STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

CHARLES EBARB,

Complainant,

v.

CLARK COUNTY and CLARK COUNTY WATER RECLAMATION DISTRICT,

Respondents.

Case No. 2018-006

NOTICE OF ENTRY OF ORDER

ITEM NO. 843-C

TO: Charles Ebarb and his attorneys, Daniel Marks, Esq. and Adam Levine, Esq., of the Law Office Daniel Marks;

TO: Clark County and its attorney, Scott Davis, Esq., Deputy District Attorney, Clark County District Attorney's Office, Civil Division.

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on September 21, 2020.

A copy of said order is attached hereto.

DATED this 21st day of September 2020.

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____

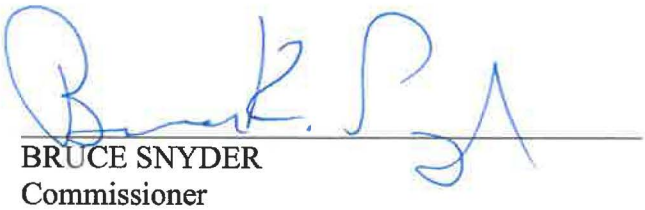
BRUCE SNYDER
Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 21st day of September 2020, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Law Office of Daniel Marks
Daniel Marks, Esq.
Adam Levine, Esq.
610 South Ninth Street
Las Vegas, NV 89101

Scott Davis, Esq.
Deputy District Attorney
Civil Division
500 South Grand Central Parkway
Las Vegas, NV 89155



BRUCE SNYDER
Commissioner

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

CHARLES EBARB, Complainant, v. CLARK COUNTY and CLARK COUNTY WATER RECLAMATION DISTRICT, Respondents.	Case No. 2018-006 **ORDER** **EN BANC** **ITEM NO. 843-C**

On September 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), NAC Chapter 288 and NRS Chapter 233B. At issue, was Respondents' motion to dismiss as well as the second portion of the bifurcated hearing. The Board held an additional hearing on these issues on July 14 and 15, 2020. The Board deliberated additionally on this matter on July 15, August 26, and September 17, 2020.

On June 12, 2020, the Sixth Amended Notice of Hearing was issued detailing the issues remaining before this Board. The Board should consider the jurisdictional issue first and said issue is dispositive in this case mandating dismissal.

Local Government Employee

While the Board is sympathetic to Complainant's contention that this issue could have been raised when this matter was still in its infancy, it is black letter law that jurisdictional challenges cannot be waived and can be raised at any time by any party. *Barber v. State*, 131 Nev. Adv. Op. 103, 363 P.3d 459, 462 (2015) ("[W]hether a court lacks subject matter jurisdiction 'can be raised by the parties at any time, or *sua sponte* by a court of review, and cannot be conferred by the parties."); *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011), *citing Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990); *Mainor v. Nault*, 120 Nev. 750, 761 n.9, 101 P.3d 308, 315 n.9 (2004) ("Lack of

subject matter jurisdiction can be raised at any time during the proceedings and is not waivable."); *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 275, 44 P.3d 506, 515 (2002) ("[p]arties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist."); *Matter of T.L.*, 133 Nev. 790, 791–92, 406 P.3d 494, 496 (2017) ("Because appellate standing is required for this court to have jurisdiction to hear Tonya's argument, we address it first."); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d 96, 105 (2008); *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984); *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994).

"NRS 288.110 requires a party complaining to the Board to be a local government employer, local government employee, or employee organization." *UMC Physicians' Bargaining Unit of Nevada Serv. Employees Union v. Nevada Serv. Employees Union/SEIU Local 1107, AFL-CIO*, 124 Nev. 84, 90, 178 P.3d 709, 713 (2008). "'Local government employee' means any person employed by a local government employer." NRS 288.050.

Respondents contend that Complainant does not qualify as a local government employee and as such the matter must be dismissed as this Board has no jurisdiction. Specifically, Respondent argues that a former employee is not a "local government employee" under the EMRA and may not bring a complaint before this Board. It is undisputed that Complainant was terminated in April 2017, and the allegation of the claimed prohibited labor practice, as alleged in the Complaint, occurred after Complainant's termination. *See infra* note 1. Respondents further contend that since Complainant was not a local government employee at the time of the alleged prohibited labor practice, the Board does not have jurisdiction to hear the dispute.

Complainant based his unilateral change allegation off Respondents' failure to disclosure all evidence which bear on the grievance prior to the arbitration (per the CBA said disclosure must have occurred at least 5 working days prior thereto) unless Complainant stipulated to a protective order or made a request to the arbitrator. The Board is limited to those matters arising out of the allegations in the Complaint. *See, e.g. IAFF, Local 5046 v. Elko County Fire Protection Dist.*, Case No. 2019-011

(2020), at 21, note 5, *citing Bonner v. City of North Las Vegas*, Docket No. 76408, 2020 WL 3571914, at 3, n. 2, filed June 30, 2020, unpublished deposition (Nev. 2020).[1]

As indicated in the Complaint, the arbitration began on August 23, 2017 and continued on October 23, 2017. After the parties met and conferred on June 30th and August 7th, 2017 regarding the production of a complete copy of the file, on August 8, 2017 Respondents indicated they would agree to produce if Complainant would be "willing to stipulate to a protective order" to address the confidentiality of the information. Respondents also indicated that "if there is a compelling need for the file you may make a discovery request to the arbitrator."

Even if the Board took the August 8th date as the first commission of the potential unilateral change (unlikely given Complainant's own contentions, the plain language of the CBA, and evidence obtained at the most recent hearing as further detailed below), this is still well after Complainant was terminated. *See Austin v. N. Las Vegas Police Officers Ass'n*, Item No. 437, Case No. A1-045648 (1998) (dismissal of matter as a retired member is not a local government employee and no standing to bring a complaint).

In opposition, Complainant cites to the Board's decision in *Boykin v. City of N. Las Vegas*, Item. No. 674E, Case No. A1-045921 (2010), relying on the language – "Officer Boykin has asked to be reinstated, showing an expectation of continued employment with the City." Complainant contends that it is this "expectation of continued employment pursued through the grievance process which is dispositive." Further, Complainant argues that he "asked to be reinstated to the negotiated grievance

[1] Complainant specifically alleged: "Despite the fact that Clark County OOD conducted recorded interviews of employees in connection with the investigation which was relied upon by Respondents as the basis for terminating Ebarb's employment, Respondents refused to produce the recordings or any other meaningful materials from the OOD investigation prior to or at the August 23, 2017 arbitration hearing unless SEIU Local 1107 agreed to additional un-bargained for conditions in connection with such materials such as confidentiality orders." Further, "[t]his refusal to produce the material relied upon continued after August 23, 2017 up through and including Day 2 of the arbitration on October 23, 2017." Additionally, "at the August 23, 2017 arbitration hearing, and continuing up through and including October 23, 2017 continuation hearing, Clark County refused to produce any material in connection with this alleged prior sustained discipline as required by Article 11 Section 4." "Because Respondents refused to release the materials relied upon for the decision to terminate in violation of Article 11 Section 4, including the witness interview" and "any materials in connection with this alleged prior sustained discipline as required by Article 11 Section 4", "Respondent, in refusing to produce the material relied upon for their decision to terminate Ebarb unless SEIU Local 1107 agreed to additional non-bargaining for conditions in connection with such materials, was a unilateral change to a subject of mandatory bargaining...." The Complaint was not amended at any time in these lengthy proceedings. *See also* April 9, 2018 Opposition to Respondents' Motion to Dismiss; May 31, 2018 and February 11, 2020 Pre-Hearing Statements; Complainant's December 19. 2019 Answering Brief Re: Remedy.

process after his termination. So long as that process is ongoing, he remains a 'local government employee' within the meaning of the EMRA." The Board disagrees.

In *Boykin*, Officer Boykin contended "that the City unilaterally changed the terms of his employment by changing the established disciplinary process, by unilaterally imposing a probationary period on him...." *Id.* at 3. The Board rejected the City's argument that it lacked jurisdiction over the case because Boykin "was not a local government employee *at the time he filed his complaint*." *Id.* at 9 (*emphasis* added). The Board solely held: "Officer Boykin was a local government employee under NRS 288.050 *at the time the City committed a prohibited labor practice*, *and* Officer Boykin has asked to be re-instated, showing an expectation of continued employment with the City." *Id.* (*emphasis* added).

However, not only is it undisputed that Complainant was not employed at the time Respondents allegedly committed a prohibited labor practice that is properly before this Board, Complainant conceded in his brief regarding the remedy that this Board may impose as well as additionally at the hearing on the motion to dismiss, that this Board cannot order reinstatement. Simply because the arbitrator had the authority to award reinstatement (*based on different authority, allegations, and procedures*) cannot expand this Board's jurisdiction. The Board went on to note directly thereafter: "Under NRS 288.110(2) the Board may restore to Officer Boykin any benefit of which he has been deprived by the City's violation of the Act. This includes restoring Officer Boykin to the position and status that held prior to the City's violation." *Id.* As such, in *Boykin*, not only was Boykin required to be employed when the prohibited labor practice was committed in order for this Board to have jurisdiction, but Boykin must also have asked to be reinstated *by the Board*. This undisputable point, that the Board cannot order reinstatement here, stems from the fact that the alleged prohibited labor practice occurred after Complainant was terminated.[2] Complainant was no longer employed when the

[2] The Board "may order ... to restore to the party aggrieved any benefit of which the party has been deprived by that action." NRS 288.110(2); *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 681, 119 P.3d 1259, 1263 (2005) (holding that "[u]nder NRS 288.110(2) the Board only had the authority to restore [Complainant] to her previous status" before the violation); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) ("The task of the Board in devising a final remedy is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice."); *Frank v. HTH Corp.*, 650 F.3d 1334, 1366 (9th Cir. 2011) ("Very often, the most effective way to protect the Board's ability to recreate such relationships and restore the status quo will be for the [Board] itself to order a return to the status quo."); *Yu v. Las Vegas Metropolitan Dep't*, Case No. 2017-025, Item No. 829 (2018) (Board ordered the Department to accept Sgt. Yu's grievance and process it in compliance with the

violations were alleged to have occurred, he was no longer a local government employee, and therefore the EMRA by its plain language does not afford Complainant protection.

