STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

WATER EMPLOYEES ASSOCIATION OF NEVADA, Complainant, v. LAS VEGAS VALLEY WATER DISTRICT, Respondent.	Case No. 2019-002 **ORDER ON RESPONDENT'S MOTION TO DEFER AND COMPLAINANT'S MOTION TO DISMISS COUNTERCLAIM** **PANEL A** **ITEM NO. 841-A**

On November 17, 2020, this matter came before the State of Nevada, Government Employee-Management Relations Board (Board) for consideration and decision pursuant to the provisions of the Government Employee-Management Relations Act (NRS Chapter 288, EMRA) and NAC 288. At issue was Respondent's motion to defer or, in the alternative, a motion for more definitive statement as well as Complainant's motion to dismiss Respondent's Counterclaim.

In its Amended Complaint, Complainant asserts numerous violations against Respondent. Specifically, Complainant alleges that Respondent announced they were looking to hire young and healthy thirty-year olds in an effort to develop a younger and healthier workforce.

Complainant further alleges that the parties had a dispute over Respondent's interfering with members' use of a short-term disability insurance policy purchased by the members through a group rate obtained from Mutual of Omaha by Respondent (Policy). The collective bargaining agreement (CBA) between the parties allows an employee to earn short-term disability benefits through hours of service.

The use of the Policy was resolved in October 2018 through a Memorandum of Understanding (MOU) wherein Respondent agreed not to interfere with an employee's use of the Policy, and the short-

term disability benefits earned under the CBA would be used in accordance with Article 18 of the CBA (Article 18 states that disability leave shall accrue at a particular rate). Complainant alleges that Article 18 does not have a requirement that short-term disability benefits must be used, citing to language that an "employee is entitled to use accrued disability leave". Unused disability leave may be received as a cash payment upon separation.

Despite the right to receive the cash payment, Complainant states that Respondent at the arbitration testified in January 2020 that the use of benefits may be forced to avoid a cash payment, which is not provided for in the CBA. Complainant alleges that Respondent has not abided by the terms of the MOU or the CBA in that it continues to require employees to exhaust short-term disability benefits and vacation benefits under the CBA prior to being able to access the Policy's disability benefits. Respondent also requires employees to exhaust annual leave and compensatory time benefits earned under Articles 13 and 17 of the CBA prior to being able to access the Policy's disability benefits.

Complainant alleges that despite having no right to administer the Policy, Respondent falsely informs employees that they do not qualify for benefits under the Policy and that they must exhaust their annual leave, compensatory time and short-term disability benefits earned under the CBA before benefits under the Policy become available.

Complainant asserts several prohibited practices; namely unilateral changes, interference, restraint, coercion, a failure to bargain in good faith, and discrimination. Specifically, Complainant alleges that Respondent's actions and practices constituted a unilateral change by interfering with how employees use benefits earned under the CBA, interfering with the third-party insurance Policy which Respondent is not a party to, interfering with an employee's expenditure of wages, violating NRS 288.150(2)(a), (b), (c), (e), (f), (j), and (m) as a matter of mandatory bargaining. Further, Complainant alleges that Respondent failed to disclose information to Respondent. Respondent, in August 2019, also unilaterally chose to disregard the grievance process and issue a final determination with regards to the grievance. Respondent's interfered, pursuant to NRS 288.150(1)(a), with Complainant's ability to bargain for benefits and wages where Respondent can force and/or prevent an employee's ability to access or use benefits under the CBA and/or Policy.

Complainant also alleges that Respondent's practice of seeking to hire thirty-year olds is an age-based practice as well as a physical and/or visual handicap in violation of NRS 288.270(1)(f).

Complainant further alleges that Respondent's ongoing interference with an employee's Policy use discriminates against an employee because of a physical or visual handicap in that it is an employment practice that adversely affects handicapped employees at a higher rate than non-handicapped employees.

