STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

AFSCME, LOCAL 4041, Complainant, v. STATE OF NEVADA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGING AND DISABILITY SERVICES DIVISION, DESERT REGIONAL CENTER; DR. LISA THOMPSON-DYSON, RESIDENTIAL DIRECTOR, Respondents.	Case No. 2020-001 **ORDER ON RESPONDENTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** **EN BANC** **ITEM 861-A**

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 NRS Chapter 288, the Government Employee-Management Relations Act ("EMRA"); NAC Chapter 288 and NRS Chapter 233B.

At issue was Respondents' Motion to Dismiss the First Amended Complaint (FAC). Respondents argue that the Board should dismiss the FAC as the claims asserted against them are meritless because the employees did not have rights afforded to them at any time relevant to the FAC.

Preliminarily, as the Board noted in its previous order on Respondents' initial motion to dismiss, and as this Board has repeatedly held, cases involving factual disputes, and credibility determinations, require a hearing and cannot be disposed of by a motion to dismiss. NAC 288.375 provides that the Board **may** dismiss a matter if the Board determines that no probable cause exists for the complaint. An evidentiary hearing is still required here to determine the issues presented including the proper submission and presentation of evidence as well as credibility determinations in accordance with NRS

and NAC 288.[1]

Respondents contend that the FAC is brought pursuant to incorrect authority. Count 1 is for engaging in a prohibited labor practice under NRS 288.270(1)(a) while Count 2 is brought pursuant to NRS 288.270(1)(e). Under NRS 288.620, it is a prohibited practice for the Department to engage in any prohibited practice applicable to a local government employer set forth in subsection 1 of NRS 288.270 "except paragraphs (e) and (g) of that subsection." As such, NRS 288.270(1)(a) applies in this case. While NRS 288.620(1)(b) provides a similar prohibited practice of refusing to collectively bargain in good faith, this is pursuant to NRS 288.565. NRS 288.270(1)(e) prohibits refusing to collectively bargain in good faith as required by NRS 288.150. NRS 288.150 provides the well-established laundry list of mandatory subjects of bargaining. NRS 288.656 provides that the parties shall engage in collective bargaining as required by NRS 288.540. NRS 288.540 provides that bargaining shall concern "the wages, hours and other terms and conditions of employment for the employees", modeling the NLRA. Significantly, NRS 288.500 provides that collective bargaining shall entail a mutual obligation to bargain in good faith **with respect to any subject of mandatory bargaining set for in subjection 2 of NRS 288.150**, except paragraph (f) of that subsection. Count 2 in the FAC is based on NRS 288.150(1)(g), "[t]he total hours of work required of any employee on each workday or workweek".[2] As such, NRS 288.150(2)(g) is applicable to the Executive Department based on the plain language of the EMRA.

While Respondents generally argue in a footnote that NRS 288.270(1) and NRS 288.620(1)(a) and (b) are not identical in every respect, they do not put forth any difference which matters in this case (let alone one at all). NAC 288.235(2) provides the Board may disregard any defects which do not

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[1] Respondents indicated that pursuant to NRS 288.625(2)(a) the Board should dismiss the FAC, seemingly requesting this Board to perform a preliminary investigation. The Board however notes that it does not elect to use its discretion to conduct a preliminary investigation of the complaint pursuant to NRS 288.625(2) as the provisions related thereto do not warrant such. *See Nevada Police Union v. State of Nevada*, Case No. 2020-015, Item No. 866 (2020) (listing factors). The Board also noted in that matter: "In adopting this regulation, it was noted that the Board has never conducted investigations in its history, instead acts as an impartial court, and this provision was intended to be useful when a pro se client files a complaint with the Board." *Id*, *citing* Minutes of the Workshop to Solicit Comments for New Regulations or Changes to Existing Regulations of the EMRB (July 17, 2019).

[2] Reference to NRS 288.150(1)(g) in the FAC is clearly a typo as there is no subsection (1)(g) and subsection (2)(g) indeed provides for "[t]he total hours of work required of any employee on each workday or workweek" – moreover, NRS 288.150(1) provides for good faith negotiation concerning mandatory subjects of bargaining set forth in subsection 2.

affect substantial rights of a party and pleadings will be liberally construed. Given the foregoing, the Board finds the defect does not affect the substantial rights of Respondents and should be disregarded.

Respondents additionally argue that the FAC remains premature under this Board's prior order because it effects a continuation of the same proceedings improperly instituted. In support of this, Respondents cite to Sections 53 and 53.5 of SB 135 concluding that these sections were meant to give the Executive Department complete control over its employees until the Board completed its ancillary tasks of placing job classifications/titles into the statutorily pre-defined 11 bargaining units. Respondents go so far to say this was the Legislature's "manifest purpose" in enacting these provisions.

Yet, these provisions are plain and unambiguous in what they purport to do (*i.e.*, the procedure to determine which job classifications/titles go into the 11 bargaining units previously established by the Legislature and requiring that a labor organization cannot file a complaint before it is designated). In other words, the "manifest purpose" Respondents advance is nowhere to be found in the EMRA nor legislative history.[3] *See infra* Discussion below.

