

The ABC's of Prosecuting a Claim

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



Our Topics for Today

1. Overview of the EMRB
2. Types of Claims That Can / Cannot Be Filed With the EMRB
3. Filing Procedures and Extensions of Time
4. Drafting a Complaint
5. Motion Practice

Our Topics for Today

6. Drafting a Prehearing Statement
7. The Prehearing Conference
8. Mandatory Settlement Conferences
9. The Hearing and Post-Hearing Briefs
10. EMRB's Decision and Order and What To Do If You Lose

1: OVERVIEW OF THE EMRB

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

In Honor of David Letterman -

**TOP TEN THINGS TO
KNOW ABOUT THE
EMRB !!**

TOP 10 THINGS TO KNOW

10. The EMRB operates much like a court.
9. The ~~three~~ five Board members are appointed by the Governor for 4-year terms.
8. The NLRB only has jurisdiction over private sector employers and their unions. The EMRB fills the gap by covering some public sector employers and their unions.
7. The EMRB is the smallest state agency. Half of our agency is speaking with you right now.
6. The EMRB is attached to the Department of Business & Industry – although we neither serve business nor industry.

TOP 10 THINGS TO KNOW

5. The EMRB is 100% funded by an annual fee assessed the local governments, which is currently \$6.75 per employee.
4. The Board meets once a month for 3 days and during that time hears one or more cases plus rules on various motions and other matters.
3. The Board is required to meet where the case originates from.
2. The agency's enabling statute is NRS 288 – the Employee-Management Relations Act.
1. We serve approximately 170 local governments, 230 bargaining units and 80,000 local government employees.

THE EMRB'S MISSION

The Official Mission Statement

The Employee-Management Relations Board (EMRB), a Division of the Department of Business and Industry, fosters the collective bargaining process between local governments and their employee organizations (i.e., unions), provides support in the process, and resolves disputes between local governments, employee organizations, and individual employees as they arise.

THE EMRB'S MISSION

The Unofficial Mission Statement

We make sure that local governments and the unions that represent their employees play fair in the sandbox.

2. TYPES OF CLAIMS THAT CAN / CANNOT BE FILED WITH THE EMRB

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



Types of Issues We Do Not Handle

Workers' Compensation

Unemployment Compensation

Family and Medical Leave (FMLA)

Americans With Disabilities Act

OSHA Violations

Wrongful Termination

General Pay Disputes

Types of Issues We Do Not Handle

Collective Bargaining Disputes

- Discipline Issues

- Contract Interpretation Disputes

This includes:

- Internal grievance levels

- Mediation of disputes

- Binding arbitration of disputes

We also do not get involved over bargaining of a new CBA unless bad faith bargaining is alleged.

Types of Issues We Do Handle

Petitions

- To Determine Whether a Group of Employees Should Be Recognized as a Bargaining Unit
- To Determine Who Should Represent a Bargaining Unit
- To Determine Whether a Current Bargaining Agent Should No Longer Represent a Bargaining Unit
- To Determine Whether Certain Job Classifications Should Be Excluded from a Bargaining Unit
- To Issue Declaratory Orders When Presented With Specific Questions on How to Proceed in a Given Situation

Prohibited Practices

- Filed by an Employee and/or Employee Organization Against a Local Government
- Filed by a Local Government Against an Employee Organization
- Filed by an Employee Against an Employee Organization

Prohibited Practices – Local Governments

NRS 288.270 Employer or representative; employee or employee organization.

1. It is a prohibited practice for a local government employer or its designated representative willfully to:

(a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

(b) Dominate, interfere or assist in the formation or administration of any employee organization.

(c) Discriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization.

(d) Discharge or otherwise discriminate against any employee because the employee has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

(e) Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and fact-finding, provided for in this chapter.

(f) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.

(g) Fail to provide the information required by NRS 288.180.

Prohibited Practices – Employee and Employee Organizations

2. It is a prohibited practice for a local government employee or for an employee organization or its designated agent willfully to:

(a) Interfere with, restrain or coerce any employee in the exercise of any right guaranteed under this chapter.

(b) Refuse to bargain collectively in good faith with the local government employer, if it is an exclusive representative, as required in NRS 288.150. Bargaining collectively includes the entire bargaining process, including mediation and fact-finding, provided for in this chapter.

