STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

WASHOE COUNTY PUBLIC ATTORNEYS ASSOCIATION, Complainant, vs. WASHOE COUNTY, Respondents,	ITEM NO. 750A CASE NO. A1-046001 **ORDER**

For Complainant: Francis C. Flaherty, Esq.

For Respondent: David Watts-Vial, Esq.

On the 14th day of June, 2011, this matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board"), for consideration and decision pursuant to the provisions of NRS and NAC chapters 288, NRS chapter 233B, and was properly noticed pursuant to Nevada's open meeting laws.

The Board held the hearing in this matter on June 13, 2011 in Reno, Nevada. The case was tried upon stipulated facts and documentary exhibits admitted into evidence before the Board at the hearing.

NRS 288.150(2)(i) states that discipline and discharge procedures are a mandatory subject of bargaining between a local government employer and a recognized bargaining agent. Washoe County ("County") is a local government employer and has recognized the Washoe County Public Attorneys Association ("Association") as the bargaining agent for the County's public attorneys, including Deputy District Attorneys, Deputy Public Defenders, and attorneys with the County's Senior Law Project. In June and July of 2010, the Association sought to bargain with the County over discipline and discharge procedures pursuant to NRS 288.150(2)(i). The County refused, and continues to refuse, to bargain with the Association over

this subject. (Stipulated Facts #17-19). Based upon the County's refusal to bargain, the Association filed a prohibited practices complaint with the Board on December 20, 2010.

The County has stipulated that it refuses to bargain over this topic, but asserts that it is justified in refusing to bargain with the Association because it does not have a duty to bargain with the Association, at least as to discipline and discharge procedures. The County's authority for this assertion is a declaratory judgment entered by the Second Judicial District Court in 1992 in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751. The County has provided the record of that proceeding and introduced it into evidence before the Board, including the Court's order, which states at Conclusion of Law No. 6:

> Legal professional employees of Washoe County are at-will employees serving at the pleasure of their appointing authorities and as such, Washoe County is not obligated by the provisions of NRS 288.150 to bargain with the Association over discipline and discharge procedures.

(Exhibit B).

Following entry of the District Court's 1992 order, the Association appealed the order to the Nevada Supreme Court. On November 3, 1993, the Nevada Supreme Court entered an unpublished order dismissing the appeal, stating that the District Court properly concluded that Washoe County was entitled to judgment as a matter of law. (Exhibit C).

The County argues that these prior decisions are controlling on the issue of the County's duty to bargain with the Association over discipline and discharge procedures, and that because there is no duty to bargain, the County could not have committed a prohibited labor practice when it refused to bargain.

Although the County has invoked both issue preclusion and claim preclusion in this case, as a preliminary matter we dispense with the claim preclusion doctrine as not applicable to this proceeding. "Claim preclusion may apply in a suit to preclude both claims that were or could have been raised in a prior suit." Five Star Capital Corp. v. Ruby 124 Nev. Adv. Op. 88, 194 P.3d 709, 714 (2008). The 1992 case and the present case involve two different occurrences separated by approximately 18 years. The claim in 1992 appears to have arisen at the request of

the Washoe County Board of Commissioners during the process of initially forming the bargaining unit and recognizing the Association. (Exhibit B). In contrast, the current dispute arose in 2010 in the course of negotiating a new collective bargaining agreement following specific requests from the Association to bargain over discipline and discharge procedures. (Stipulated Facts # 17-19). It does not strike us as plausible that the refusal to bargain claims which arose in 2010, and the Association now asserts, "were or could have been raised in the prior litigation." Id. Therefore, claim preclusion does not apply.

Issue Preclusion

The Board agrees with the County that issue preclusion is applicable in this matter. Britton v. City of North Las Vegas, 106 Nev. 690, 799 P.2d 568 (1990)

Issue preclusion is an affirmative defense, and as such the County bears the burden to establish each element of issue preclusion. Marine Midland Bank v. Monroe, 104 Nev. 307, 756 P.2d 1193 (1988).

