

FILED

AUG 26 2020

STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

ERIC GIL,

Complainant,

v.

CITY OF LAS VEGAS,

Respondent.

Case No. 2019-020

NOTICE OF ENTRY OF ORDER

PANEL A

ITEM NO. 852-A

TO: Complainants and their attorneys of record Adam Levine, Esq. and the Law Office of Daniel Marks.

TO: Respondent and their attorneys of record Morgan Davis, Chief Deputy City Attorney, James B. Lewis, Deputy City Attorney and the Las Vegas City Attorney's Office.

PLEASE TAKE NOTICE that the **ORDER** was entered on the 26th day of August 2020, a copy of which is attached hereto.

DATED this 26th day of August 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY:


MARISU ROMUALDEZ ABELLAR
Executive Assistant

1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Government Employee-Management Relations
3 Board, and that on the 26th day of August 2020, I served a copy of the foregoing NOTICE OF ENTRY
4 OF ORDER by mailing a copy thereof, postage prepaid to:

5 Morgan Davis
6 Chief Deputy City Attorney
7 James B. Lewis
8 Deputy City Attorney
9 City of Las Vegas
10 495 S. Main Street, Sixth Floor
11 Las Vegas, NV 89101

12 Law Office of Daniel Marks
13 Daniel Marks, Esq.
14 Adam Levine, Esq.
15 610 South Ninth Street
16 Las Vegas, NV 89101



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MARISU ROMUALDEZ ABELLAR
Executive Assistant

AUG 26 2020

STATE OF NEVADA
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GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

ERIC GIL,

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v.

CITY OF LAS VEGAS,

Respondent.

Case No. 2019-020

ORDER**PANEL B****ITEM NO. 852-A**

On August 26, 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 is the first portion of the bifurcated hearing on whether Complainant's case is barred by the limitations period set forth in NRS 288.110.

The Complaint asserts discriminatory conduct by Respondent on either personal or political grounds. Complainant resigned from Las Vegas Fire and Rescue (LVFR) after Respondent initiated disciplinary proceedings against Complainant. Respondent permitted Complainant to retest for a new firefighter position. While Complainant placed in the first tier of candidates that tested for that position, he was not invited to continue with the hiring process after Complainant participated in an interview with the interview panel.

The Board may not consider any complaint filed more than 6 months after the 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, 1076-77 (2011).¹

¹ 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

1 Complainant received a letter from LVFR on November 7, 2018 indicating that he was not
2 selected to move forward. Respondent asserts this is when Complainant received unequivocal notice.
3 However, Complainant contends that he lacked notice that he had been passed over in favor of other
4 employees who did not score within Group 1 in the testing process. Specifically, other alleged cheaters
5 were permitted, as Complainant, to reapply for a new position with LVFR, and those persons were
6 selected to move forward in the hiring process. A person that did not score as well on the written exam
7 was selected to move forward with the hiring process while Complainant was not. Complainant asserts
8 that he did not receive unequivocal notice until March 19, 2019, when he was sent a text from a friend
9 with a list of the roster in which Complainant discovered that a position had been offered to Brian
10 White, who had a test score in Group 2. Alternatively, Complainant argues that equitable tolling should
11 permit his complaint to proceed.

12 The complaint was filed on September 4, 2019. Six months prior thereto is March 4, 2019.
13 Based on the evidence presented, the Board finds that Complainant received unequivocal notice in
14 November 2018 as this is when Respondent chose to pass over Complainant (allegedly for political or
15 personal reasons in violation of the EMRA). *See also infra* note 2. However, as further explained
16 below, the Board also finds that equitable tolling should apply based on the facts of this case.

17 The Board's decision in *Pershing County Law Enforcement Ass'n v. Pershing County*, Item No.
18 725C, Case No. A1-045974 (2013) is instructive. The Board noted that in *City of N. Las Vegas*, "the
19 Nevada Supreme Court repeatedly referred to *Cone* as authority for the unequivocal notice rule... In the
20 Nevada Supreme Court's own words, footnote 2 of the *Cone* decision 'indicat[es] that the six-month
21 period is triggered when the complainant becomes aware that a prohibited practice actually happened.'"
22 "There, the Nevada Supreme Court determined that this Board had erred because the complainants had
23 'filed their claim within six months of the policy's enactment'". *Id.*, citing *Cone*, at 477, n. 2. "In other
24 words, this was when the complainant has reason to know that the supposed prohibited labor practice
25 had actually happened. This is entirely consistent with the unequivocal notice rule." *Id.* at 4. The

26
27 force the victim of a prohibited labor practice to file anticipatory complaints, a complainant must first have knowledge of the
28 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
Respondent has the burden to establish that the complaint was untimely. *Id.*