(c) Discriminate because of race, color, religion, sex, age, physical or visual handicap, national origin or because of political or personal reasons or affiliations.

(d) Fail to provide the information required by NRS 288.180.

Most Common Prohibited Practice Claims Filed at the EMRB

Unilateral Change Claims

General Interference With a Protected Right

General Bad Faith Bargaining

End Run Bargaining / Direct Dealing

Discrimination Based Upon Protected Class

Discrimination Based Upon Protected Conduct

Duty of Fair Representation

Note: The EMRB has a booklet explaining the elements of these types of claims.

3. FILING PROCEDURES AND EXTENSIONS OF TIME

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



Filing Procedures

The #1 thing to know about filing – IT IS EASY

Do a one-time registration by completing a one-page form. Our Board Secretary will help you with this task.

Then each time you need to file a document just send an e-mail to emrb@business.nv.gov and attach the document you wish to file as a .pdf attachment to the e-mail.

The Board Secretary will see the request to file a document and will file-stamp the document and then e-mail the document back to you in the same manner (i.e., as a .pdf file).

If you are filing a new complaint, the file-stamped copy will also display the case number assigned to the new complaint.

Service of Documents

An initial complaint must be served on the Respondent(s) via certified mail within 5 days.

When the green card comes back, file the green card as you would any other document. Thus the EMRB will then know when the answer is due.

For all other documents, you have the option of electronically serving the other parties to the case in lieu of serving by personal service or mail.

About 99% of all documents filed at the EMRB are both electronically filed and electronically served.

Time Computations

The EMRB uses Nevada Rules of Civil Procedure Rules 6(a) and 6(e) for the computation of when documents are due.

Example time deadlines:

An answer is due 20 days after the service of a complaint.

Prehearing statements are due 20 days after the answer is filed.

An opposition to a motion is due 10 days after the filing of a motion.

A reply to an opposition is due 10 days after the filing of an opposition.

Extensions of Time

The Board may extend the time for any document by motion of a party. This is rarely used.

The Commissioner may extend the time for any document by agreement of the other parties if the Commissioner determines that the extension of time will not delay any hearing on the matter.

- This is usually done by the parties submitting an e-mail chain to the Commissioner in lieu of a formal stipulation.
- The Commissioner then issues a Commissioner's Order extending the deadline.

The Commissioner may extend the time for the filing of prehearing statements on his own discretion. The Commissioner does this by issuing a Commissioner's Order.

4: DRAFTING A COMPLAINT

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Basics of a Complaint

The Complaint looks very much like a complaint filed in a court.

The Complaint has:

- The name and contact information of the attorney in the top left corner of page 1.
- A caption.
- The title of the document.
- Paragraphs listing the alleged facts.
- Counts (this is preferred but not everyone does it).
- Remedy requests.
- A signature of the attorney at the end of the document.
- A certificate of mailing – note it must be by certified mail.

EMRB is a Limited Jurisdiction Agency

Thus the beginning of the Complaint must allege certain facts establishing jurisdiction.

1. It must allege that the Complainant(s) are either a local government employee, a local government employer and/or an employee organization.
 - Example: At all times relevant herein, John Doe was a local government employee pursuant to NRS 288.050.
 - Example: At all times relevant herein, the Las Vegas Association of Employees was an employee organization pursuant to NRS 288.040 and was recognized by the City of Las Vegas as the exclusive representative of certain employees of that local government.
 - Example: At all times relevant herein, the City of Las Vegas was a local government employer pursuant to NRS 288.060.
2. It must allege that the Respondent(s) are either a local government employee, a local government employer and/or an employee organization.

Form of Pleadings and Motions

Found in NAC 288.231

Set forth a clear and concise statement of the matters relied upon as a basis for the action or relief requested and an appropriate prayer;

Be clear, legible and typewritten or printed on white, unglazed paper – letter size;

Be firmly bound together at the upper left-hand corner of the document;

Not exceed 30 pages, except with permission of the Board;

Black type and at least 11 characters per inch;

One inch margins with pages numbered at bottom of the page;

No exhibits are allowed to be attached to a complaint.