The following factors are necessary for application of issue preclusion: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation"; and (4) the issue was actually and necessarily litigated." Five Star Capital at 713.

The County has established that the issue decided in the prior litigation is identical to the issue presented in this current case – whether or not the County is obligated to bargain with the Association over discipline and discharge procedures. This issue was raised in the 1992 complaint before the District Court (Exhibit 1) and the District Court addressed this same issue in its conclusions of law by stating that the County was not obligated by the provisions of NRS 288.150 to negotiate discipline and discharge procedures with the County. In this case, the dispute revolves around the same question and the same mandatory subject of bargaining – whether the same County owes a duty to negotiate with the same Association over discipline and discharge procedures. Therefore we conclude that the County has established the first element of issue preclusion.

We also agree that the prior ruling was on the merits and was final. A ruling is "on the merits" if it "is based on a determination of legal rights [i.e. arguing facts and law] as distinguished from mere matters of practice, procedure, jurisdiction, or form." CJS Judgments § 959. The evidence in the record shows that the District Court's decision was not a procedural determination, but was based upon the arguments from the parties, in the form of cross-motions for summary judgment. (Exhibits 9-11); (Exhibit B). A ruling is final if it extinguishes a claim. See Restatement (Second) of Judgments § 13. We determine the District Court's decision is final (Exhibit B) based on the above analysis.

The parties have stipulated that they are the same parties that were involved in the 1992 case. (Stipulated Facts # 3-5). Therefore the County satisfies the third element of issue preclusion.

Finally, we conclude that the County has shown that the issue was actually and necessarily litigated in 1992. In order to be "actually litigated," the issue must have been "properly raised in the pleadings or otherwise submitted for determination and in fact determined." Restatement (Second) of Judgments § 27, comment d. "Necessarily litigated" means "essential to the judgment" or "the final outcome hinges on [determination of the issue]." Bobby v. Bies, 129 S. Ct. 2145, 2152 (2009). At earlier stages in this case we had some question as to whether or not this element was satisfied, owing to the minimal language in the 1992 order addressing Chapter 288 and the argument that the County could not by local law exempt itself from the mandatory bargaining provisions of NRS 288.150 under the Nevada Supreme Court's decision in City of Reno v. Reno Police Protective Ass'n, 98 Nev. 472, 653 P.2d 156 (1982). However, the evidence does show that during the 1992 District Court case, this question, and the City of Reno case in particular were raised in the pleadings and were submitted to the District Court for decision. Ex. 4, p. 4; Exhibit 11; Ex. 13; and again to the Supreme Court. Ex. 33, 34, 35. Thus, the question was actually litigated. The question was also necessarily litigated because the outcome of the 1992 case depended upon a determination of whether NRS 288.150(2)(i) imposed a duty on the County to bargain with the Association over discipline and discharge procedures. Thus, the County has satisfied the fourth element of issue preclusion as well.

Exceptions to Issue Preclusion

The Association urges the Board to apply one of the recognized exceptions to the issue preclusion doctrine. Specifically, the Association argues that a change in the legal context concerning the exclusive jurisdiction of this Board warrants reconsideration of the issue. See Restatement (Second) of Judgments § 28(2) and (3). Based upon a line of cases beginning in 2002 with the Nevada Supreme Court's decision in Rosequist v. Int'l Ass'n of Firefighters, 118 Nev. 444, 49 P.3d 651 (2002), the Association argues that this Board has exclusive original jurisdiction over claims arising under, and interpretations of, the Local Government Employee-Management Relations Act. The Rosequist court did in fact state that this Board has exclusive jurisdiction over unfair labor practice issues, similar to the exclusive jurisdiction granted to the National Labor Relations Board under federal law. Id. at 449, 49 P.3d at 654. The court concluded that a claimant did not have discretion to file a claim under Chapter 288 with the District Court, instead it was mandatory to file with this Board. Id. at 451, 49 P.3d at 655. The Association argues that this line of reasoning continued in City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 895, 59 P.3d 1212, 1217 (2002) ("EMRB is not estopped from determining issues previously decided by an arbitrator when the EMRB has exclusive jurisdiction over the issue"); City of Henderson v. Kilgore, 122 Nev. 331, 131 P.3d 11 (2006), and Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 170 P.3d 989 (2007), culminating with a discernable rule from those decisions that a District Court does not have jurisdiction over an issue when an administrative agency such as this Board has exclusive jurisdiction over the issue. See also Baldonado v. Wynn Las Vegas, 124 Nev. Adv. Op. 81, 194 P.3d 96 (2008). This is the only change in the legal context which the Association argued at the hearing.[1] Notably, there does not appear to have been any material change to the relevant provisions of the Washoe County Code or NRS 288.150 since the District Court's 1992 decision.