Indeed, *in every single unilateral change brought by an employee that has been found by this Board since its inception*, the unilateral change occurred *before* the employee was terminated. *See, e.g.*, *Las Vegas Police Protective Ass'n Metro, Inc. v. City of Las Vegas*, Item No. 248, Case No. A1-045461 (1990); *Reno Police Protective Ass'n vs. Reno Police Dep't*, Case No. A1-045626, Item No. 415B (2000), *aff'd sub nom in City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 897, 59 P.3d 1212, 1217–18 (2002); *Boykin v. City of N. Las Vegas*, Item. No. 674E, Case No. A1-045921 (2010); *Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014); *Bisch v. The Las Vegas Metropolitan Police Dep't*, Item No. 705B, Case No. A1-045955 (2010), *aff'd Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 339, 302 P.3d 1108, 1116 (2013); *Barto v. City of Las Vegas*, Item No. 799, Case No. A1-046091 (2014); *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, Case No. A1-046116 (2015); *D'Ambrosio v. Las Vegas Metropolitan Police Dep't*, Item No. 808, Case No. A1-046119 (2015); *Brown v. Las Vegas Metropolitan Police Dep't*, Item No. 818, Case No. 2015-013 (2016); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-010 (2017); *Grunwald v. Las Vegas Metropolitan Police Dep't*, Item No. 826, Case No. 2017-006 (2017); *Yu v. Las Vegas Metropolitan Police Dep't*, Item No. 829, Case No. 2017-025 (2018); *Jackson v. Clark County*, Case No. 2018-007 (2019).

While Complainant may still be covered by contract after he has been terminated, he was no longer protected under the EMRA for violations occurring thereafter especially when the Board has no authority to order reinstatement. Complainant did not present any authority to the contrary and such a holding would be in direct contravention to the plain language of the EMRA[3] as well as the purposes

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parties' contractually agreed upon terms and bargained-for procedures as set forth in Article 12 of the CBA (Grievance Procedures)).

[3] "Employed" is defined presently as "(of a person) having a paid job" (Oxford online dictionary), "having a job working for a company or another" (dictionary.cambridge.org), including examples such as: "In April the number of employed people in the region dropped by 1,900 to 637,500", "Part-time workers accounted for 29.3% of the employed population last year", and "Her husband is not currently employed." (dictionary.cambridge.org). As another example: "Someone who's employed has a job or is busy with something." (vocabulary.com). "The state of being employed: in the employ of the city" and "working, in work, having a job, in employment, in a job, earning your living". (thefreedictionary.com/employed). This Board is obligated to follow the plain language of the statute regardless of the result. *See, e.g., Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, 134 Nev. 716, 429 P.3d 658 (2018); *see also* Complainant's December 19. 2019 Answering Brief Re: Remedy, at 7 ("Indeed, an argument could be made that Charles Ebarb is not currently a member

and policies of the Act. *See also Clark Cty. Deputy Marshals Ass'n v. Clark Cty.*, 425 P.3d 381, Docket No. 68660, filed September 7, 2018, unpublished deposition (Nev. 2018) (holding that "NRS Chapter 288 grants bargaining rights to local government employees, defined as 'any person employed by a local government employer' … [b]y the terms of the Chapter, once it is determined that the parties are not local government employees, as happened here, there is no need for further analysis…." as well as courts "are loathe to commit the board, which has been charged with the duty to administer the act regulating public employee collective bargaining in this state, to any particular policy course not clearly dictated by the terms of the statute itself), *citing Emp. Mgmt. Relations Bd. v. Gen. Sales Drivers, Delivery Drivers and Helpers, Teamsters Local Union No. 14*, 98 Nev. 94, 98, 641 P.2d 478, 480 (1982) (holding the same).

For the first time, at the second portion of the bifurcated hearing and hearing on Respondents' Motion to Dismiss, Complainant argued the Board has jurisdiction as Respondents' conduct qualifies as a "continuing violation". Preliminarily, this assertion is used to prevent being barred by a statute of limitations and not the jurisdictional issue at hand. *McCormick v. Bisbee*, 401 P.3d 1146 (Nev. 2017) ("not barred by the statute of limitations because it implicated the same claims as he alleged regarding his 2014 hearing and the repetition of the same injury rendered it a continuing violation."); *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 746 (9th Cir. 2019), *cert. denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899, 205 L. Ed. 2d 468 (2020) ("The continuing violations doctrine functions as an exception to the discovery rule of accrual 'allowing a plaintiff to seek relief for events outside of the limitations period.'"); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1278 (9th Cir. 1994) ("dismissed them on statute of limitation rather than on the jurisdictional ground."); *N.L.R.B. v. Bakersfield Californian*, 128 F.3d 1339, 1341 (9th Cir. 1997) ("Section 10(b)'s time requirement for filing an unfair labor practice charge 'operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board.'"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982) ("is not a jurisdictional prerequisite to suit in

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of Local 1107 as he has not been employed with Clark County since 2017, and has not paid any dues to the Local for the last three (3) years."). *See also generally* legislative history for Senate Bill 87, Dodge Act (1969) (consistently referring to employees as those currently employed).

federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

Even if it applied, the doctrine would not save the complaint. Complainant argued at the hearing that the violation started when Respondents did not turn the recordings over to Ms. Kisling at the Step 1 hearing, referring to the Stipulation in Lieu of Testimony as well as the statement she read at the grievance hearings. Complainant argues that the violation started then and continued every day that Respondents did not turn it over. In other words, Complainant argues that since a violation occurred prior to Complainant being terminated, the Board has jurisdiction based on the continuing violations doctrine. Yet, the complaint is limited to violations as related to the failure to produce for the arbitration. *See supra* note 1; *see also* Complainant's May 31, 2018 Pre-Hearing Statement ("However, the Clark County District Attorney who represents both WRD and Clark County in arbitrations took the position that the underlying recorded witness statements from OOD interviews would not be produced unless SEIU Local 1107 signed confidentiality/protective order prohibiting dissemination."); *see also* Complainant's February 11, 2020 Pre-Hearing Statement; Complainant's December 19, 2019 Answering Brief Re: Remedy (conceding the Board cannot order reinstated because a violation did not occur before Complainant was terminated). Moreover, even if the Board were to accept that a violation occurred prior thereto and was properly before this Board, the prior alleged violation that occurred when Complainant was employed would be barred by the time limitations set forth in the EMRA as further explained below and conceded by Complainant.[4]

Complainant cited to the matter in *King Manor Care Ctr.*, 308 NLRB 884, 887 (1992) in which the NLRB affirmed the Administrative Law Judge's ruling. The ALJ held: "Inasmuch as this case does not involve an alleged repudiation of the entire agreement but only an unlawful unilateral change of a particular provision, the 'continuing violation' doctrine is applicable and therefore the charge filed and served on March 7, 1990, is timely *with respect to any unilateral changes commencing September 7,*

[4] According to the Arbitrator's decision, the meeting for the Step 1 pre-termination meeting would take place on March 29, 2017. Pursuant to the CBA, a written request for a Step 2 appeal was made to Clark County HR. On April 21, 2017, a letter from the Office of HR was sent indicating that the Step 2 meeting related to the termination was held on April 12, 2017. The letter indicated that the union failed to substantiate its' claim that the investigation was flawed and to provide compelling evidence to overturn the Step 1 decision. Thereafter, the request for arbitration was made. So while Complainant may have been a local government employee at the Step 1 meeting, that violation was not properly for the Board and, even if it had been, is barred by the 6-month deadline in the EMRA as detailed further herein.

1989, a date 6 months prior to service of the charge on March 7, 1990." Id (*emphasis* added). As explained further below, even the last date of the potential violation under the parties' CBA is outside the 6-month period in this case (regardless, 3 working days prior to the Step 1 pre-termination meeting was in March 2017). Further, in *King Manor Care Ctr.*, the respondent had a "contractual requirement to make monthly payments to the welfare fund"; yet, here, the CBA provides for certain disclosures at three set times (*i.e.*, 3 working days prior to Step 1 or Step 2 meetings and at least 5 working days prior to a Step 3 hearing). As further explained below and is well established for the rules of the continuing violations doctrine, and explained in *King Manor Care Ctr.*, each failure to produce "constitutes a separate and discrete violation independent of the evidence that may support earlier violations". The failure to produce in regards to the Step 1 meeting is a separate and discrete violation which was not only not properly before the Board but also filed outside of the Board's 6-month deadline as conceded by Complainant at the second portion of the bifurcated hearing ("because we filed after he was terminated and not, you know, within six months of the Step 1 hearing where he's still employed...."). Indeed, in *King Manor Care Ctr.*, the ALJ noted that the respondent "was required by contract to make monthly payments" and explained that "[e]ach monthly refusal, or delay as in this case, constitutes a separate and discrete violation independent of the evidence that may support earlier violations"). *Id.*[5]

Complainant also cited to the Board's decision in *Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014) arguing that he was terminated but the Board reinstated him. Similar to the above argument, Complainant advances that "an employee has an expectation of reinstatement throughout the negotiated grievance process; and in this particular case, that grievance process and arbitration process, that expectation of reinstatement remains until such time as the arbitration provisions are completed." Yet, as also further explained herein, and in the same vein as *Boykin*, "Officer Frabbiele claim[ed] that the City unilaterally changed the discipline and discharge procedures when the City used the non-confirmation process to terminate his employment ...." *Id.* at 7, 12. The Board held that "the City impermissibly collapsed elements of the disciplinary process and elements of the non-disciplinary process into one process. This spawned an altogether new process that was used to

[5] The ALJ also noted that allowing additional violations not alleged in the complaint "would not be consistent with Respondent's due process rights ...." *Id.* at 889.

terminate Officer Frabbiele." *Id.* at 13. As such, the complained of conduct occurred *before* Frabbiele was terminated. The Board also reinstated Frabbiele (which, as conceded, the Board cannot do so in this case).

As the 9th Circuit Court of Appeals instructs, "'discrete ... acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges' because '[e]ach discrete ... act starts a new clock for filing charges alleging that act." *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 746-47 (9th Cir. 2019), *cert. denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899, 205 L. Ed. 2d 468 (2020); *Flynt v. Shimazu*, 940 F.3d 457, 463 (9th Cir. 2019) ("As the Eleventh Circuit has explained, the term 'continuing violation' is 'something of a misnomer,' in that it 'implies that there is but one incessant violation and that the plaintiffs should be able to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window.' But that is not the scenario that it describes. Rather than 'one on-going violation,' a continuing violation is really 'a series of repeated violations.' And '[b]ecause each violation gives rise to a new cause of action, each [violation] begins a new statute of limitations period as to that particular event."), *citing Knight v. Columbus, Ga.*, 19 F.3d 579, 582 (11th Cir. 1994); *Scott v. Pac. Mar. Ass'n*, 695 F.2d 1199, 1205 (9th Cir. 1983) ("may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.").

Limitations Period

The Complaint is further barred by the six-month deadline for filing claims with this Board. Again, while the Board is sympathetic to Complainant's contention regarding the delay in moving for relief on this basis, the authorities unambiguously hold that Respondents did not waive this defense.

"[L]ike other statutes of limitations, NRS 288.110(4)'s deadline is subject to the equitable defenses of waiver, estoppel, and tolling." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 639–40, 261 P.3d 1071, 1077 (2011).

"Typically, waiver analysis looks only at the acts of the waiving party to see if there was an intentional relinquishment of a known right...." *Gordon v. Deloitte & Touche, LLP Grp. Long Term Disability Plan*, 749 F.3d 746, 752 (9th Cir. 2014). "Failure to timely assert an affirmative defense may

operate as a waiver if the opposing party is not given reasonable notice and an opportunity to respond." *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980). NRCP 8(c) provides that in responding to a pleading, a party must affirmatively state any affirmative defense including statute of limitations. NAC 288.220 provides that if an answer is not timely made then the dilatory party is precluded generally from asserting any affirmative defenses. NRCP 12 provides for waiver and preservation of certain defense by omitting it from a motion or failing to make it by motion or include in a responsive pleading – these certain defenses do not include statute of limitations. *See* NRCP 12(b)(2)-(4). NRCP 12(g) (*emphasis* added) provides that "a party that makes a motion *under this rule* must not make another motion under this rule raising a defense of objection that was available to the party but omitted from its earlier motion." However, statute of limitation is not a listed defense under Rule 12.

While the better practice would have been for Respondents to assert this defense in their first motion to dismiss so the Board could have included this aspect in the first portion of the bifurcated hearing, Respondents are not precluded from raising the defense of the untimely complaint. *See Randle v. Crawford*, No. 3:02-CV-0617-ECR-RAM, 2008 WL 11450888, at *4 (D. Nev. Mar. 5, 2008), *aff'd*, 578 F.3d 1177 (9th Cir. 2009), *opinion amended and superseded on denial of reh'g*, 604 F.3d 1047 (9th Cir. 2010) ("Petitioner points to the fact that respondents did not raise the limitations issue in their first motion to dismiss, filed December 10, 2003; or in the stipulation to stay the case, filed February 5, 2004; or in response to the motion to reopen the case. Petitioner complains of the extensive litigation that occurred in state court before this case was reopened and the statute of limitations issue raised. While it might well have been more efficient, in petitioner's view, for respondents to have raised the statute of limitations defense in their first motion to dismiss, the Court finds there to be no waiver."); *see also* NAC 288.231 (noting pleadings and motions separately); NRCP Rule 7 (defining "pleadings"); *Williams*, 96 Nev. at 860, 619 P.2d at 1221 ("In this case, NRS 88.100 was first raised in a motion for summary judgment sometime after the complaint was filed. However, unlike the appellant in Schwartz, the Williamses had an opportunity and did respond to the motion and no prejudice attached. Although the better practice would have been to amend its answer pursuant to NRCP 156 before moving for

summary judgment, Cottonwood will not be precluded from raising as a defense failure to comply with the provisions of NRCP 8(c).").

Respondents' Answer specifically included, as a third affirmative defense, that the complaint is untimely under NRS 288.110(4). Moreover, Respondents moved for relief on this basis prior to the second portion of the bifurcated, the merits hearing. As such, Respondents did not waive their right to assert its limitations defense. *See also Little v. United States*, 15 F.3d 1086 (9th Cir. 1993) ("As long as a defendant asserts the statute of limitations as an affirmative defense before or at trial, it is not waived."); *United States v. Benzer*, No. 2:13-CR-18 JCM GWF, 2015 WL 2250043, at *8 (D. Nev. May 13, 2015) ("[S]tatute of limitations is an affirmative defense that is waived if it is not raised at trial."), *citing United States v. Hickey*, 580 F.3d 922, 928 n. 1 (9th Cir.2009); *Goicovic v. Knezevich*, 77 Nev. 450, 453, 366 P.2d 97, 98–99 (1961) ("We do not find the complaint of Goicovic and his reply to the counterclaim inconsistent. By such pleadings he stated, in effect, that should that court find in his favor upon the complaint, he would be willing to reduce his recovery by the rent which was due but outlawed; however, should the court deny him relief upon his complaint, he would rely upon the statute of limitations as a defense to the counterclaim for rent. It is apparent that Goicovic did not, by such pleadings, waive a defense; he only waived his right, if any, to recover an amount equal to the credit for rent."); *see contra Second Baptist Church of Reno v. First Nat. Bank of Nevada*, 89 Nev. 217, 220, 510 P.2d 630, 632 (1973) ("There was no appropriate pleading in this case, thus the defense is waived. Accordingly it could not properly form the basis of the summary judgment.").[6]

Moving to the substance of the defense, the Board may not consider any complaint filed more than 6 months after occurrence which the subject of the complaint. NRS 288.110(4). "[T]he limitations period begins to run 'when the victim of an unfair labor practice receives unequivocal notice of a final adverse decision.'" *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 639, 261 P.3d 1071, 1076-

[6] Complainant cited to the NLRB decision in *Taft Broad. Co.*, 264 NLRB 185, 190 (1982). However, here it was held that "the issue of the timeliness of the charge *was not pleaded* nor specifically litigated at the hearing and Respondent first raised this defense *in its post-hearing brief*...." *Id.* (*emphasis* added). The other decision on which Complainant relies is *In Re Paul Mueller Co.*, 337 NLRB 764 (2002). However, here it was held that "it is clear that the Respondent did not raise the 10(b) defense either in its answer or at the hearing. Instead, the Respondent first raised the 10(b) defense in its post-hearing brief to the judge." *Id.*

77 (2011).[7]

The complaint was filed on February 21, 2018. Six months prior thereto is August 21, 2017. The arbitration began on August 23, 2017. On August 8, 2017, Respondents agreed to produce if Complainant would be "willing to stipulate to a protective order" to address the confidentiality of the information. Respondents also indicated that "if there is a compelling need for the file you may make a discovery request to the arbitrator." Complainant did not respond again prior to the arbitration. The CBA provides said disclosure must have occurred at least 5 working days prior thereto – 5 working days prior to the start of arbitration was August 16, 2017. As such, if Complainant received unequivocal notice either by Respondents' August 8th letter or by Respondents' failure to produce 5 working days prior to the commencement of arbitration, the complaint is untimely. However, Complainant asserts that the clock did not start until the arbitration began.

The Board's decision in *Pershing County Law Enforcement Ass'n v. Pershing County*, Item No. 725C, Case No. A1-045974 (2013) is directly on point. The Board noted that in *City of N. Las Vegas*, "the Nevada Supreme Court repeatedly referred to *Cone* as authority for the unequivocal notice rule… In the Nevada Supreme Court's own words, footnote 2 of the *Cone* decision 'indicat[es] that the six-month period is triggered when the complainant becomes aware that a prohibited practice actually happened.'" "There, the Nevada Supreme Court determined that this Board had erred because the complainants had 'filed their claim within six months of the policy's enactment'". *Id*, *citing Cone*, at 477, n. 2. "In other words, this was when the complainant has reason to know that the supposed prohibited labor practice had actually happened. This is entirely consistent with the unequivocal notice rule." *Id.* at 4. The Board also cited to its prior decision in *Glazier v. City of N. Las Vegas*, Item No. 624A, Case No. A1-045876 (2007) which stands for the proposition that it is the actual occurrence of

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[7] *Citing N.L.R.B v. Public Serv. Elec. And Gas Co.*, 157 F.3d 222, 227 (3rd Cir. 1998) (6-month limitations period "begins to run when an aggrieved party has clear and unequivocal notice of a violation of the NLRA"), *Cone*, 116 Nev. at 477 n. 2, 998 P.2d at 1181 n. 2 (indicating that the six-month period is triggered when the complainant becomes aware that a prohibited practice actually happened); *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (stating that a "statute of limitation[s] will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach"). "Because the six-month limitations period does not force the victim of a prohibited labor practice to file anticipatory complaints, a complainant must first have knowledge of the facts necessary to support a present and ripe prohibited labor practices complaint." *Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014), *citing Public Serv. Elec. And Gas Co.*, 157 F.3d at 227, *quoting Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 746 (7th Cir. 1989). The six-month statute of limitations is an affirmative defense, and thus Respondents have the burden to establish that the complaint was untimely. *Id.*

the complained act which is significant. *Id.* at 5-6. The Board noted: "As stated in *City of North Las Vegas*, the unequivocal notice rule required unequivocal notice of a 'final adverse action.'" *Id.*

Respondents clearly and unequivocally indicated they would not produce without a protective order or discovery request made to the arbitrator when they failed to produce per the terms of the CBA (*i.e.*, 5 working days before the arbitration). The prohibited practice asserted in this matter is "Respondent [] refusing to produce the material relied upon for their decision to terminate Ebarb unless SEIU Local 1107 agreed to additional non-bargaining for conditions in connection with such materials" "as required by Article 11 Section 4". *See supra* note 1. As such, Complainant had unequivocal notice at least by the date of the required production (*i.e.* 5 working days prior to the arbitration). *See also supra* note 4; *Cone*, 116 Nev. at 477, 998 P.2d at 1181, *citing Fraternal Order of Police Haas Mem'l Lodge #7 v. Pennsylvania Labor Relations Bd.*, 696 A.2d 873, 876 (Pa.Commw.Ct.1997) (holding that the limitations period for the filing of an unfair labor practices charge is triggered when the complainant has reason to believe that an unfair labor practice has actually occurred).[8]

Our decision in *Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014) is further instructive. Officer Frabbiele claimed the City unilaterally changed the discipline and discharge procedures when the City used the non-confirmation process to terminate his employment in lieu of the discipline procedure that had been bargained-for. *Id.* at 7. The Board found "that the unequivocal notice of a unilateral change could not have occurred prior to January 21, 2008" as this "is the date that the City sent a letter to Frabbiele advising him of the City's view that by using the non-confirmation process the City did not discipline him." *Id.* "The evidence in this case indicates that Frabbiele did not have unequivocal notice that the City was viewing his termination as a non-disciplinary matter until at least the City's January 21, 2008 letter." *Id.* "This letter was a response to Frabbiele's request for his internal affairs file. The City's response to that request was to inform Frabbiele that he was not entitled to his internal affairs file because the City did not view itself as

[8] *See also Gil v. City of Las Vegas*, Case No. 2019-020, at 3 (2020), *citing Pershing County*, Item No. 725C, Case No. A1-045974 and *Glazier*, Item No. 624A, Case No. A1-045876 (explaining that "[t]he complaint was not time-barred because it was filed within six months of the occurrence of the discriminatory act"); *See also, e.g.*, *City of N. Las Vegas*, 127 Nev. at 639, 261 P.3d at 1077 ("With regard to Spannbauer's claims, the period would have started at least by the time Spannbauer resigned on November 6, 2005), *citing Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792*, 800, 801 P.2d 1377, 1382 (1990) ("stating that a 'statute of limitation[s] will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach').

having taken punitive action against him." *Id.* The Board held that January letter established unequivocal notice. In other words, the Board held that the complainant could not have been aware that the unilateral change occurred until the letter advising that the City did not discipline him.[9]

The Board also noted: "Unequivocal notice of a violation does not exist where an employer sends conflicting signals about its actions." *Id.* at 8, *citing In Re Cab Association & Bldg. Materials Teamsters, Local 282*, 340 N.L.R.B. 1391, 1392 (2003); *Pershing County Law Enforcement Ass'n v. Pershing County*, Item No. 725C, Case No. A1-045974 (2013). The Board found the City had sent Frabbiele conflicting signals as it acted like the process was disciplinary such as conducting an internal affairs investigation, mitigation hearing, and stating his actions constituted just cause for discipline. However, unlike the current matter, these conflicting signals were *directed at Frabbiele.*[10] Here, the conflicting signals alleged in this case were directed at the union or other individuals which are not parties to the action. Moreover, the assertion regarding Edenburn turned out to be inaccurate at the second hearing and the Board does not find credible the assertion regarding the only other instance as further explained herein.

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[9] The City argued that any actual change to the disciplinary process could have occurred no later than September 7, 2007, as Frabbiele's mitigation hearing took place two days prior and the decision to terminate his employment was made shortly thereafter. However, the Board agreed with Frabbiele that unequivocal notice could not have occurred prior to January 21, 2008, the date the City sent a letter to him advising that by using the non-confirmation process the City did not discipline him. As the Nevada Supreme Court explained, the unequivocal notice rule "means that the limitations period begins to run 'when the victim of an unfair labor practice receives unequivocal notice of a final adverse decision'." *City of N. Las Vegas*, 127 Nev. at 639, *citing Nevada State Bank,* 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (stating that a "statute of limitation[s] will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach"). "With regard to Spannbauer's claims, the period would have started at least by the time Spannbauer resigned on November 6, 2005." *Id.* As such, in *Frabbiele*, it could be argued that the facts giving rise to the breach could not reasonably been known or the violation did not occur until the 2008 letter. Here, however, as explained, all facts giving rise to any breach were known at each breach (*i.e.*, 3 working days prior to the Step 1 or Step 2 meeting and 5 working days prior to the Step 3 hearing).

[10] The Board also noted: "Our prior decision was not decided under the unequivocal notice standard, and instead considered when Frabbiele knew or 'should have known' of the change .... However, this isolated reference to non-confirmation is insufficient to establish the unequivocal notice now required by *City of N. Las Vegas*." *Id.* at 8. The Board noted in *Frabbiele*, that pursuant to the clarification provided in *City of N. Las Vegas* to look to precedent under the NLRA, the date of the alleged prohibited labor practice is not counted in computing the six-month limitations period. *Id.* at 6, *citing Macdonald's Indus. Products.*, 281 NLRB 577 (1986). In that matter, the NLRB held that "the Act's 6-month limitation period properly begins the day following the commission of the alleged unfair labor practice, in this case 5 March 1985, and thus the charge here was timely filed." *Id.* Even if the Board were to accept this logic, the day following the commission here, August 17th, is still outside of the limitations period. However, it is not applicable here, and the Board clarifies as such, since the Board's limitation period is different from the NLRB's standard. In the addition to the filing of the complaint, the NLRB's provision additionally requires "and service of a copy thereof". The NLRB extended to the day after based on service issues. *See Macdonald's Indus. Products.*, 281 NLRB 577 (1986), *citing Laborers Local 264 (D & G Construction)*, 216 NLRB 40 fn. 1, 43 (1975); *Glacier Lincoln-Mercury*, 189 NLRB 640, 643 (1971); *Luzerne Hide & Tallow Co.*, 89 NLRB 989, 990 (1950).

As the Stipulation in Lieu of Testimony for Edenburn and Sharon Kisling provide, Clark County/OOD produced during the grievance process the audio interviews of all persons interviewed by OOD in connection with its investigation of Edenburn. However, it withheld the "Confidential OOD Summary Statement" and Memorandum to Tom Minwegen from Sandy Jeantete dated April 26, 2016. Prior to a scheduled arbitration for Edenburn, Local 1107 requested the entire OOD file. The County took the position it would only produce the withheld materials upon an execution of a "Release of Records". Local 1107 took the position that it could not be required to do so as indicated. Prior to the scheduled arbitration for Edenburn, Clark County/OOD did produce the Summary Statement without requiring the execution of the "Release of Records".

Complainant points to the evidence regarding the correspondence from earlier in 2017 relating to an upcoming arbitration for Edenburn wherein the County refused to produce for arbitration OOD materials unless an extra-contractual confidentiality agreement was signed. The evidence presented to the Board at the first hearing showed that the County ultimately relented and provided the withheld materials without a protective order to the arbitration hearing. However, at the second hearing, Exhibit 12 was stipulated into evidence. Exhibit 12 is a Acknowledge of Confidentiality/Restriction on Disclosure and use of these Records and the Information Contained therein regarding an investigation conducted in Edenburn. Included in the production was an audio disk containing recorded interviews between August 2015 to January 2016. As such, it was shown that a confidentiality agreement was in actuality signed in the Edenburn case as well as the practice of the parties was to release audio recordings so long as a confidentiality agreement was signed (as the parties stipulated to the summary statement being released without a signed agreement which was the practice as explained below). The above stipulation thus remained ambiguous as to whether the recordings were produced with a signed agreement in Edenburn. The testimony at second hearing made clear that the summary statements were produced as a policy without requiring a signed confidentiality agreement (as such it was wrongly withheld initially in Edenburn but this mistake was corrected prior to arbitration). Marzan testified that she could only think of one other case, Steven Spindel, where Respondent gave her the recordings. However, Respondents produced a signed confidentiality agreement from the Spindel grievance in a 2018 matter. Exhibit L (signed by Marzan). Marzan later testified that, in regards to the question of an

example when she obtained audio recordings without a confidentiality agreement, that it was from one of Mr. Spindel's earlier diversity complaints. Marzan testified this was before 2017, perhaps in 2014 or 2015.

Scupi was the head of the Office of Diversity until she retired in January 2015, and she testified that there was a longstanding established policy of maintaining confidentiality and she would not release any records of witness testimony to the union.[11] However, they would release a summary statement of the charges, specific allegations raised – the findings as to the allegation or the allegations raised. Scupi indicated that during her tenure she did not have any discussions with the union about the practice of not turning over witness statements. Bonilla took over the job after her predecessor, Scupi, retired in or about January 2015 (Scupi was previously Bonilla's supervisor). While the practice under Scupi had been to not release recordings at all, under Bonilla the practice became to release the recordings but only with a signed acknowledgement of confidentiality agreement signed by the union. Bonilla was not aware of any instance when they released the actual witness recordings to the union at all under Scupi nor was Bonilla aware of instance when they released said recordings without a confidentiality agreement after Scupi's retirement. In connection with the foregoing, the Board finds Scupi and Bonilla credible.[12] As such, the practice of parties was to require a signed acknowledgement of confidentiality agreement prior to the production of the recordings. This is what occurred in this case.

Furthermore, Exhibit Y shows that there was also a different attorney involved in the Edenburn case so there was no reasonable reason to suspect that the same result would occur. More importantly, Exhibit Y shows that the material was provided, specifically on January 4, 2017. Exhibit Y notes that the arbitration was set for January 13, 2016 and as such the matter was resolved more than 5 working days before the arbitration began. Here, if Respondents violated the contract, they did so 5 working

[11] Scupi testified that before 2003, and during 2003 and after 2003, they were released to the DA Civil Division when there was litigation in response to a subpoena.

[12] While the Board in its prior order found Marzan credible that in the years prior to 2016 and 2017 the County did not require protective orders or confidentiality agreements that led to a decision to discipline, this was based on the evidence before us at that time. Given the new evidence and complete picture as detailed above, the Board finds Bonilla and Scupi credible. Moreover, while Marzan testified that different analysts had different practices, the Board was not presented with sufficient evidence of this (nor sufficient evidence from one of Mr. Spindel's earlier diversity complaints). Instead, the Board was presented with evidence, such as Exhibits 3, 4, 12 and L, of signed acknowledgments of confidentiality.

days before the arbitration when they failed to produce as their previous statement of intent provided.

The NLRB, in *In Re Cab Association & Bldg. Materials Teamsters, Local 282*, 340 N.L.R.B. 1391, 1392 (2003), explained that "[c]onstructive notice will not be found where a 'delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct.'" The NLRB further explained:

> In *Christopher Street, supra*, the union sent the respondent a letter that presented alternatives: sign an industrywide contract, or negotiate a separate agreement. The respondent failed to reply. Under those circumstances, the Board found that the respondent's silence did not put the union on notice of an 8(a)(5) violation because 'the [u]nion could reasonably believe that the [r]espondent needed time to consider whether to sign the industrywide contract.' *Id.* at 253. Here, by contrast, the Union knew that CAB had withdrawn the GCA's authority to bind it to the 1999-2002 agreement. Thus, the Union offered the Respondent no alternatives, but simply demanded that it sign an independent agreement.

Here, it was Complainant's silence and not Respondents and, again, the alleged conflicting signals were directed at the union not made a party to this case. Moreover, while Respondents gave Complainant alternatives (either stipulate to a protective order or make a discovery request), both alternatives were alleged to be impermissible unilateral changes. Furthermore, in support of the rule regarding conflicting signals, the NLRB, in *In re Cab Ass'n*, cited to *A & L Underground & Plumbers Local Union No. 8 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of Usa & Canada, Afl-Cio*, 302 NLRB 467, 469 (1991). In that matter, the NLRB explained: "Once a party has notice of a clear and unequivocal contract repudiation, however, a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice—the refusal to bargain—fundamentally occurs; and the legality of the repudiating party's refusal depends on the evidence that the parties muster as to the repudiator's right to take that action at that time." *Id.* The NLRB concluded that "the Respondent sent a letter that severed the bargaining relationship in one stroke, and its failure to apply the contract thereafter is little more than the effect or result of that action." *Id.* In the same vein, Respondents continued refusal to produce at the second day of the arbitration or the continuation of it thereafter is little more than the effect or result of its initial action as further explained below.

Complainant further contends that the August 8th e-mail does not constitute clear and unequivocal notice of the prohibited labor practice. Complainant cites to NLRB decisions which

purportedly hold that statement of future intent to commit a prohibited practice does not constitute the clear and unequivocal notice necessary to start the statute of limitations.

Complainant cites to the NLRB's decision in *In Re CBS Broad., Inc.*, 343 NLRB 871 (2004). However, this case dealt with the situation of a waiver of a right to bargain under a different standard, not waiver of a timeliness defense. *Id.* at 873, 879. Complainant also cited to the NLRB's decision in *Leach Corp.*, 312 NLRB 990 (1993). Yet, in regards to waiver, this matter involved waiver of a union's representational rights. *Id.* at 998. The NLRB did address timeliness in this matter, holding: "The Board held that where, as here, there has been a total contract repudiation, as distinct from an ad hoc breach, the limitation period begins to run from the time the charging party has clear and unequivocal notice. To find a charge timely at any time within the contract term and for 6 months thereafter would do 'injury to the stability of collective-bargaining relationships, and (it) impair(s) the process for adjudicating those charges.'" *Id.* at 997. The NLRB concluded: "Here, there was clear and unequivocal notice from the Respondent to the Union that it would not abide by the contract as to relocated employees, followed by relocation and nonadherence to the contract." *Id.* In the same vein, as further detailed above, clear and unequivocal notice occurred when Respondents failed to produce the requested materials per the CBA.

Complainant contends that the arbitration commencing on August 23, 2017 is when clear and unequivocal notice occurred as this is when the County would not likewise relent at the last minute as they did in Edenburn. Further, since the arbitration continued in October, the County could have brought itself into "substantial compliance" by producing then. However, in the same vein as the matters cited above, Respondents clearly and unequivocally indicated they would not produce without a protective order or discovery request to the arbitrator when they failed to produce per the terms of the CBA (*i.e.*, 5 working days before the arbitration). At this point, it was no longer a statement of future intent to commit a prohibited practice as Complainant argues – the terms of the CBA had been violated if indeed requiring stipulating to a protective order or a discovery request was a unilateral change. As such, the complaint is untimely.[13] Also, as indicated, Respondents did not relent last minute in

[13] In our view, permitting Complainant's contention would allow statute of limitation to impermissibly extend based off indefinite subjective considerations of what Complainant believed could change in the future. Yet, it is undisputed that Complainant's union did not respond to Respondents' inquiry until perhaps the arbitration. Indeed, the NLRB decision on

Edenburn (instead they followed the practice of providing the summary statement which is not the same as the audio recordings when considering the parties' previous conduct).

While Complainant did not plead a continuing violation in regards to the statute of limitations and as such is not properly before this Board[14], the Board notes that a continuing violation was not shown here as the courts hold that "mere continuing impact violations is not actionable." This is well established. *See, e.g.*, *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001), *citing Grimes v. City and County of San Francisco*, 951 F.2d 236, 238–39 (9th Cir.1991), *Williams v. Owens–Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.1982), *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir.1979) ("The proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful.").[15]

This is made plainly evident from the fact that the CBA itself does not provide for expanded production. The CBA has set dates for production including plainly providing for production 5 working days prior to the start of arbitration, a Step 3 hearing. Importantly, there was not sufficient evidence presented to establish a past practice of disregarding the express language and producing on the first or subsequent days of arbitration (nor that this language was intended to require production on a continued day of arbitration). Complainant failed to establish that a new violation occurred (*i.e.*, a

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which the Nevada Supreme Court's decision in *City of N. Las Vegas* is based, specifically held: "The testimony relating to Local 1576's representative's subjective belief as to whether PSE & G ever would furnish the requested information should not alter this result; this evidence is not strong enough to overcome the ALJ's findings which are based solidly on the equivocal language of PSE & G's June 11, 1993 letter." *Pub. Serv. Elec. & Gas Co.*, *supra*, 157 F.3d at 228–29.

[14] *Scott v. Pac. Mar. Ass'n*, 695 F.2d 1199, 1204 (9th Cir. 1983) ("[T]he fact that the continuing violation doctrine was not even mentioned in the pretrial statement or the district court's memorandum, we cannot agree that the continuing violation doctrine was an issue properly raised or considered by the trial court.").

[15] Furthermore, Nevada courts have explained that the Supreme Court has substantially limited the continuing violation doctrine which not may not even be applicable in the case at hand: "The Ninth Circuit had applied the continuing violation doctrine to section 1983 actions and allowed 'a plaintiff to seek relief for events outside of the limitations period' when the actions involved were closely enough related to constitute a continuing violation and one or more of them fell within the statute of limitations period." *Collins v. Collins*, No. 316CV00111MMDWGC, 2019 WL 5295541, at *7 (D. Nev. May 14, 2019), *report and recommendation adopted*, No. 316CV00111MMDWGC, 2019 WL 3573666 (D. Nev. Aug. 6, 2019). "*Cherosky* confirmed that 'the Supreme Court substantially limited the notion of continuing violations' and had rejected application of the continuing violations doctrine to serial violations such as this." *Id.* The District Court of Nevada held: "In other words, none of them actually evaluated Plaintiff's STG status anew. Instead, they relied on the prior STG designation to conclude that Plaintiff should remain in administrative segregation instead of being moved to general population." *Id*; *see also Hall v. Reg'l Transportation Comm'n of S. Nevada,* No. 2:08-CV-237-RLH-RJJ, 2008 WL 11389127, at *2 (D. Nev. Aug. 5, 2008) ("But the continuing violations doctrine 'evolved in the context of tort and nuisance law; it is not applicable in the context of an APA claim for judicial review.").

unilateral change) when Respondents failed to produce once the arbitration began, after the first day, or when it resumed in October. As the courts uniformly hold, rather the "subsequent and repeated denials" of production "is merely the continuing effect of the original" failure to produce. *Knox*, 260 F.3d at 1013.[16] *See also, e.g.*, *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977) ("But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists."); *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 748 (9th Cir. 2019), *cert. denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899, 205 L. Ed. 2d 468 (2020) ("continuing effect is insufficient to constitute a continuing violation"); *Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008) ("A 'continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation'"); *Poole v. City of Los Angeles*, 41 F. App'x 60, 64 (9th Cir. 2002) ("We have 'repeatedly held that a 'mere continuing impact from past violations is not actionable.'"); *Sansome v. Fairall*, 739 F. App'x 877, 880 (9th Cir. 2018) ("The ongoing restriction that followed is best characterized as the 'continuing impact' of the initial restriction rather than a continuing violation."); *Shannon v. Babb*, 103 F. App'x 201, 202 (9th Cir. 2004) ("defendants' subsequent withholding of magazines was merely the continuing effect of their initial decision."); *MacGregor v. D*ial, 671 F. App'x 441, 442 (9th Cir. 2016) ("MacGregor failed to allege facts sufficient to show that defendants' treatment of him constituted a continuing violation.").

Finally, in *Frabbiele*, the Board noted that equitable tolling is an exception to the timeliness requirement that allows the Board to hear and determine a complaint that is otherwise untimely. The Board noted that at oral argument, Frabbiele's counsel indicated he was not relying on the equitable tolling argument. While the Board did hold the complaint was timely in that matter, it did not address equitable tolling in part based on this representation. Here, at no point has Complainant's counsel argued that equitable tolling is applicable including on the hearing on the motion to dismiss and it is not at issue. *See also* Sixth Amended Notice of Hearing. As such, there is no need to consider whether

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[16] The Court in *Knox* also distinguished the 11th Circuit decision in *Knight v. Columbus, Georgia*, 19 F.3d 579 (11th Cir.1994), noting : "Notably, the holding in *Knight* turned upon the fact that the employees' cause of action did not require any reference to the city's original decision to deny overtime pay. *See Knight*, 19 F.3d at 583 ('[T]hey do not require reference to any action taken by the City outside the limitations period.'). In contrast, Knox is challenging her original suspension, which requires reference to events that occurred outside the limitations period. This is precisely the result that a statute of limitations is designed to prevent." *Id.* at note 5. In the same vein as the decision in *Knox*, the failure to continue to produce here requires reference to Respondents' original decision to deny production.

equitable tolling applies.

However, the Board would have found equitable tolling inapplicable in any event. "[E]quitable tolling 'focuses on 'whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.'" *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077. "[T]he following factors, among any other relevant considerations, should be analyzed when determining whether equitable tolling will apply: the claimant's diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer." *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077 (holding that equitable tolling will extend a statute of limitations if a reasonable plaintiff would not have known of the existence of their claim within the limitations period); *Charles v. City of Henderson*, No. 67125, 2016 WL 2757394, at *1 (Nev. May 10, 2016) (noting that "[t]he law does not permit equitable tolling when a party simply did not realize the 'extent' of his claim."); *see also Bantz v. Washoe County Sch. Dist.*, Item No. 832, Case No. 2017-028 (2018); *Woodard v. Sparks Police Prot. Ass'n*, Case No, 2018-026, Item No. 853 (2019).

While the Board finds that the diligence and prejudice factors may arguably cut in favor of equitable tolling, the remaining factors do not. On balance, the Board finds that equitable tolling would not be appropriate in this case.

It is undisputed that Complainant had knowledge of all relevant facts, at least related to the imposition of additional terms to the CBA which form the basis of the unilateral change, by the date of required production. In *City of N. Las Vegas* and *Woodard*, Complainant found out about the alleged differential treatment of a similarly situated employee and then filed complaints after obtaining knowledge of an NRS Chapter 288 violation. Yet, here, it is undisputed that Complainant was aware of the Edenburn matter prior Respondents failure to produce. Indeed, Complainant testified at the second portion of the bifurcated hearing that he was aware that a confidentiality acknowledgement had been signed in order to obtain the witness recordings (though later testified that he couldn't remember). Instead, Complainant indicated that his belief that the recordings would be produced was based on the

production of the summary statement in the Edenburn case without a confidentiality agreement; yet, the evidence showed this was consistent with the practice of Respondents. Moreover, Complainant conceded that he was provided the summary statement without the requirement of a confidentiality acknowledgement. In any event, even if Complainant was not aware that Edenburn signed the agreement to obtain the recordings, equitable tolling should not apply as it was shown that Edenburn did in fact sign said acknowledgment at least in regards to the recordings. Moreover, *City of N. Las Vegas* and *Woodard*, the Board noted that federal courts have been reluctant to apply the statute of limitation to bar discrimination claims which have not been asserted in this case. As such, this factor cuts against the application of equitable tolling.

In *Woodard*, it appeared Complainant was informed that his case would not be successful at arbitration in some sense, but the Board was not presented with sufficient reasonable evidence of this factor and thus found it cut against applying the doctrine of equitable tolling. In the same vein, Complainant did not present sufficient evidence of misleading agency statements or conduct. Complainant seems to rely on only one instance with the Edenburn case, which did not involve the same situation (the issue in Edenburn was the investigative report which the District provided in Complainant's case). Moreover, as indicated, the conduct was directed at the union and not complainant in this case. Further, there was no ambiguity in Respondents' August 8th email that they refused to produce per the timeline imposed under the CBA.[17]

The focus of equitable tolling is on excusable delay due to not knowing the existence of a claim so a complainant can gather what information is needed. Once Respondents failed to produce per the time frame provided for in the CBA, the existence of the claim was known, and no further information was needed to be gathered to support a violation of the EMRA.[18]

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[17] As indicated, the Board was presented with new evidence at the most recent hearing that the assumption made in Edenburn turned out to be inaccurate. Marzan could only recall one other instance yet given the above and due to the fact that no corroborating or supporting evidence was provided for this other instance, the Board in weighing the evidence finds the testimony of Scupi and Bonilla credible.

[18] For example, Brenda Marzan, president of Local 1107 and previously vice president of the non-supervisory unit of the Clark County bargaining unit, testified that the *previous practice* of the parties, in the years prior to 2016 and 2017, was for Clark County not to require protective orders or confidentiality agreements for investigatory materials that led to a decision to discipline an employee.

As the ruling on the first portion of the bifurcated hearing was based on incomplete evidence, the Board rescinds and withdraws its June 28, 2019 Order resulting therefrom. *Bybee v. The White Pine County Sch. Dist.*, Item No. 724E, Case No. A1-045972 (2012).

As the above issues are dispositive, the remaining issues are not necessary to this Board's determination. *See also Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 623, n. 30, 188 P.3d 1092, 1099 (2008); *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005); *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 600, 260 P.3d 408, 412 (2011).

Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter as they are not warranted.

FINDINGS OF FACT

1. Complainant based his unilateral change allegation off Respondents' failure to disclosure all evidence which bear on the grievance prior to the arbitration (per the CBA said disclosure must have occurred at least 5 working days prior thereto) unless Complainant stipulated to a protective order or made a request to the arbitrator.

2. The arbitration began on August 23, 2017 and continued on October 23, 2017.

3. After the parties met and conferred on June 30th and August 7th, 2017 regarding the production of a complete copy of the file, on August 8, 2017, Respondents indicated they would agree to produce if Complainant would be "willing to stipulate to a protective order" to address the confidentiality of the information.

4. Respondents also indicated that "if there is a compelling need for the file you may make a discovery request to the arbitrator."

5. Even if the Board took the August 8th date as the first commission of the potential unilateral change (unlikely given Complainant's own contentions, the plain language of the CBA, and evidence obtained at the most recent hearing as further detailed below), this is still well after Complainant was terminated.

6. Not only is it undisputed that Complainant was not employed at the time Respondents allegedly committed a prohibited labor practice that is properly before this Board, Complainant

conceded in his brief regarding the remedy that this Board may impose as well as additionally at the hearing on the motion to dismiss, that this Board cannot order reinstatement.

7. The complaint is limited to violations as related to the failure to produce for the arbitration.

8. While Complainant may have been a local government employee at the Step 1 meeting, that violation was not properly for the Board and, even if it had been, is barred by the 6-month deadline in the EMRA as detailed further herein.

9. As explained further below, even the last date of the potential violation under the parties' CBA is outside the 6-month period in this case (regardless, 3 working days prior to the Step 1 pre-termination meeting was in March 2017).

10. The CBA provides for certain disclosures at three set times (*i.e.*, 3 working days prior to Step 1 or Step 2 meetings and at least 5 working days prior to a Step 3 hearing).

11. Respondents' Answer specifically included, as a third affirmative defense, that the complaint is untimely under NRS 288.110(4).

12. Moreover, Respondents moved for relief on this basis prior to the second portion of the bifurcated, the merits hearing.

13. The complaint was filed on February 21, 2018.

14. Six months prior thereto is August 21, 2017.

15. The arbitration began on August 23, 2017.

16. On August 8, 2017, Respondents agreed to produce if Complainant would be "willing to stipulate to a protective order" to address the confidentiality of the information.

17. Respondents also indicated that "if there is a compelling need for the file you may make a discovery request to the arbitrator."

18. Complainant did not respond again prior to the arbitration.

19. The CBA provides said disclosure must have occurred at least 5 working days prior thereto – 5 working days prior to the start of arbitration was August 16, 2017.

20. The prohibited practice asserted in this matter is "Respondent [] refusing to produce the material relied upon for their decision to terminate Ebarb unless SEIU Local 1107 agreed to additional non-bargaining for conditions in connection with such materials" "as required by Article 11 Section 4".

21. Here, as explained, all facts giving rise to any breach were known at each breach (*i.e.*, 3 working days prior to the Step 1 or Step 2 meeting and 5 working days prior to the Step 3 hearing).

22. As the Stipulation in Lieu of Testimony for Edenburn and Sharon Kisling provide, Clark County/OOD produced during the grievance process the audio interviews of all persons interviewed by OOD in connection with its investigation of Edenburn.

23. However, it withheld the "Confidential OOD Summary Statement" and Memorandum to Tom Minwegen from Sandy Jeantete dated April 26, 2016.

24. Prior to a scheduled arbitration for Edenburn, Local 1107 requested the entire OOD file. The County took the position it would only produce the withheld materials upon an execution of a "Release of Records".

25. Local 1107 took the position that it could not be required to do so as indicated.

26. Prior to the scheduled arbitration for Edenburn, Clark County/OOD did produce the Summary Statement without requiring the execution of the "Release of Records".

27. At the second hearing, Exhibit 12 was stipulated into evidence.

28. Exhibit 12 is a Acknowledge of Confidentiality/Restriction on Disclosure and use of these Records and the Information Contained therein regarding an investigation conducted in Edenburn.

29. Included in the production was an audio disk containing recorded interviews between August 2015 to January 2016.

30. As such, it was shown that a confidentiality agreement was in actuality signed in the Edenburn case as well as the practice of the parties was to release audio recordings so long as a confidentiality agreement was signed (as the parties stipulated to the summary statement being released without a signed agreement which was the practice as explained below).

31. The above stipulation thus remained ambiguous as to whether the recordings were produced with a signed agreement in Edenburn.

32. The testimony at second hearing made clear that the summary statements were produced as a policy without requiring a signed confidentiality agreement (as such it was wrongly withheld initially in Edenburn but this mistake was corrected prior to arbitration).

33. Marzan testified that she could only think of one other case, Steven Spindel, where Respondent gave her the recordings.

34. However, Respondents produced a signed confidentiality agreement from the Spindel grievance in a 2018 matter. Exhibit L (signed by Marzan).

35. Marzan later testified that, in regards to the question of an example when she obtained audio recordings without a confidentiality agreement, that it was from one of Mr. Spindel's earlier diversity complaints.

36. Marzan testified this was before 2017, perhaps in 2014 or 2015.

37. Scupi was the head of the Office of Diversity until she retired in January 2015, and she testified that there was a longstanding established policy of maintaining confidentiality and she would not release any records of witness testimony to the union.

38. However, they would release a summary statement of the charges, specific allegations raised – the findings as to the allegation or the allegations raised.

39. Scupi indicated that during her tenure she did not have any discussions with the union about the practice of not turning over witness statements.

40. Bonilla took over the job after her predecessor, Scupi, retired in or about January 2015 (Scupi was previously Bonilla's supervisor).

41. While the practice under Scupi had been to not release recordings at all, under Bonilla the practice became to release the recordings but only with a signed acknowledgement of confidentiality agreement signed by the union.

42. Bonilla was not aware of any instance when they released the actual witness recordings to the union at all under Scupi nor was Bonilla aware of instance when they released said recordings without a confidentiality agreement after Scupi's retirement.

43. In connection with the foregoing, the Board finds Scupi and Bonilla credible.

44. While the Board in its prior order found Marzan credible that in the years prior to 2016 and 2017 the County did not require protective orders or confidentiality agreements that led to a decision to discipline, this was based on the evidence before us at that time.

45. Given the new evidence and complete picture as detailed above, the Board finds Bonilla and Scupi credible.

46. Moreover, while Marzan testified that different analysts had different practices, the Board was not presented with sufficient evidence of this (nor sufficient evidence from one of Mr. Spindel's earlier diversity complaints).

47. Instead, the Board was presented with evidence, such as Exhibits 3, 4, 12 and L, of signed acknowledgments of confidentiality.

48. As such, the practice of parties was to require a signed acknowledgement of confidentiality agreement prior to the production of the recordings.

49. This is what occurred in this case.

50. Furthermore, Exhibit Y shows that there was also a different attorney involved in the Edenburn case so there was no reasonable reason to suspect that the same result would occur.

51. More importantly, Exhibit Y shows that the material was provided, specifically on January 4, 2017.

52. Exhibit Y notes that the arbitration was set for January 13, 2016 and as such the matter was resolved more than 5 working days before the arbitration began.

53. Respondents did not relent last minute in Edenburn (instead they followed the practice of providing the summary statement which is not the same as the audio recordings when considering the parties' previous conduct).

54. The CBA itself does not provide for expanded production.

55. The CBA has set dates for production including plainly providing for production 5 working days prior to the start of arbitration, a Step 3 hearing.

56. Importantly, there was not sufficient evidence presented to establish a past practice of disregarding the express language and producing on the first or subsequent days of arbitration (nor that this language was intended to require production on a continued day of arbitration).

57. It is undisputed that Complainant had knowledge of all relevant facts, at least related to the imposition of additional terms to the CBA which form the basis of the unilateral change, by the date of required production.

58. In *City of N. Las Vegas* and *Woodard*, Complainant found out about the alleged differential treatment of a similarly situated employee and then filed complaints after obtaining knowledge of an NRS Chapter 288 violation.

59. Yet, here, it is undisputed that Complainant was aware of the Edenburn matter prior Respondents failure to produce.

60. Indeed, Complainant testified at the second portion of the bifurcated hearing that he was aware that a confidentiality acknowledgement had been signed in order to obtain the witness recordings (though later testified that he couldn't remember).

61. Instead, Complainant indicated that his belief that the recordings would be produced was based on the production of the summary statement in the Edenburn case without a confidentiality agreement; yet, the evidence showed this was consistent with the practice of Respondents.

62. Moreover, Complainant conceded that he was provided the summary statement without the requirement of a confidentiality acknowledgement.

63. In any event, even if Complainant was not aware that Edenburn signed the agreement to obtain the recordings, equitable tolling should not apply as it was shown that Edenburn did in fact sign said acknowledgment at least in regards to the recordings.

64. Moreover, *City of N. Las Vegas* and *Woodard*, the Board noted that federal courts have been reluctant to apply the statute of limitation to bar discrimination claims which have not been asserted in this case.

65. Complainant seems to rely on only one instance with the Edenburn case, which did not involve the same situation (the issue in Edenburn was the investigative report which the District provided in Complainant's case).

66. Moreover, as indicated, the conduct was directed at the union and not complainant in this case.

67. Further, there was no ambiguity in Respondents' August 8th email that they refused to produce per the timeline imposed under the CBA.

68. As indicated, the Board was presented with new evidence at the most recent hearing that the assumption made in Edenburn turned out to be inaccurate.

69. Marzan could only recall one other instance yet given the above and due to the fact that no corroborating or supporting evidence was provided for this other instance, the Board in weighing the evidence finds the testimony of Scupi and Bonilla credible.

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

CONCLUSIONS OF LAW

1. It is black letter law that jurisdictional challenges cannot be waived and can be raised at any time by any party.

2. NRS 288.110 requires a party complaining to the Board to be a local government employer, local government employee, or employee organization.

3. "'Local government employee' means any person employed by a local government employer." NRS 288.050.

4. The Board is limited to those matters arising out of the allegations in the Complaint.

5. In *Boykin*, Officer Boykin contended "that the City unilaterally changed the terms of his employment by changing the established disciplinary process, by unilaterally imposing a probationary period on him...." *Id.* at 3.

6. The Board rejected the City's argument that it lacked jurisdiction over the case because Boykin "was not a local government employee *at the time he filed his complaint*." *Id.* at 9 (*emphasis* added).

7. The Board solely held: "Officer Boykin was a local government employee under NRS 288.050 *at the time the City committed a prohibited labor practice, and* Officer Boykin has asked to be re-instated, showing an expectation of continued employment with the City." *Id.* (*emphasis* added).

8. Simply because the arbitrator had the authority to award reinstatement (*based on different authority, allegations, and procedures*) cannot expand this Board's jurisdiction.

9. "Under NRS 288.110(2) the Board may restore to Officer Boykin any benefit of which he has been deprived by the City's violation of the Act. This includes restoring Officer Boykin to the position and status that held prior to the City's violation." *Id.*

10. As such, in *Boykin*, not only was Boykin required to be employed when the prohibited labor practice was committed in order for this Board to have jurisdiction, but Boykin must also have asked to be reinstated *by the Board*.

11. This undisputable point, that the Board cannot order reinstatement here, stems from the fact that the alleged prohibited labor practice occurred after Complainant was terminated.

12. Complainant was no longer employed when the violations were alleged to have occurred, he was no longer a local government employee, and therefore the EMRA by its plain language does not afford Complainant protection.

13. Indeed, *in every single unilateral change brought by an employee that has been found by this Board since its inception*, the unilateral change occurred *before* the employee was terminated.

14. While Complainant may still be covered by contract after he has been terminated, he was no longer protected under the EMRA for violations occurring thereafter especially when the Board has no authority to order reinstatement.

15. Complainant did not present any authority to the contrary and such a holding would be in direct contravention to the plain language of the EMRA as well as the purposes and policies of the Act.

16. "Employed" is defined presently as "(of a person) having a paid job" (Oxford online dictionary), "having a job working for a company or another" (dictionary.cambridge.org), including examples such as: "In April the number of employed people in the region dropped by 1,900 to 637,500", "Part-time workers accounted for 29.3% of the employed population last year", and "Her husband is not currently employed." (dictionary.cambridge.org). As another example: "Someone who's employed has a job or is busy with something." (vocabulary.com). "The state of being employed: in the employ of the city" and "working, in work, having a job, in employment, in a job, earning your living". (thefreedictionary.com/employed).

17. This Board is obligated to follow the plain language of the statute regardless of the result. *See, e.g., Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, 134 Nev. 716, 429 P.3d 658 (2018); *see also* Complainant's December 19. 2019 Answering Brief Re: Remedy, at 7 ("Indeed, an argument could be made that Charles Ebarb is not currently a member of Local 1107 as he has not been employed with Clark County since 2017, and has not paid any dues to the Local for the last three (3) years."). *See also generally* legislative history for Senate Bill 87, Dodge Act (1969) (consistently referring to employees as those currently employed).

18. The continuing violation doctrine is generally used to prevent being barred by a statute of limitations and not the jurisdictional issue at hand.

19. Even if it applied, the doctrine would not save the complaint.

20. Even if the Board were to accept that a violation occurred prior to termination and was properly before this Board, the prior alleged violation that occurred when Complainant was employed would be barred by the time limitations set forth in the EMRA as further explained below and conceded by Complainant.

21. In *King Manor Care Ctr.*, the ALJ held: "Inasmuch as this case does not involve an alleged repudiation of the entire agreement but only an unlawful unilateral change of a particular provision, the 'continuing violation' doctrine is applicable and therefore the charge filed and served on March 7, 1990, is timely *with respect to any unilateral changes commencing September 7, 1989, a date 6 months prior to service of the charge on March 7, 1990.*" Id (*emphasis* added).

22. Further, in *King Manor Care Ctr.*, the respondent had a "contractual requirement to make monthly payments to the welfare fund".

23. The failure to produce in regards to the Step 1 meeting is a separate and discrete violation which was not only not properly before the Board but also filed outside of the Board's 6-month deadline as conceded by Complainant at the second portion of the bifurcated hearing ("because we filed after he was terminated and not, you know, within six months of the Step 1 hearing where he's still employed....").

24. As the 9th Circuit Court of Appeals instructs, "'discrete ... acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges' because '[e]ach discrete ... act

starts a new clock for filing charges alleging that act." *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 746-47 (9th Cir. 2019), *cert. denied sub nom. Bird v. Hawaii*, 140 S. Ct. 899, 205 L. Ed. 2d 468 (2020); *Flynt v. Shimazu*, 940 F.3d 457, 463 (9th Cir. 2019).

25. The Complaint is further barred by the six-month deadline for filing claims with this Board.

26. "[L]ike other statutes of limitations, NRS 288.110(4)'s deadline is subject to the equitable defenses of waiver, estoppel, and tolling." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 639–40, 261 P.3d 1071, 1077 (2011).

27. "Typically, waiver analysis looks only at the acts of the waiving party to see if there was an intentional relinquishment of a known right...." *Gordon v. Deloitte & Touche, LLP Grp. Long Term Disability Plan*, 749 F.3d 746, 752 (9th Cir. 2014).

28. "Failure to timely assert an affirmative defense may operate as a waiver if the opposing party is not given reasonable notice and an opportunity to respond." *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980).

29. NRCP 8(c) provides that in responding to a pleading, a party must affirmatively state any affirmative defense including statute of limitations.

30. NAC 288.220 provides that if an answer is not timely made then the dilatory party is precluded generally from asserting any affirmative defenses.

31. NRCP 12 provides for waiver and preservation of certain defense by omitting it from a motion or failing to make it by motion or include in a responsive pleading – these certain defenses do not include statute of limitations. *See* NRCP 12(b)(2)-(4).

32. NRCP 12(g) (*emphasis* added) provides that "a party that makes a motion *under this rule* must not make another motion under this rule raising a defense of objection that was available to the party but omitted from its earlier motion." However, statute of limitation is not a listed defense under Rule 12.

33. Respondents did not waive their right to assert its limitations defense.

34. The Board may not consider any complaint filed more than 6 months after occurrence which the subject of the complaint. NRS 288.110(4).

35. "[T]he limitations period begins to run 'when the victim of an unfair labor practice receives unequivocal notice of a final adverse decision.'" *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 639, 261 P.3d 1071, 1076-77 (2011).

36. If Complainant received unequivocal notice either by Respondents' August 8th letter or by Respondents' failure to produce 5 working days prior to the commencement of arbitration, the complaint is untimely.

37. The Board's decision in *Pershing County Law Enforcement Ass'n v. Pershing County*, Item No. 725C, Case No. A1-045974 (2013) is directly on point.

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

39. "There, the Nevada Supreme Court determined that this Board had erred because the complainants had 'filed their claim within six months of the policy's enactment'". *Id*, *citing Cone*, at 477, n. 2.

40. "In other words, this was when the complainant has reason to know that the supposed prohibited labor practice had actually happened. This is entirely consistent with the unequivocal notice rule." *Id.* at 4.

41. The Board also cited to its prior decision in *Glazier v. City of N. Las Vegas*, Item No. 624A, Case No. A1-045876 (2007) which stands for the proposition that it is the actual occurrence of the complained act which is significant. *Id.* at 5-6.

42. The Board noted: "As stated in *City of North Las Vegas*, the unequivocal notice rule required unequivocal notice of a 'final adverse action.'" *Id.*

43. Respondents clearly and unequivocally indicated they would not produce without a protective order or discovery request made to the arbitrator when they failed to produce per the terms of the CBA (*i.e.*, 5 working days before the arbitration).

44. Complainant had unequivocal notice at least by the date of the required production (*i.e.* 5 working days prior to the arbitration). *See also supra* note 4; *Cone*, 116 Nev. at 477, 998 P.2d at 1181,

citing Fraternal Order of Police Haas Mem'l Lodge #7 v. Pennsylvania Labor Relations Bd., 696 A.2d 873, 876 (Pa.Commw.Ct.1997) (holding that the limitations period for the filing of an unfair labor practices charge is triggered when the complainant has reason to believe that an unfair labor practice has actually occurred).

45. Our decision in *Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014) is further instructive.

46. The City argued that any actual change to the disciplinary process could have occurred no later than September 7, 2007, as Frabbiele's mitigation hearing took place two days prior and the decision to terminate his employment was made shortly thereafter.

47. However, the Board agreed with Frabbiele that unequivocal notice could not have occurred prior to January 21, 2008, the date the City sent a letter to him advising that by using the non-confirmation process the City did not discipline him.

48. As the Nevada Supreme Court explained, the unequivocal notice rule "means that the limitations period begins to run 'when the victim of an unfair labor practice receives unequivocal notice of a final adverse decision'."

49. "With regard to Spannbauer's claims, the period would have started at least by the time Spannbauer resigned on November 6, 2005."

50. As such, in *Frabbiele*, it could be argued that the facts giving rise to the breach could not reasonably been known or the violation did not occur until the 2008 letter.

51. Here, if Respondents violated the contract, they did so 5 working days before the arbitration when they failed to produce as their previous statement of intent provided.

52. While Respondents gave Complainant alternatives (either stipulate to a protective order or make a discovery request), both alternatives were alleged to be impermissible unilateral changes.

53. Respondents continued refusal to produce at the second day of the arbitration or the continuation of it thereafter is little more than the effect or result of its initial action as further explained below.

54. In the same vein as the matters cited above, Respondents clearly and unequivocally indicated they would not produce without a protective order or discovery request to the arbitrator when

they failed to produce per the terms of the CBA (*i.e.*, 5 working days before the arbitration).

55. At this point, it was no longer a statement of future intent to commit a prohibited practice as Complainant argues – the terms of the CBA had been violated if indeed requiring stipulating to a protective order or a discovery request was a unilateral change.

56. As such, the complaint is untimely.

57. Complainant did not argue a continuing violation in regards to the statute of limitations and as such is not properly before this Board.

58. The Board notes that a continuing violation was not shown here as the courts hold that "mere continuing impact violations is not actionable."

59. Nevada courts have explained that the Supreme Court has substantially limited the continuing violation doctrine which not may not even be applicable in the case at hand.

60. Complainant failed to establish that a new violation occurred (*i.e.*, a unilateral change) when Respondents failed to produce once the arbitration began, after the first day, or when it resumed in October.

61. As the courts uniformly hold, rather the "subsequent and repeated denials" of production "is merely the continuing effect of the original" failure to produce. *Knox*, 260 F.3d at 1013.

62. Here, at no point has Complainant's counsel argued that equitable tolling is applicable including on the hearing on the motion to dismiss and it is not at issue.

63. As such, there is no need to consider whether equitable tolling applies as it was not properly before the Board.

64. However, the Board would have found equitable tolling inapplicable in any event.

65. "[E]quitable tolling 'focuses on 'whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.'" *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077.

66. "[T]he following factors, among any other relevant considerations, should be analyzed when determining whether equitable tolling will apply: the claimant's diligence, knowledge of the

relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer." *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077.

67. While the Board finds that the diligence and prejudice factors may arguably cut in favor of equitable tolling, the remaining factors do not.

68. On balance, the Board finds that equitable tolling would not be appropriate in this case.

69. In *Woodard*, it appeared Complainant was informed that his case would not be successful at arbitration in some sense, but the Board was not presented with sufficient reasonable evidence of this factor and thus found it cut against applying the doctrine of equitable tolling.

70. In the same vein, Complainant did not present sufficient evidence of misleading agency statements or conduct.

71. The focus of equitable tolling is on excusable delay due to not knowing the existence of a claim so a complainant can gather what information is needed.

72. Once Respondents failed to produce per the time frame provided for in the CBA, the existence of the claim was known, and no further information was needed to be gathered to support a violation of the EMRA.

73. As the ruling on the first portion of the bifurcated hearing was based on incomplete evidence, the Board rescinds and withdraws its June 28, 2019 Order resulting therefrom. *Bybee v. The White Pine County Sch. Dist.*, Item No. 724E, Case No. A1-045972 (2012).

74. As the above issues are dispositive, the remaining issues are not necessary to this Board's determination. *See also Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 623, n. 30, 188 P.3d 1092, 1099 (2008); *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005); *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 600, 260 P.3d 408, 412 (2011).

75. Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter as they are not warranted.

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

ORDER

Based on the foregoing, it is hereby ORDERED that the Complaint is DISMISSED.

DATED this 21st day of September 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
GARY COTTINO, Board Member

By: _____
BRETT HARRIS, ESQ., Board Member