Amendment of Pleadings

The Board may allow any pleading to be amended or corrected, or any omission in a pleading to be cured

- If substantial rights of the parties will not be prejudiced;
- Will be liberally construed and any defects not affecting the substantial rights of any party may be disregarded by the Board.

Other Issues Relating to Complaints

The EMRB allows for the intervention of any person claiming an interest in a dispute through the filing of a petition – very similar to that in court.

The EMRB allows for the consolidation of cases

- When it appears that the issues are substantially the same and
- When the rights of the parties will not be prejudiced

The EMRB now has a provision allowing for the filing of *amicus* briefs either by motion or by invitation of the Board

Assignment of Cases to a Panel

The EMRB now has five panels of three Board members each to hear cases.

When a case is filed the Board Secretary will randomly assign the case to an Initial Panel.

The Initial Panel:

- Hears all motions, including motions to dismiss;
- Determines whether to send the case to a mandatory settlement conference;
- Determines whether to grant a hearing for the case.

If the Initial Panel grants a hearing for a case, then the case is randomly reassigned to a Hearing Panel, which conducts the hearing and decides the issues in the case, which culminate in the issuance of an order.

Cases of Statewide Significance

Upon the filing of a Complaint, the Commissioner can designate the case as one of statewide significance.

This is done by the issuance of an order by the Commissioner to the Board and the parties to the case, stating the reasons for the designation.

Cases of statewide significance are not assigned to a panel, but instead are assigned to the Board sitting *en banc*.

Options for Legal Research

1. Westlaw
2. Lexis
3. Nevada Law Library on CD (we currently have orders from 400 to the present and hope to have 1-399 on the disk in the coming year)
4. Electronic Digest of Decisions and Orders on EMRB Website
5. Practice Guides on Website
 - Booklet on the Duty of Fair Representation
 - White Paper on EMRB's Discrimination Provision
 - More Coming

5. MOTION PRACTICE

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Motions to Dismiss

1. A motion directed at a complaint must be filed before the answer is due.
2. Parties usually file the motion and then a minute later file the answer.
3. Filing of a motion to dismiss does not stay the requirement to file the answer.
4. Filing of a motion to dismiss usually results in the Commissioner issuing an order to stay the filing of the prehearing statements.
5. Exhibits are allowed on motions to dismiss.
6. The Board (or panel) seldom allows for oral argument on motions to dismiss.
7. The Board (or panel) decision results in the issuance of an order.

Examples of Other Motions

Motion to Strike

Motion for a More Definite Statement

Motion for Summary Judgment – treated as a Motion to Dismiss

Motion Practice

Opposition to a motion is due within 10 days of the filing of the opposition.

Reply to an opposition to a motion is due within 10 days of the filing of the opposition.

Extensions of time can be granted as previously discussed.

Once all documents are received then the motion is placed on the next calendar of the Board or assigned panel.

If there are multiple motions affecting the same case then the Commissioner will wait until all documents are received on all the motions before the case is placed on a calendar.

6. DRAFTING A PREHEARING STATEMENT

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



Prehearing Statement Contents

1. A plain and concise statement of the issues of fact and law to be determined by the Board which have not been resolved by negotiation or otherwise;
2. A memorandum of law or points and authorities in support of the party's position, including a list of significant differences or close similarities of the issue or issues to any prior determinations of the Board;
3. A list of witnesses and their qualifications, including a brief summary of their expected testimony; and
4. An estimate, to the nearest hour, of the time needed for the presentation of the party's position.

Examples of Issue Statements

Whether JJSA's agreement to modify Article 8, as embodied in the currently effective and ratified C BA, bars any claim that the County failed to bargain in good faith in violation of NRS 288.270(1)(e) with the JJSA over the same.

Whether NRS 288.225 (SB 241) requires a union claiming it funded union leave in prior contracts to provide evidence of the specific amount of the alleged financial concession.

Whether the County's insistence on negotiating the union leave time provided in Article 8, to conform to the statutory requirement of NRS 288.225 (SB 241) constitutes bad faith bargaining in violation of NRS 288.270(1)(e).

Examples of Issue Statements

Whether LVMPD engaged in a prohibited practice, in violation of NRS 288.270(1)(e), by unilaterally changing the terms of the CBA Grievance Procedure article, when the person who met with Officer X and conducted the grievance hearing failed to issue a written decision.