[1] Previously, the Association had filed pleadings which argued that a change in Washoe County's population to a level above 400,000 constituted a change in the legal circumstances. To the extent that the Association maintains this argument, we do not agree. Pursuant to NRS 0.050, any such change to Washoe County's population would not be effective until July 1, 2011.

Based upon this change in the legal context from this series of court decisions that now assigns exclusive jurisdiction to the Board, the Association asserts that the Board is not bound by the District Court decision and should address the question anew. Although we agree with the Association that this Board has exclusive jurisdiction over disputes arising under Chapter 288 pursuant to Rosequist, that jurisdiction is always and necessarily subject to judicial review by the District Courts and the Nevada Supreme Court. Rosequist at 450, 49 P.3d at 654; NRS 288.130. The Nevada Supreme Court has stressed the importance of the judicial review process to administrative actions. E.g. Cone v. Nevada Service Employees Union, 116 Nev. 473, 998 P.2d 1178 (2000). If we were to accept the Association's invitation to revisit the issue, it would essentially invert the standard judicial review process because the Board would be placed in the position of second-guessing the decisions of the District Court and the Supreme Court. This we decline to do, especially in light of the fact that there has been no material change to the statutes and code provisions that were before the District Court in 1992. We also look to the stated purpose behind the issue preclusion doctrine of bringing finality to an issue. Therefore, we do not find that an exception to the issue preclusion doctrine is warranted in this case.

Laches and Statute of Limitations

The County has also raised the affirmative defenses of laches and statute of limitations. Laches does not apply because the County has not established that it has been disadvantaged by the Association's actions. See Carson City v. Price, 113 Nev. 406, 412, 934 P.2d 1042, 1043 (1997). Nor are the claims barred by the statute of limitations because the County has not established that the Associations complaint was filed more than six months after the Association had reason to believe that a prohibited labor practice may have occurred. Cone at 477, n.2 (2000).

Finally, we do not believe that this case warrants an award of attorneys fees as even the County acknowledged that the Association had stated a prima facie case for a prohibited labor practice and because of the necessity to examine the record to determine whether the elements of issue preclusion were met.

Based upon the forgoing, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Washoe County is a local government employer

2. Washoe County Public Attorneys Association has been recognized by Washoe County as the bargaining agent for the unit composed of the County's public attorneys.

3. In June and July of 2010, the Association sought to bargain with the County over discipline and discharge procedures.

4. After being approached in June and July of 2010, the County refused to bargain with the Association over discipline and discharge procedures.

5. The claims asserted by the Association in its complaint before the Board had not yet occurred and could not be have been asserted in 1992 in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751.

6. The issue of whether or not the County is obligated to bargain with the Association over discipline and discharge procedures is identical to the issue in this case.

7. The 1992 ruling in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751 (Exhibit B) was on the merits and was final.

8. The parties to the proceedings in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751 are the same parties that are before the Board in this case.

9. The issue of whether or not the County is obligated to bargain with the Association over discipline and discharge procedures was actually litigated in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751, as evidenced by the record of that proceeding introduced into evidence before the Board.

