related business between June 8, 2015 and the date that a successor agreement was reached; and

2. Restore any pay increases that were suspended between June 1, 2015, and June 30, 2015, and any pay increases that were suspended after June 30, 2015, and that would have been processed under the system of pay in effect as of June 30, 2015, and that are not provided for in the successor agreement.

Date this 24th day of November, 2015.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
PHILIP E. LARSON, Chairman

BY: _____
BRENT C. ECKERSLEY, Vice-Chairman

BY: _____
SANDRA MASTERS, Board Member

STATEMENT OF DISSENT

I do not agree with the Board's view that NRS 288.155(2) allows the County to continue to process pay increases under an existing "pay system." The intent behind SB 241 is evident from the tone of the bill, and that intent is, I believe, to eliminate any increase in pay for any employee when an agreement expires. In other words it freezes all employee pay.

Our obligation is not to determine policy, but rather to give effect to the policy chosen by the legislature through our administration over Chapter 288. For this reason I would find that all employee pay increases of any kind are suspended upon the expiration of an agreement and will remain as such until a satisfactory new contract is established. The Board's contrary view undermines the intent behind SB 241, and I respectfully dissent from this portion of the Board's order.

Sandra Masters

SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1107, Complainant, vs. CLARK COUNTY, Respondent.	CASE NO. 2015-011 **NOTICE OF ENTRY OF ORDER**

TO : Complainant Service Employees International Union, Local 1107, by and through their attorneys Michael Urban and Sean McDonald and The Urban Law Firm;

TO: Respondent Clark County, by and through their attorneys Mark Ricciardi, Esq. and Fisher & Phillips LLP.

PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on November 24, 2015.

A copy of said order is attached hereto.

DATED this 24th day of November 2015.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____
BRUCE K. SNYDER
Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 24th day of November 2015, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

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Anthony Golden, Esq.
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BRUCE K. SNYDER
Commissioner