Whether the Department unilaterally changed any term of the Collective Bargaining Agreement.

Legal Memorandum

The bulk of the prehearing statement usually consists of a legal memorandum, outlining the issues in the case and why that party's position is correct.

Frankly, some of the legal memorandums are very good while others are very poorly written and sometimes are nothing more than a recitation of the facts contained in the complaint.

List of Witnesses

The next part of the prehearing statement is a list of witnesses and their expected testimony.

IMPORTANT: The presiding officer generally will not allow someone to testify in a party's case-in-chief if that person has not been listed as a witness in a prehearing statement or a supplement to the prehearing statement.

Estimate of Time Needed

This is done in hours (and is only an estimate).

Most attorneys put down $\frac{1}{2}$ day, 1 day, etc.

The Board or a panel usually meets for three consecutive days – so that should be an indication of what the maximum time might be to hear a case.

Board Deliberation on Granting a Hearing

Once the prehearing statements are received, the Board or the Initial Panel will review:

- Complaint
- Answer
- Prehearing Statements

The Board or Initial Panel will then determine whether to send the case to a mandatory settlement conference and/or whether to grant a hearing.

The Board may also postpone a hearing on the matter if there is a pending grievance or arbitration. This is known as the limited deferral doctrine.

If a hearing is granted, then the case is randomly assigned to a Hearing Panel.

Notice of Hearing

Once a hearing is granted, the Commissioner will then issue a Notice of Hearing, containing:

- Information on the Panel and the Presiding Officer
- Date and Time of the Hearing
- Location of the Hearing
- Details Concerning the Hearing, including the court reporter and exhibits
- Date and Time for the Prehearing Conference
- List of the Issues as submitted by the parties in their prehearing statements, as massaged by the Commissioner

Notice of Hearing

The Notice of Hearing is mailed to the attorneys of record.

A courtesy copy is e-mailed to the attorneys, along with the prehearing checklist and a map to the Nevada State Business Center.

7: THE PREHEARING CONFERENCE

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



Prehearing Conference Law

NAC 288.273 Prehearing conference. (NRS 288.110)

1. The Board or Commissioner may, upon written notice to all parties of record, hold a prehearing conference to:
 - (a) Formulate or simplify the issues;
 - (b) Obtain admissions of fact which will avoid unnecessary proof;
 - (c) Discuss any proposed exhibits which were exchanged between the parties at least 5 days before the date of the prehearing conference;
 - (d) Limit the number of witnesses; and
 - (e) Establish any other procedure which may expedite the orderly conduct and disposition of the proceedings.

Prehearing Conference Itself

The date and time for the prehearing conference is mentioned in the Notice of Hearing.

The prehearing conference is almost always telephonic, with the call originated by the Commissioner.

Sometimes the Board Secretary or the Deputy Attorney General will also be present at the telephonic conference.

If important decisions are made, the Commissioner will then send an e-mail after the conference, placing in writing the decisions made during the conference.

Prehearing Checklist

The ERMB has a Prehearing Checklist, which is e-mailed to the attorneys of record on a given case at the time the Notice of Hearing is issued.

This document is used as a reference both during the prehearing conference and by the attorneys and their staff prior to the hearing.

Topics include:

- Issues and Settlement
- Admissions of Fact
- Exhibits
- Witnesses
- Other Procedures

8: SETTLEMENT CONFERENCES

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Settlement Conference Orders

Either a party or the Board may order that a given case be sent to a mandatory settlement conference.

This can only be done after the parties have submitted their prehearing statements.

The order must be at least 60 days prior to any hearing on the matter.

The order allows the Commissioner to set the particulars for the conference, including when it is to be held.

After the order is issued, the Commissioner then sends a letter to the parties, notifying them of the particulars of the settlement conference.

Settlement Conference Limitations

Certain cases (basically non-prohibited practice cases) cannot be sent to a settlement conference.

Parties cannot be required to submit additional statements or briefs for the conference.

The Commissioner cannot establish guidelines that will impose any undue expense on a party.

The settlement conferences are confidential and the Commissioner cannot be called as a witness at a hearing as to what transpired during the conference.

Settlement Conferences - Miscellaneous

The settlement conferences are run by the Commissioner.