10. The issue of whether or not the County is obligated to bargain with the Association over discipline and discharge procedures was necessarily litigated in Washoe County v. Washoe County Public Attorneys Association, Case No. CV92-01751, as evidenced by the record of that proceeding introduced into evidence before the Board.

11. The County has not established by substantial evidence that it is disadvantaged by the Association's request to bargain over discipline and discharge.

12. The County has not established by substantial evidence that the Association's complaint was filed with the Board more than six months after the Association had reason to believe that a prohibited labor practice may have occurred.

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

CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the Local Government Employee-Management Relations Act.

2. The Board has exclusive jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS Chapter 288.

3. Claim preclusion is not applicable to this case.

4. Issue preclusion applies in administrative proceedings.

5. The County has met its burden to establish the affirmative defense of issue preclusion in this case, as set forth in this order.

6. There have not been any material changes to the relevant provisions of the Washoe County Code or NRS 288.150 since the time that the District Court entered its decision in 1992.

7. There is no basis to apply any recognized exception to the issue preclusion doctrine in this case.

8. The doctrine of laches does not apply in this proceeding.

9. The Association's compliant is not barred by the six-month statute of limitations of NRS 288.110(4).

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

ORDER

It is hereby ordered the Board finds in favor of Respondent Washoe County on all claims asserted against it.

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It is further ordered that each party shall bear its own costs and fees incurred in this matter.

DATED the 15th day of July, 2011.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

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

BY: _____
PHILIP E. LARSON, Vice-Chairman

BY: _____
SANDRA MASTERS. Board Member

STATEMENT IN CONCURRENCE

I agree that ultimately the decision of this Board is compelled by issue preclusion and the 1992 District Court decision. I feel it necessary however to state some of the difficulties that attach to the 1992 decision.

The District Court's decision seems to run in direct opposition to the plain language of NRS 288.150 which imposes on every local government employer the duty to negotiate over the mandatory subjects of bargaining, including but not limited to Discipline and Discharge Procedures. The only exceptions to that duty are stated in NRS 288.150(4). The District Court's decision is unwieldy because it offers no explanation or reasoning for its disregard of this statute.

Neither the District Court's decision, nor the unpublished Order Dismissing Appeal entered by the Supreme Court even mention the 1982 decision of City of Reno v. Reno Police

Protective Association, which appears to me to directly answer the question of whether or not a County may exempt itself from the provisions of NRS 288.150 through provisions of its own local code.

Due to the extremely threadbare analysis devoted to NRS 288.150, and the silence of both the District Court and the Supreme Court as to the City of Reno case, I can discern no cogent standard that emerges from those decisions which this Board could apply to cases other than this present case. My understanding is that for all other cases which may arise before this Board the standard set forth in City of Reno – that a local government cannot by local law or ordinance exempt itself from the provisions of NRS 288 – continues to be the appropriate standard to apply, and that today's decision applies only to Washoe County, and only to its bargaining relationship with the Washoe County Public Attorneys Association.

I also wish to clarify that the 1992 District Court's decision discusses only discipline and discharge procedures under NRS 288.150(2)(i). It does not appear to excuse the County from negotiating any other mandatory subject of bargaining with the Association.

The excusal from negotiating over discipline and discharge that we encounter in this case is a solitary occurrence, arising only in this case because of the unique circumstances showing that issue preclusion attaches to the 1992 District Court decision.

BY: _____
PHILIP E. LARSON. Vice-Chairman

I join in the concurrence.

BY: _____
SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

WASHOE COUNTY PUBLIC ATTORNEYS ASSOCIATION, Complainant, vs. WASHOE COUNTY, Respondents,	CASE NO. A1-046001 **NOTICE OF ENTRY OF ORDER**

To: Francis C. Flaherty, Esq.

To: David Watts-Vial, Esq

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on July 15, 2011.

A copy of said order is attached hereto.

DATED this 15th day of July, 2011.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____
JOYCE A. 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 15th day of July, 2011, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

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