Moreover, Complainant alleges that Respondent's ongoing interference with an employees' Policy use discriminates against the employee because of personal reasons in that the practice is specifically designed to personally attack employees who would otherwise be entitled to payouts upon employment separation of earned unused short-term disability wages, vacation leave and compensatory time. Further, it discriminates against members due to union affiliation.

Complainant additionally contends that Respondent discriminated against older workers by requiring workers to exhaust benefits earned under the CBA before accessing the Policy. Older workers with substantial hours of earned benefit under the CBA will not exhaust hours and will be prevented from using the Policy while younger workers with fewer CBA hours will exhaust those hours and receive the benefit of the Policy.

Finally, with regards to a failure to bargain in good faith, Complainant contends that grievance and arbitration provisions are matters of required bargaining under NRS 288.150. Complainant alleges Respondent had a duty to bargain in good faith by providing information during the grievance process, and Respondent breached this duty by not providing information. Further, Respondent had a duty to bargain by completing the Step II grievance process, and Respondent breached its duty by not completing said process. Finally, Complainant alleges that Respondent provided materially false information in bad faith and acted unilaterally without completing the grievance process in bad faith.

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DEFERRAL DOCTRINE

As set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), the Board will defer, as a matter of discretion. In *Town of Pahrump*, the Board detailed the deferral standard:

> The arbitrator had jurisdiction to determine if just cause existed but not to determine whether [Respondent] engaged in an unfair labor practice. The Board has exclusive jurisdiction over unfair labor practice issues. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 895, 59 P.3d 1212, 1217 (2002). It is proper to look toward the NLRB for guidance on issues involving the EMRB. *Id.* The EMRB defers to a prior arbitration if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not clearly repugnant to the purposes and policies of the EMRA; (4) the contractual issue was factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id.* The party desiring the EMRB to reject an arbitration award has the burden of demonstrating that these principles are not met. *Id*; *see also Washoe Sch. Principals Ass'n v. Washoe Cty. Sch. Dist.*, Case No. A1-046098 (2017); *Reichold Chemicals*, 275 NLRB 1414, 1415 (1985); *Good Samaritan Hosp. & California Nurses Ass'n*, 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015).[1]

Int'l Ass'n of Fire Fighters, Local 4068 v. Town of Pahrump, Case No. 2017-009 (2018).

Complainant argues that the Board should not defer in this case as the arbitrator decided the matter on the narrow issue of *res judicata*.[2] Further, the Arbitrator made no finding or ruling on Respondent's continuing inconsistent application of its sick leave calculations and improper inclusion of other compensatory benefits (vacation benefits which are mandatory subjects of bargaining).

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[1] As set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), the Board will defer, as a matter of discretion, in cases where the arbitral proceedings appear to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision is not clearly repugnant to the Act. In *Raytheon Co.*, 140 NLRB 883, 884-885 (1963), *enf. denied*, 326 F.2d 471 (1st Cir. 1964), the Board added the requirement that the arbitrator must have considered the unfair labor practice issue. As interpreted in *Olin Corp.*, 268 NLRB 573 (1984), this requirement is satisfied if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *See also Good Samaritan Hosp. & California Nurses Ass'n*, No. 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015).

[2] The Arbitrator specifically provided: "Pared to its essence, the Employer maintains that the grievance filed by the Association in 2017, and subsequently settled via the mediated Memorandum of Agreement, bars their instant complaint from any consideration by the arbitrator based upon the merits." Arbitrator Opinion and Award (Arbitrator Opinion), at 15. The Arbitrator noted: "It is widely held that a mutual settlement of a grievance by the parties to a collective bargaining agreement, ordinarily will be considered binding upon them in any subsequent grievance involving the identical or near identical issues(s)." Opinion, at 15 (*emphasis* in original), *citing* Elkouri & Elkouri, *How Arbitration Works*, BNA 6th Ed. The Arbitrator equated this to the doctrine of *res judicata*. *Id.* at 16. The Arbitrator further explained that "WEANv's grievance claims that Management has unilaterally interjected its interpretation of Article 18 when completing their portion of MO's Certificate of Insurance, thereby reducing the employee's weekly benefits." *Id.* Finally, the Arbitrator stated he was influenced "by WEANv's stated request to Management to 're-mediate' the parties' executed MoU in connection with their current dispute … [which] represents an attempt to 'relitigate' a nearly identical issue…." *Id.* The Arbitrator provided that "they would be far better served to address the problem with WO per paragraph 2 of the Memorandum of Agreement. Otherwise the bargaining table may well be the appropriate venue to remedy such issues going forward." *Id.* at 19.

Complainant states that despite Respondent's discriminatory intent of misreporting information to Mutual of Omaha so that older workers are forced to burn through earned CBA benefits prior to accessing the Policy, the Arbitrator never considered the facts or addressed the issue. Rather, the Award makes clear, the Arbitrator decided the matter on the MOU entered between the parties, which the Arbitrator concluded prohibited Complainant from filing the March 5, 2019 grievance. For example, the Arbitrator's statement of issues he considered shows that neither Respondent's failure to produce information nor the discriminatory effect of Respondent's policy were considered.

Here, the arbitration proceeding was fair and regular. "All parties were afforded notice of the proceeding, appeared at the arbitration hearing, and were given the opportunity to present witnesses, cross-examine witnesses, introduce documentary exhibits, and fully brief their positions to the arbitrator. Due process was thus provided to all participants." *Good Samaritan Hosp. & California Nurses Ass'n*, No. 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015).

However, the Board finds that the remaining elements have not been satisfied.

Respondent requests this Board to defer to unaddressed matters. It is telling that Respondent argues the Board should "infer that the Union, when presented the opportunity to introduce evidence on this matter [of discrimination] in the Arbitration, failed to introduce sufficient evidence to obtain an award" in Complainant's favor.[3]

The Arbitration Opinion is clear in this case. The Arbitrator expressly stated there were four issues: "(1) Was the Association's formal complaint timely filed consistent with the applicable provisions of the Master Agreement in Article 5(D)?[;] (2) Has the subject matter of the grievance been previously addressed and resolved in a prior complaint filed in 2017?[;] (3) If the answer to question #1 is affirmative and/or question #2 negative, then had the District violated Article 18 [of] the [MOU]

[3] Further telling is that Respondent first attempts to argue that "evidence fails to state a judiciable controversy" regarding the claims for age and handicap discrimination. NAC 288.375 provides that the Board may dismiss a matter if the Board determines that no probable cause exists for the complaint. While Respondent did not bring a motion to dismiss for lack of probable cause, the Board has repeatedly held, cases involving factual disputes, and credibility determinations, require a hearing and cannot be disposed of by a motion to dismiss. Regardless, an evidentiary hearing is required to determine the issues presented including the proper submission and presentation of evidence as well as credibility determinations in accordance with NRS and NAC 288. Respondent seems to change course in their Reply, instead arguing that the EMRA only applies to current employees, not applicants, regarding discriminatory hiring. Reply in Support of Motion for Deferral, at 13. As indicated, this determination may involve factual disputes, potential credibility determination, and requires the proper presentation and submission of evidence at a hearing. *See, e.g.*, *Ebarb v. Clark County*, Case No. 2018-006, Item No. 843-C (2020).

when they required that an employee seeking to use the qualified short term medical leave, first exhaust all sick leave, vacation leave or other earned leave prior to availing themselves of the short term medical leave offered as a separate benefit to Association members under the collective bargaining agreement?"[;] and (4) the remedy, if necessary. *Olin Corp.*, 268 NLRB 573, 576 (1984) ("Indeed, the arbitrator noted that the factual questions that he was required to determine.").

The Arbitrator expressly concluded: "Initially, the District's two affirmative defenses regarding ***the arbitrability*** of the Union's class action grievance must be considered for if either one are persuasive, ***then this matter will be deemed resolved and I will not proceed with an examination and analysis of the merits.***" Opinion, at 11 (***emphasis*** added). While the Arbitrator did analyze some merits-based allegations (*e.g.*, at 17), the Arbitrator ruled that the grievance must be denied on *res judicata* ground. *See id.* at 17-19. The Arbitrator expressly limited his decision.

The Arbitrator did not discuss the discrimination claims based on hiring practices. The Arbitrator even noted that the basis of Respondent's *res judicata* defense (on which the Arbitrator ruled) is based nothing "more than the WEANv's attempt to re-litigate the same grievance that was settled in October of 2017 as described in the MoU which addressed the District's **policies requiring exhaustion of all sick and vacation leave for employees making use of the short-term disability benefit.**" *Id.* at, 8 (**emphasis** added).

The Arbitrator's "Analysis of the Evidence" is similarly limited to the timeliness and *res judicata* defenses. *See id.* at 11-19; *see also Bay Shipbuilding Corp.*, 251 NLRB 809, 810 (1980) (the arbitrator should make "factual findings, in the course of resolving the contractual issue, which resolve the unfair labor practice issues."); *In Re Kohler Mix Specialties, Inc.*, 332 NLRB 630, 631 (2000) ("The issue decided by the arbitrator, however, was only whether any provision of the parties' contract affirmatively prohibited the Respondent's unilateral decision to subcontract its over-the-road-delivery operation.")[4]; *Armour & Co.*, 280 NLRB 824, 824, n. 2 (1986) ("Here, the sole issue decided by the arbitrator was whether the Respondent breached arts. 19 and 25 of the parties' contract"); *Ciba-Geigy*

[4] Also noting *Dennison National Co., 296 NLRB 169*, 170 fn. 6 (1989), "where the Board distinguished *Armour & Co.* and found that the arbitrator had adequately considered the unfair labor practice issue inasmuch as he did not limit himself to the issue of whether the respondent's unilateral action violated the collective-bargaining agreement, but also found that the management-rights clause of the contract granted the respondent the right to act unilaterally." *Id.*

Pharm. Div. v. N.L.R.B., 722 F.2d 1120, 1126 (3d Cir. 1983) ("And, as noted in Part II above, the arbitrator did not discuss whether or not the one unilateral change in the contract which he found was a statutory violation, and did not address the further question whether, aside from that unilateral modification of the contract, a unilateral change in other mandatory subjects of collective bargaining was a statutory violation.").

In analysis of whether the contractual and statutory issues were factually parallel, an Administrative Law Judge (ALJ) found that "central to both cases is the elimination of 52 Charge Nurse positions." *Good Samaritan Hosp. & California Nurses Ass'n*, No. 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015). However, here the central inquiry of discrimination based on hiring differ from those of the unilateral change theories and disparate impact administration allegations. Indeed, the ALJ relied on the "factual analysis [considered by] the arbitrator". *Id.* The same cannot be said for the Arbitrator's Opinion in this case as it was plainly limited and did not consider the discrimination based on hiring. *See id.* (also stating: "The arbitrator fully considered the issue of transfer of bargaining unit work to supervisors and found that the Department Supervisors perform no bargaining unit work ...."). The ALJ found: "These findings resolve the unfair labor practice allegation that Respondent transferred unit work to non-union, supervisory employees without bargaining." *Id.* However, the Arbitrator's findings in this case do not resolve the discriminatory hiring claim.

The contractual issues presented at the arbitration and statutory issue of discriminatory hiring practices do not turn on the same findings and thus are not factually parallel and further renders deferral to the award clearly repugnant to the EMRA. *See also Nevins v. N.L.R.B.*, 796 F.2d 14, 19 (2d Cir. 1986) ("More important, the arbitrator's determination that Browne had not employed Nevins as a helper does not dispose of the issue of whether Browne offered employment as a helper to Nevins on January 5th (a fact which Browne concedes) conditioned upon Nevins's acceptance of sub-scale wages."); *In Re Kohler Mix Specialties, Inc.*, 332 NLRB 630, 631 (2000) ("in his analysis, the arbitrator did not have to find, nor did he implicitly find, that the Respondent's decision did not involve labor costs, direct or indirect, or any other matter that was amenable to the bargaining process."); *Olin Corp.*, 268 NLRB 573, 574 (1984) ("In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg*

standards of whether an award is 'clearly repugnant' to the Act.").[5]

The arbitrator was also not presented generally with the facts relevant to resolving the unfair labor practice of discriminatory hiring (as opposed to discriminatory effect/administration). This is made clear from the Award as well as transcript. *See, e.g.*, *Good Samaritan Hosp. & California Nurses Ass'n*, No. 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015) ("The arbitrator accepted such evidence at the hearing and considered it in his decision."); *Nevins v. N.L.R.B.*, 796 F.2d 14, 19 (2d Cir. 1986) ("The arbitrator's decision, however, made no mention of the January 5th incident, referring in passing only to Nevins's work on January 2nd as a driver for Browne"); *Munn v. Clark County Firefighters IAAF Local 1908*, Case No. A1-04604, Item No. 781 (2012) ("did not consider facts relating to the alleged breach of the duty of fair representation."). Further, Complainant has shown that the arbitrator was lacking evidence relevant to the determination of discriminatory hiring. *Olin Corp.*, 268 NLRB 573, 576 (1984) (the evidence before the arbitrator should be "essentially the same evidence necessary for determination of the merits of the unfair labor practice charge.").

"When countervailing policies outweigh the policy of preferring arbitration, the limited deferral doctrine will not apply." *Clark County Ed. Ass'n v. Clark County Sch. Dist.*, Case No. A1-046025, Item No. 764B (2012). The Board finds Complainant has demonstrated that the deferral principles were not met at this stage, and thus the Board will not defer to the Arbitrator's decision in this matter at this time.[6]

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[5] Moreover, if we are to accept deferral here, it would lead to situations in which all potentially asserted prohibited labor practices could not be presented to this Board due to claims occurring around the same time. In other words, where an employer committed alleged unilateral changes that were submitted to arbitration, it would bar distinct discrimination claims that do not meet the elements for deferral. *See Olin Corp.*, 268 NLRB 573, 574 (1984) ("On the contrary, the Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceeding by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act."); *see also Clark County Ed. Ass'n v. Clark County Sch. Dist.*, Case No. A1-046025, Item No. 764B (2012) ("deferral to the arbitrator's decision at this stage would result in the Board's approval of a local government employer's refusal to bargain over a mandatory subject of bargaining. Such a result is clearly repugnant to the policies and purposes of the Act."). Due to the additional unfair labor practice of discriminatory hiring, the Arbitrator's decision is not suspectable to an interpretation consistent with the EMRA. *See also Murray Am. Energy, Inc.*, No. JD-26-16, 2016 WL 1359359 (Apr. 5, 2016) ("It is well established that the Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act."). Furthermore, Respondent failed to present any authority that supports the proposition that when a limited ruling (*res judicata*) is made it is still appropriate for deferral.

[6] This is not to say the Arbitrator's analysis will not have any persuasive effect at the hearing before the Board; however, given the foregoing a hearing is warranted. Respondent also did not provide any authority for the proposition that the Board must defer in part only if other violations meet the elements for deferral (for example, in deferring only to the unilateral

MOTION FOR MORE DEFINITIVE STATEMENT

Respondent requests a more definitive statement "before filing its Answer." However, Respondent then filed its Answer to Amended Complaint and Counterclaim on the same day as filing its motion. NAC 288.200 requires "a clear and concise statement of the facts constituting the alleged practice sufficient to raise a justiciable controversy under chapter 288 of NRS, including the time and place of the occurrence of the particular acts and the names of persons involved." The Board finds that the Amended Complaint filed in this matter fails to meet the requirements of NAC 288.200 as to the discriminatory hiring charge and may affect the substantial rights of Respondent. *See also* See NAC 288.235(2). However, given that Respondent filed its Answer, the Board is left to speculate as to whether Respondent maintains this assertion (or if it has been waived).

Given the foregoing, the Board will provisionally grant the motion for a more definitive statement with regards to the discriminatory hiring charge subject to meet and confer efforts between Respondent and Complainant. If the parties are unable to agree, Complainant shall file a second amended complaint (SAC) within 21 days of the date of this order. If the parties agree that a SAC is unnecessary, they shall file a joint status report within 21 days of the date of this order to inform the Board and shall within that same 21-day period also file their respective prehearing statements pursuant to NAC 288.250.

MOTION TO DISMISS COUNTERCLAIM

Complainant brings its motion pursuant to NAC 288.375(1) based on a lack of probable cause. Complainant concedes that the Board must look "to the totality of the circumstances in the particular case". As the Board has repeatedly held, cases involving factual disputes, and credibility determinations, require a hearing and cannot be disposed of by a motion to dismiss. NAC 288.375 provides that the Board **may** dismiss a matter if the Board determines that no probable cause exists for the complaint. An evidentiary hearing is required to determine the issues presented including the

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change allegations). *See* Reply in Support of Motion for Deferral, at 3, n. 1. However, the Board will not foreclose this issue at the hearing and expects clarification as well as support from the parties as to their respective positions.

proper submission and presentation of evidence as well as credibility determinations in accordance with NRS and NAC 288. As such, the Board denies Complainant's motion.

ORDER

Based on the foregoing, it is hereby ORDERED that Respondent's Motion for Deferral to Arbitration Award and Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion for a More Definitive Statement is provisionally GRANTED as detailed herein.

IT IS FURTHER ORDERED that Complainant's Motion to Dismiss Counterclaim is DENIED.

DATED this 4th day of January 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
BRETT HARRIS, ESQ., Board Member

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

WATER EMPLOYEES ASSOCIATION OF NEVADA, Complainant, v. LAS VEGAS VALLEY WATER DISTRICT, Respondent.	Case No. 2019-002 **NOTICE OF ENTRY OF ORDER** **PANEL A** **ITEM NO. 841-A**

TO: Complainant and their attorneys of record Evan L. James, Esq. and Christensen James & Martin;

TO: Respondent and their attorneys of record Mark Ricciardi, Esq. and Allison Kheel, Esq. and Fisher & Phillips LLP.

PLEASE TAKE NOTICE that the **ORDER ON RESPONDENT'S MOTION TO DEFER AND COMPLAINANT'S MOTION TO DISMISS COUNTERCLAIM** was entered on the 4th day of January 2021, a copy of which is attached hereto.

DATED this 4th of January 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: _____
BRUCE K. SNYDER
Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 4th day of January 2021, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER by mailing a copy thereof, postage prepaid to:

Evan L. James, Esq.
Christensen James & Martin
7440 W. Sahara Avenue
Las Vegas, NV 89117

Mark Ricciardi, Esq.
Allison Kheel, Esq.
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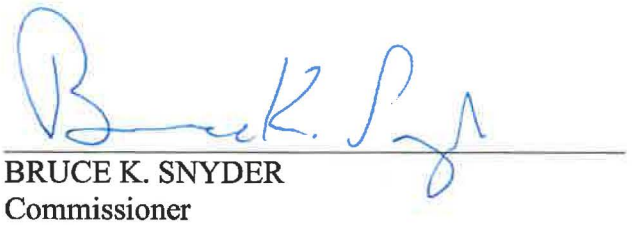

BRUCE K. SNYDER
Commissioner