After a brief meeting, the parties are generally separated with one party staying in the EMRB's conference room and the other going to the Commissioner's Office.

Since inception of the program in the fall of 2014 approximately 50% of the conferences have resulted in a settlement.

Any case that settles then has a deadline for the parties to submit a stipulation to dismiss for Board approval.

9: THE HEARING AND POST-HEARING BRIEFS

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Hearing Procedure

Presiding Officer makes introductory remarks

Parties then offer any stipulations and motions related to the conduct of the hearing

- Examples include exclusion of witnesses, introduction of non-contested exhibits, etc.

Opening Statements

- Complainant(s)
- Respondent(s)

Complainant's Case in Chief, witness by witness

Respondent's Case in Chief, witness by witness

Complainant's Rebuttal Case

Hearings - Oral Closing Arguments

The Board prefers oral closing arguments in lieu of written briefs.

If oral arguments are made, the Board usually allows the attorneys time to prepare and in the interim the Board conducts other business.

The Board usually allows 30 minutes per side for oral closing arguments, with Complainant being allowed to reserve some of its 30 minutes for rebuttal.

Hearings – Written Briefs

If written briefs are granted (usually because there are significant legal issues needing briefing) then the Board usually sets the briefs due 30 days upon EMRB receiving the transcript of the hearing from the court reporter.

Hearings – Miscellaneous Issues

After the attorneys conclude with each witness, the Board then has the opportunity to ask questions of the witness. So don't be surprised by this!

The Board generally follows the rules of evidence but can – and does – depart from them, usually on the issue of hearsay, which is allowed in administrative hearings.

The Board expects all attorneys to be civil and generally dislikes argumentative behavior.

Hearings - Deliberations

Upon conclusion of the hearing (or upon receipt of the briefs, if allowed) the Board will then deliberate on the case.

The Board must render a decision within 120 days of the conclusion of the hearing.

Pursuant to the EMRB's enabling statute, the Board has the right to deliberate in closed session – and always does so. Upon reaching a decision, the Board will then return to open session, at which time a motion is made and voted upon.

The Deputy Attorney General will then draft the order, based upon the motion, and after the draft is reviewed, commented upon, and approved, staff then affixes the signatures of the members.

If a member of the Board or Panel dissents, then that member may also draft a written dissent, which is placed above his/her signature, all of which is included in the order.

10: EMRB'S DECISION AND WHAT TO DO IF YOU LOSE

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD



3 Options

1. Petition for Rehearing
2. Petition for Reconsideration
3. Petition for Judicial Review

Petition for Rehearing

Must be filed within 15 days after service of a final decision.

An answer to be petition for rehearing is not allowed.

The Board must make its decision at least 5 days before the deadline to file a Petition for Judicial Review.

If granted, then the other party may file a response. The Board, in its order granting a rehearing, may request the submission of additional evidence and/or briefs on the issues granted.

At a rehearing, the Board may abrogate or modify the original order if it believes that order to be unjust, unwarranted, unlawful or in need of change.

Petition for Reconsideration

If the case is heard by a panel and the panel had a split decision on one or more of the issues, then the party who was in the minority may file a petition for reconsideration.

A petition for reconsideration requests that the entire Board reconsider the decision of the panel in the hopes that the two members not on the panel would instead side with the dissenting panel member and thus, in effect, reverse the decision of the panel.

The party who lost on the issue(s) files a petition for reconsideration, explaining why the decision was incorrect. The two members of the Board not on the panel then read the petition, and if one or more of the two members, signs off on the petition then the entire Board will reconsider the matter.

Reconsideration consists of the two members not on the panel reviewing the administrative record. Oral argument is then made by the attorneys, followed by deliberation by the Board.

Interplay of Panels and the Board

EMRB has a handout, “Procedural Outline for Petitions for Rehearing and Petitions for Reconsideration”.

The handout explains when each of the two options is or is not available.

The handout also explains what to do, step-by-step.

Petition for Judicial Review

- Once a final decision is rendered by the EMRB (Board or Panel) and
- A petition for rehearing was not made or, if made, has been resolved and
- A petition for reconsideration was not made or, if made, has been resolved:

Then a party may file a Petition for Judicial Review in District Court !!

Questions?

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD