

FILED

DEC 24 2019

STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

JASON WOODARD,

Complainant,

v.

SPARKS POLICE PROTECTIVE
ASSOCIATION,

Respondent.

Case No. 2018-026

NOTICE OF ENTRY OF ORDER

PANEL E

ITEM NO. 853

To: Complainant Jason Woodard and his attorneys Francis Flaherty, Esq. and Dyer Lawrence, LLP;

To: Respondent Sparks Police Protective Association and their attorney Michael E. Langton, Esq.

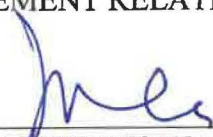
PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on
December 24, 2019.

A copy of said order is attached hereto.

DATED this 24 day of December 2019.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY


MARISU ROMUALDEZ ABELLAR
Executive Assistant

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2
3 **CERTIFICATE OF MAILING**

4 I hereby certify that I am an employee of the Local Government Employee-Management
5 Relations Board, and that on the 24 day of December 2019, I served a copy of the foregoing **NOTICE**
6 **OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:
7

8 Francis Flaherty, Esq.
9 Dyer Lawrence, LLP
10 2805 Mountain Street
Carson City, NV 89703

11 Michael E. Langton, Esq.
12 801 Riverside Drive
13 Reno, NV 89503

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15 _____
16 MARISU ROMUALDEZ ABELLAR
17 Executive Assistant
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SPARKS POLICE PROTECTIVE
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Respondent.

Case No. 2018-026

ORDER

PANEL E

ITEM NO. 853

On December 17, 2019, 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-Management Relations Act (the "Act"); NAC Chapter 288 and NRS Chapter 233B.

The Board previously ordered that this matter be bifurcated with the hearing on the applicability of equitable tolling occurring first. The Nevada Supreme Court has determined that NRS 288.110(4) is subject to the doctrine of equitable tolling. 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). Indeed, "equitable 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.'" *Id.* at 640. "[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." *Id.*

The facts in this case are not seriously in dispute. On March 11, 2016, the Sparks Police Department ("SPD") notified Complainant that he was the subject of an internal affairs investigation.

1 On May 4, 2016, SPD notified Complainant of the results of the investigation. On June 1, 2016, SPD
2 notified Complainant of a pre-disciplinary hearing regarding his proposed demotion from sergeant to
3 patrol officer. SPPA provided representation to Complainant at the pre-disciplinary hearing and at a
4 subsequent grievance appeal hearing before the Sparks City Manager.

5 Following the City Manager appeal hearing, SPPA ceased providing representation to
6 Complainant in his demotion grievance. Complainant petitioned SPPA for assistance with attorney's
7 fees and costs for his demotion grievance arbitration on two separate occasions, including an
8 appearance before the SPPA membership on November 21, 2016. However, Complainant was denied
9 assistance. Complainant's demotion grievance was arbitrated in April 2017 with an award in
10 September 2017, reducing Complainant's discipline from a permanent demotion to a temporary, 120-
11 day demotion.

12 In early November 2017, Complainant had a discussion with SPPA Vice President Danny James
13 about SPPA providing financial support to defend his win at arbitration (Sparks City Council voted to
14 file a motion to vacate the arbitrator's award with the City of Sparks filing said motion in December
15 2017). James informed Complainant that he did not think he would get sufficient votes from the SPPA
16 membership. In April 2018, the District Court entered an order denying the City's Motion to Vacate
17 while confirming the award.

18 In a different matter, SPD conducted an investigation into conduct of then probationary
19 Lieutenant Mike McCreary. Complainant alleges that his violations were similar to that of Lt.
20 McCreary's. As with Complainant, SPPA provided representation for Lt. McCreary at the pre-
21 disciplinary hearing. In June 2018, SPPA held a general meeting wherein it allowed Lt. McCreary's
22 personal attorney to address the membership. SPPA membership voted to pay Lt. McCreary's attorney
23 fees for arbitration.

24 Shortly thereafter, in late summer of 2018, Complainant met with SPPA President Brian
25 Sullivan and informed him he thought the treatment between Lt. McCreary and himself was discrepant
26 and the circumstances between their cases were very similar. Complainant asked if the SPPA would
27 reconsider reimbursing Complainant for his arbitration expenses or some portion thereof. Sullivan
28 stated that they would not and that they felt the time Complainant had to file against them had expired.

1 Complainant contends that there are numerous reasons why it would make Lt. McCreary's case more
2 difficult that Complainant's at arbitration.

3 Complainant alleges that the SPPA violated the duty of fair representation.
4 In the underlying case before the Board of *City of N. Las Vegas v. EMRB*, 127 Nev. 631, 639, 261 P.3d
5 1071, 1076-77 (2011), Spannbauer alleged that the union breach the duty of fair representation. In that
6 matter, the Board found that Spannbauer did not know and could not have known of potential violations
7 until he learned of different, more favorable, treatment received subsequently by a similarly situated
8 employee. See e.g. *District 17, United Mine Workers of America and Phillip Lee White*, 315 NLRB
9 1052 (1994). The Nevada Supreme Court upheld the Board's decision in *City of N. Las Vegas*.

10 As indicated, "the following factors, among any other relevant considerations, should be
11 analyzed when determining whether equitable tolling will apply: the claimant's diligence, knowledge of
12 the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer
13 conduct, and any prejudice to the employer." *Id*; see also *Bantz v. Washoe County Sch. Dist.*, Item No.
14 832, Case No. 2017-028 (2018).

15 Diligence

16 In *City of N. Las Vegas*, approximately two months after learning of a similarly situated
17 employee's differential treatment, Spannbauer filed a complaint with the EMRB. The Nevada Supreme
18 Court approved this as diligent. See *City of N. Las Vegas*, 127 Nev. at 640-41, 261 P.3d 1077. In the
19 same vein, Complainant didn't learn of different treatment in the McCreary case until summer 2018 and
20 filed his complaint approximately 3 months after in October. In previous cases, the Board found a lack
21 of diligence when the complainant waited 1 to 6 years. See e.g., *Bantz v. Washoe County Sch. Dist.*,
22 Item No. 832, Case No. 2017-028 (2018); *Danser v. the City of North Las Vegas*, Case No. 2017-035
23 (2018). Moreover, Complainant pursued his underlying case and arbitration in a timely fashion.

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

25 Knowledge of the Relevant Facts

26 In the same vein as *City of N. Las Vegas*, Complainant did not find out about the alleged
27 differential treatment of a similarly situated employee and then filed his complaint after obtaining
28 knowledge of an NRS Chapter 288 violation and reason to question the union's actions including the

1 more difficulty of Lt. McCreary's case. In *Bantz*, however, she did not provide any new factual
2 information pertaining to her claims including admitted that were no knew relevant facts pertaining to
3 her claims. *Bantz v. Washoe County Sch. Dist.*, Item No. 832, Case No. 2017-028 (2018); *see also*
4 *Danser v. the City of North Las Vegas*, Case No. 2017-035 (2018). Moreover, Complainant did not
5 learn until later that his case would be partly successful at arbitration.

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

7 Reliance on Misleading Agency Statements or Conduct

8 While it appears Complainant was informed that his case would not be successful at arbitration
9 in some sense, the Board was not presented with sufficient reasonable evidence of this factor and thus
10 finds it cuts against applying the doctrine of equitable tolling.

11 Prejudice

12 In *Bantz* and *Danser*, the hearings showed that witnesses would not have sufficient memory if
13 called to testify. The Board thus found prejudice. However, here the Board was not presented with
14 sufficient evidence of an inability to present clear testimony of the events. In the same vein, the
15 Nevada Supreme Court agreed that prejudice was lacking in these instances. *See City of N. Las Vegas*,
16 127 Nev. at 641, 261 P.3d 1077.

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

18 * * *

19 While the Board is cautious here to note that claims may not remain forever open by the simple
20 learning of dissimilar treatment in the future, the facts of this case and the timeline related thereto are
21 close enough to allow this case to proceed to a hearing. Federal courts on which our doctrine of
22 equitable tolling is based have been reluctant to allow procedural technicalities to bar discrimination
23 claims. *City of N. Las Vegas*, 127 Nev. at 640, 261 P.3d 1077, *citing Copeland v. Desert Inn Hotel*, 99
24 Nev. 823, 826, 673 P.2d 490 (1983); *Weiner v. Beatty*, 121 Nev. 243, 249 (2005) (The duty of fair
25 representation requires that when the union represents or negotiates on behalf of a union member, it
26 must conduct itself in a manner that is not "arbitrary, discriminatory, or in bad faith."). The duty of fair
27 representation may still have not been breached, but justice here and the facts of this case require a
28 hearing on the merits to determine as such.

1 Motion for Protective Order

2 Also at issue was Respondent's Motion for Protective Order or, in the Alternative, Motion to
3 Modify Subpoena Duces Tecum. The subpoena at issue sought four categories. Respondent agreed to
4 provide items requested in Item 1 but objected to Items 2-4 on the following grounds: (a) documents are
5 not in the possession, custody or control of SPPA; (b) confidentiality under NRS 289.080; and (c) the
6 attorney-client privilege.

7 Complainant argues that NRS 289 is not applicable as the plain language of the statute only
8 addresses information that a representative, such as SPPA or its attorneys, obtains directly from the
9 peace officer. Complainant states it is not seeking any information that SPPA obtained from a peace
10 officer, such as Lt. McCreary, as a result of Lt. McCreary's investigation and discipline, but rather
11 documents generated by a third-party. Specifically, Item 2 requests correspondence between SPD IA
12 and Lt. McCreary and/or SPPA regarding the McCreary discipline. Complainant contends that if SPPA
13 received these documents from SPD rather than Lt. McCreary, then NRS 289 does apply. Moreover,
14 McCreary is not the original source of the information between SPD and SPPA. In the same vein,
15 Complainant also argues the documents are not protected by attorney-client privilege as Complainant is
16 not seeking any information that SPPA obtained from Lt. McCreary or Lt. McCreary's attorney as a
17 result of SPD's Investigation, but rather documents that SPPA obtained from a third-party.

18 In its Reply, including a declaration submitted therewith, SPPA declared it did not receive any
19 correspondence between SPD IA and Lt. McCreary and/or SPPA regarding the McCreary discipline.
20 Any information concerning the McCreary discipline was communicated to Sullivan by their attorney in
21 a privileged communication. SPPA also agreed to produce a copy of the grievance and two emails from
22 City of Sparks representatives that are responsive.

23 SPPA has now provided documents requested in Item 1 but does not possess any items
24 requested in Items 2, 3, or 4. If said documents exist, they are in the possession, custody or control of
25 SPD. Thus, the instant motion appears moot; however, the Board grants in part on the limited basis of
26 communications SPPA's attorney had with President Sullivan concerning Lt. McCreary.

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FINDINGS OF FACT

1. On March 11, 2016, Sparks Police Department ("SPD") notified Complainant that he was the subject of an internal affairs investigation.

2. On May 4, 2016, SPD notified Complainant of the results of the investigation.

3. On June 1, 2016, SPD notified Complainant of a pre-disciplinary hearing regarding his proposed demotion from sergeant to patrol officer.

4. SPPA provided representation to Complainant at the pre-disciplinary hearing and at a subsequent grievance appeal hearing before the Sparks City Manager.

5. Following the City Manager appeal hearing, SPPA ceased providing representation to Complainant in his demotion grievance.

6. Complainant petitioned SPPA for assistance with attorney fees and costs for his demotion grievance arbitration on two separate occasions, including an appearance before the SPPA membership on November 21, 2016.

7. Complainant was denied assistance.

8. Complainant's demotion grievance was arbitrated in April 2017 with an award in September 2017, reducing Complainant's discipline from a permanent demotion to a temporary, 120-day demotion.

9. In April 2018, the District Court entered an order denying the City's Motion to Vacate while confirming the award.

10. SPD conducted an investigation into conduct of then probationary Lieutenant Mike McCreary.

11. SPPA provided representation for Lt. McCreary at the pre-disciplinary hearing.

12. In June 2018, SPPA held a general meeting wherein it allowed Lt. McCreary's personal attorney to address the membership.

13. SPPA membership voted to pay Lt. McCreary's attorney fees for arbitration.

14. Shortly thereafter, in late summer of 2018, Complainant met with SPPA President Brian Sullivan and informed him he thought the treatment between Lt. McCreary and himself was discrepant and the circumstances between their cases were very similar.

15. Complainant asked if the SPPA would reconsider reimbursing Complainant for his arbitration expenses or some portion thereof.

16. Sullivan stated that they would not and that they felt the time Complainant had to file against them had expired.

17. Complainant did not learn of the different treatment in the McCreary case until summer 2018 and filed his complaint approximately 3 months after in October.

18. Complainant pursued his underlying case and arbitration in a timely fashion.

19. Complainant did not find out about the alleged differential treatment of a similarly situated employee and then filed his complaint after obtaining knowledge of an NRS Chapter 288 violation and reason to question the union's actions including the more difficulty of Lt. McCreary's case.

20. Complainant did not learn until later that his case would be partly successful at arbitration.

21. The Board was not presented with sufficient evidence of an inability to present clear testimony of the events.

22. 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 Local Government Employee-Management Relations Act.

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

3. 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).

4. “[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

1 plaintiff can gather what information he needs.”

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

6 6. Complainant alleges that the SPPA violated the duty of fair representation.

7 7. The duty of fair representation requires that when the union represents or negotiates on
8 behalf of a union member, it must conduct itself in a manner that is not “arbitrary, discriminatory, or in
9 bad faith.”

10 8. The factor of diligence cuts in favor of the application of equitable tolling.

11 9. The factor of knowledge of relevant facts cuts in favor of the application of equitable
12 tolling.

13 10. The factor of reliance on misleading agency statements cuts against of the application of
14 equitable tolling.

15 11. The factor of prejudice cuts in favor of the application of equitable tolling.

16 12. Federal courts on which our doctrine of equitable tolling is based have been reluctant to
17 allow procedural technicalities to bar discrimination claims.

18 13. The doctrine of equitable tolling is applicable in this case.

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

21 **ORDER**

22 IT IS, THEREFORE, ORDERED that the doctrine of equitable tolling applies, and the
23 Commissioner shall set the matter for hearing.

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1 IT FURTHER ORDERED that the Motion for Protective Order is GRANTED in PART as
2 indicated above.

3 Dated this 23 day of December 2019.

4 GOVERNMENT EMPLOYEE-
5 MANAGEMENT RELATIONS BOARD

6 By: 
7 BRENT ECKERSLEY, ESQ., Chair

8 By: 
9 SANDRA MASTERS, Vice-Chair

10
11 By: 
12 GARY COTTINO, Board Member