1 Board also cited to its prior decision in *Glazier v. City of N. Las Vegas*, Item No. 624A, Case No. A1-
2 045876 (2007) which stands for the proposition that it is the actual occurrence of the complained act
3 which is significant. *Id.* at 5-6.² The Board noted: “As stated in *City of North Las Vegas*, the
4 unequivocal notice rule required unequivocal notice of a ‘final adverse action.’” *Id.*

5 As such, when Respondent made its final decision to not select Complainant, Complainant had
6 unequivocal notice of a final adverse decision. Black letter statutory rules of construction law prohibit
7 interpreting a statute to produce an absurd or unreasonable result. If the Board were to allow notice
8 from any third party to extend the six-month deadline in the EMRA, it could extend those time
9 limitations indefinitely. In other words, for example, if Complainant had not received the text from his
10 friend until years later, the time limitation would be extended well past the plain language of “6 months
11 after the occurrence which is the subject of the complaint”. *See, e.g., City of N. Las Vegas*, 127 Nev. at
12 639, 261 P.3d at 1077 (“With regard to Spannbauer's claims, the period would have started at least by
13 the time Spannbauer resigned on November 6, 2005), *citing Nevada State Bank v. Jamison Family*
14 *Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (“stating that a ‘statute of limitation[s]’
15 will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts
16 giving rise to the breach’). As indicated in *City of N. Las Vegas*, while Spannbauer did not learn until
17 approximately five months later, on April 5, 2006, that Department treated similarity situated employee
18 differently, the Nevada Supreme Court held unequivocal notice occurred when Spannbauer resigned in
19 November 2005. The distinction being the knowledge gained was regarding the different treatment
20 applied to equitable tolling, not to extend the unequivocal notice. The same analysis applies in this

21 ² Interestingly, in the Board’s citation to its decision in *Glazier*, we noted that Glazier only knew his employer denied him a
22 promotion when he became aware of the promotions of three other officers. *Id.* The promotions of two officers became
23 effective July 9, 2005 (the third on January 7, 2006), and this Board determined the complaint was not time-barred as
24 *Glazier should have been promoted on July 9, 2005*. Before July 9, 2005, evidence showed that Glazier only knew of his
25 employer’s *intent* to promote others and that on July 9th those promotions became official. The complaint was not time-
26 barred because it was filed within six months of the occurrence of the discriminatory act – the promotions of others *over*
27 *him*. Here, the alleged discriminatory act occurred when, as Complainant contends, he had been passed over in favor of
28 other employees who did not score within Group 1 in the testing process. Complaint, at ¶ 7; Complainant’s Pre-Hearing
Statement, at 2. In *Glazier*, the discriminatory act occurred at the same time as the promotion of the other employees (or at
least apparently the first two as this is when Glazier should have been promoted). Here, it is when Respondent
unequivocally notified Complainant that he would not proceed any further (again allegedly for political or personal reasons).
The Board was not presented with clear evidence of when White was admitted to the Fire Academy – instead the Board was
only presented with a copy of the Kronos Roster for firefighter trainees as of March 19, 2019. However, Respondent’s
Exhibit 9 indicated that verbal and written offers were made between January 14-16, 2009. Regardless, this period is still
outside the 6-month period prior to the filing of the Complaint.

1 case.³

2 EQUITABLE TOLLING

3 As indicated, the Board finds equitable tolling applicable. “[E]quitable tolling ‘focuses on
4 ‘whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of
5 the existence of a possible claim within the limitations period, then equitable tolling will serve to extend
6 the statute of limitations for filing suit until the plaintiff can gather what information he needs.’” *City*
7 *of N. Las Vegas*, 127 Nev. at 640, 261 P.3d at 1077. “[T]he following factors, among any other
8 relevant considerations, should be analyzed when determining whether equitable tolling will apply: the
9 claimant's diligence, knowledge of the relevant facts, reliance on misleading authoritative agency
10 statements and/or misleading employer conduct, and any prejudice to the employer.” *City of N. Las*
11 *Vegas*, 127 Nev. at 640, 261 P.3d at 1077 (holding that equitable tolling will extend a statute of
12 limitations if a reasonable plaintiff would not have known of the existence of their claim within the
13 limitations period); *Charles v. City of Henderson*, No. 67125, 2016 WL 2757394, at *1 (Nev. May 10,
14 2016) (noting that “[t]he law does not permit equitable tolling when a party simply did not realize the
15 ‘extent’ of his claim.”); *see also Bantz v. Washoe County Sch. Dist.*, Item No. 832, Case No. 2017-028
16 (2018); *Woodard v. Sparks Police Prot. Ass’n*, Case No. 2018-026, Item No. 853 (2019).

17 The Nevada Supreme Court’s decision in *City of N. Las Vegas*, *supra*, and our decision in
18 *Woodard v. Sparks Police Prot. Ass’n*, Case No. 2018-026, Item No. 853 (2019) are directly on point.

19 Diligence

20 In *City of N. Las Vegas*, approximately two months after learning of a similarly situated
21 employee’s differential treatment, Spannbauer filed a complaint with the EMRB. The Nevada Supreme
22 Court approved this as diligent. *See City of N. Las Vegas*, 127 Nev. at 640-41, 261 P.3d 1077. In
23 *Woodard*, Complainant did not learn of different treatment in the McCreary case until summer 2018
24 and filed his complaint approximately 3 months after in October (as such, the complainant was
25 determined to be diligent). In previous cases, the Board found a lack of diligence when the complainant
26 waited 1 to 6 years. *See e.g., Bantz v. Washoe County Sch. Dist.*, Item No. 832, Case No. 2017-028

27
28 ³ Indeed, the Nevada Supreme Court noted: “Initially, the EMRB found that Spannbauer's complaint was filed in a timely manner because Spannbauer did not know and could not have known about a violation of his rights until he learned of the different treatment received by the female employee.” *Id.* at 637.

1 (2018); *Danser v. the City of North Las Vegas*, Case No. 2017-035 (2018). Here, Complainant
2 discovered the different treatment on March 19, 2019 and filed his Complaint less than 6 months
3 thereafter on September 4, 2019. The Board finds this as diligent including finding Complainant
4 credible in his reasons for waiting until September to do so as explained at the hearing.

5 As such, the Board finds this factor cuts in favor of the application of equitable tolling.

6 Knowledge of the Relevant Facts

7 In the same vein as *City of N. Las Vegas* and *Woodard*, Complainant filed his complaint after
8 obtaining knowledge of the alleged differential treatment of a similarly situated employee and reason to
9 question Respondent's actions. In *Bantz*, however, she did not provide any new factual information
10 pertaining to her claims including admitted that were no knew relevant facts pertaining to her claims.
11 *Bantz v. Washoe County Sch. Dist.*, Item No. 832, Case No. 2017-028 (2018); *see also Danser v. the*
12 *City of North Las Vegas*, Case No. 2017-035 (2018).

13 As such, the Board finds this factor cuts in favor of the application of equitable tolling.

14 Reliance on Misleading Agency Statements or Conduct

15 As in *Woodard*, the Board was not presented with sufficient reasonable evidence of this factor
16 and thus finds it cuts against applying the doctrine of equitable tolling.

17 Prejudice

18 In *Bantz* and *Danser*, the hearings showed that witnesses would not have sufficient memory if
19 called to testify. The Board thus found prejudice. However, here, as in *Woodard*, the Board was not
20 presented with sufficient evidence of an inability to present clear testimony of the events. In the same
21 vein, the Nevada Supreme Court agreed that prejudice was lacking in these instances. *See City of N.*
22 *Las Vegas*, 127 Nev. at 641, 261 P.3d 1077.

23 As such, the Board finds this factor cuts in favor of the application of equitable tolling.

24 * * *

25 As the Board noted in *Woodard*, the Board is cautious here to reiterate that claims may not
26 remain forever open by the simple learning of dissimilar treatment in the future. However, the facts of
27 this case and the timeline related thereto are close enough to allow this case to proceed to a hearing.
28 Federal courts on which our doctrine of equitable tolling is based have been reluctant to allow

1 procedural technicalities to bar discrimination claims. *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d
2 1077, citing *Copeland v. Desert inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490 (1983).⁴ A violation
3 ultimately may not have occurred, but justice, equity, and the facts of this case require a hearing on the
4 merits to determine as such.

5 FINDINGS OF FACT

6 1. Complainant resigned from LVFR after Respondent initiated disciplinary proceedings
7 against Complainant.

8 2. Respondent permitted Complainant to retest for a new firefighter position.

9 3. While Complainant placed in the first tier of candidates that tested for that position, he
10 was not invited to continue with the hiring process after Complainant participated in an interview with
11 the interview panel.

12 4. Complainant received a letter from LVFR on November 7, 2018 indicating that he was
13 not selected to move forward.

14 5. A person that did not score as well on the written exam was selected to move forward
15 with the hiring process while Complainant was not.

16 6. On March 19, 2019, Complainant was sent a text from a friend with a list of the roster in
17 which Complainant discovered that a position had been offered to Brain White who had a test score in
18 Group 2.

19 7. The complaint was filed on September 4, 2019.

20 8. Six months prior thereto is March 4, 2019.

21
22 ⁴ Complainant claims he is a victim of discrimination by the Department due to personal and political reasons in violation of
23 NRS 288.270(1)(f). Specifically, the passing over of Complainant for the position was made for personal or political
24 reasons. Discrimination of this sort is analyzed under the framework set forth in *Reno Police Protective Ass'n v. City of*
25 *Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op.
26 36, 302 P.3d 1108 (2013). As the Court explained, "[i]n *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d
27 1321 (1986), this court adopted the framework used in adjudicating federal prohibited-labor-practice claims under the [NLRA]
28 for use in resolving state prohibited-labor-practice claims against employers brought under NRS 288.270." *Bisch v. Las Vegas*
Metro Police Dep't, 129 Nev. Adv. Op. 36, 302 P.3d 1108, 1116 (2013); *Bonner v. City of N. Las Vegas*, Case No. 2015-027
(2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, filed June 30, 2020, unpublished deposition (Nev. 2020); *Jackson v.*
Clark County, Case No. 2018.007 (2019); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-
010 (2017); *Brown v. Las Vegas Metropolitan Police Dep't*, Item No. 818, Case No. 2015-013 (2016); *D'Ambrosio v. Las*
Vegas Metropolitan Police Dep't, Item No. 808, Case No. A1-046119 (2015); *Ducas v. Las Vegas Metropolitan Police*
Dep't, Item No. 812 (2016); *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, Case No. A1-046116 (2015);
Vos v. City of Las Vegas, Item No. 749, Case No. A1-046000 (2014); *Kilgore v. City of Henderson*, Item No. 550H, Case
No. A1-045763 (2005).

9. Complainant discovered the different treatment on March 19, 2019 and filed his Complaint less than 6 months thereafter on September 4, 2019.

10. The Board finds this as diligent including finding Complainant credible in his reasons for waiting until September to do so as explained at the hearing.

11. In the same vein as *City of N. Las Vegas* and *Woodard*, Complainant filed his complaint after obtaining knowledge of the alleged differential treatment of a similarly situated employee and reason to question Respondent's actions.

12. As in *Woodard*, the Board was not presented with sufficient evidence of an inability to present clear testimony of the events.

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

CONCLUSIONS OF LAW

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

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

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

4. Time limitations are not triggered until the victim receives unequivocal notice of a final decision. *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 639, 261 P.3d 1071, 1076-77 (2011).

5. “As stated in *City of North Las Vegas*, the unequivocal notice rule required unequivocal notice of a ‘final adverse action.’”

6. Unequivocal notice occurred when the complainant has reason to know that the supposed prohibited labor practice had actually happened.

7. The complaint is not time-barred if it was filed within six months of the occurrence of the discriminatory act.

1 8. Based on the evidence presented, the Board finds that Complainant received unequivocal
2 notice in November 2018 as this is when Respondent chose to pass over Complainant (allegedly for
3 political or personal reasons in violation of the EMRA).

4 9. Black letter statutory rules of construction law prohibit interpreting a statute to produce
5 an absurd or unreasonable result.

6 10. If the Board were to allow notice from any third party to extend the six-month deadline
7 in the EMRA, it could extend those time limitations indefinitely.

8 11. “[E]quitable tolling ‘focuses on ‘whether there was excusable delay by the plaintiff: If a
9 reasonable plaintiff would not have known of the existence of a possible claim within the limitations
10 period, then equitable tolling will serve to extend the statute of limitations for filing suit until the
11 plaintiff can gather what information he needs.’”

12 12. “[T]he following factors, among any other relevant considerations, should be analyzed
13 when determining whether equitable tolling will apply: the claimant's diligence, knowledge of the
14 relevant facts, reliance on misleading authoritative agency statements and/or misleading employer
15 conduct, and any prejudice to the employer.”

16 13. The factor of diligence cuts in favor of the application of equitable tolling.

17 14. The factor of knowledge of relevant facts cuts in favor of the application of equitable
18 tolling.

19 15. The factor of reliance on misleading agency statements cuts against of the application of
20 equitable tolling.

21 16. The factor of prejudice cuts in favor of the application of equitable tolling.

22 17. Complainant claims he is a victim of discrimination by the Department due to personal
23 and political reasons in violation of NRS 288.270(1)(f).

24 18. Federal courts on which our doctrine of equitable tolling is based have been reluctant to
25 allow procedural technicalities to bar discrimination claims.

26 19. The doctrine of equitable tolling is applicable in this case.

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

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ORDER

Based on the foregoing, it is hereby ORDERED that the Complaint is not barred by the limitations period set forth in NRS 288.110.

DATED this 26th day of August 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: 
BRENT ECKERSLEY, ESQ., Chair

By: 
SANDRA MASTERS, Vice-Chair

By: 
BRETT HARRIS, ESQ., Board Member