The Board previously dismissed the Complaint as it was premature because the Complaint is not related to the ability of Complainant to be designated and filed prior to designation. Here, Complainant was designated prior to filing its FAC. Respondents argue that allowing the FAC would circumvent the requirement in Section 53.5. However, absent the filing of the first motion to dismiss, the timelines for the case did not begin until after the FAC was filed and as such the intent of filing prior to designation remains in effect.[4] Respondents contend that the FAC "relates back to the date of the initial complaint". Yet, this relation back doctrine pursuant to NRCP 15(c), even if applicable, has its application generally as related to time limitations. *See, e.g.*, *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. 396, 399, 373 P.3d 89, 92 (2016); *Nelson v. City of Las Vegas*, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983); *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 307, 579 P.2d 775, 779 (1978); *Lunn v. Am. Maint. Corp.*, 96 Nev. 787, 790, 618 P.2d 343, 344 (1980); *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979);

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[3] Indeed, the general purpose of Section 53.5 was most likely so the Board would not be bombarded with complaints while completing its ancillary tasks of placing job titles into the statutorily mandated units as well as recognizing organizations with majority support.

[4] By the plain language of the section, the prohibition applies only to a labor organization that has not been designated – it is undisputed that Complainant was designated prior to filing the FAC. The Board also notes that Respondents did not provide any legislative history or other authority to support what they purport is the "intent" of this section.

Ross v. Williams, 950 F.3d 1160, 1163 (9th Cir. 2020); *Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2006-OA16, Mortg. Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald Ranch Master Ass'n*, 329 F. Supp. 3d 1221, 1227 (D. Nev. 2018). Complainant contends the dates in the FAC are within the 6-month limitations period set forth in the EMRA. In reply, Respondents do not contend that the time limitations set forth in the EMRA have been violated or affected by the amendment.

Respondents failed to argue how they are in any way prejudiced or their rights affected. As indicated above, NAC 288.235(2) provides the Board may disregard any defects which do not affect substantial rights of a party and pleadings will be liberally construed. Given the foregoing, the Board finds the defect does not affect the substantial rights of Respondents and should be disregarded. The date of filing before designated has now been cured, and the Board will not require the unnecessary task of refiling a new independent complaint given the foregoing.

Finally, Respondents argue that even if the conduct occurred, the employees did not have any rights until after the Board's regulations came into being. Respondents rely on Sections 53 and 53.5.

As detailed, the "manifest purpose" on which Respondents rely seemingly has no merit. Respondents acknowledge that in enacting SB 135, the Legislature accounted for the Board engaging in certain tasks as detailed above. Citing NRS 288.565(2), Respondents note the legislature did not set a deadline for commencement of collective bargaining any earlier than November 1, 2020.[5]

Respondents conclude that the legislature intended that the Executive Department maintain control over all working conditions of its employees. Respondents vaguely argue that SB 135 provides that labor organizations would have only limited rights to restrain the state's exercise of its managerial prerogatives during this interim period. As indicated, Respondents cite sections 53 and 53.5 in support of this proposition. However, without any direct authority in support thereof, [6] Respondents essentially

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[5] NRS 288.565(2) (*emphasis* added) in actuality provides: "A representative designated pursuant to subsection 1 and an exclusive representative shall begin negotiations concerning a collective bargaining agreement within 60 days after one party notifies the other party of the desire to negotiate or on or before November 1 of each even-numbered year, *whichever is earlier*."

[6] Respondents also incorrectly concluded that the legislature mandated that labor organizations should not begin their organizing efforts until the Board had first established appropriate bargaining units (again without any direct authority in support thereof). Yet, Respondents even note that Section 53 makes clear that a labor organization must not be *designated* an exclusive representation until the Board has adopted regulations. If the legislature had intended for an inability to even begin organizing efforts, they would have said so. Indeed, in our designation orders we noted that the Board will process a

conclude that the employees' rights could not have been violated prior to the Board's regulations becoming effective and thus employees had no rights at all when the amended EMRA came into being. If the Legislature had intended this severe limitation and restriction, they would have provided for it.

The EMRA established certain rights for state employees when it was signed into law in June 2019. Indeed, the Act became effective on June 12, 2019.[7] The employees' rights came into being at this point in time, simply giving the Board the ancillary task of placing job classifications/titles in the statutorily created, specified, pre-determined, and mandated 11 bargaining units. For example, bargaining unit letter designations corresponded to the subsection of Section 29 (codified as NRS 288.515) where the unit is described (*e.g.*, bargaining unit described in Section 29(1)(a), NRS 288.515(1)(a), is referred to as "Unit A") (the legislative history provides that Section 29 provides for the creation and organization of bargaining units of employees of the Executive Department).

To rule that the Department could violate employees' rights while the Board was simply completing its ancillary tasks would be in contravention to the purposes and polices of the EMRA as well as the plain language of the EMRA prohibiting the Department from engaging in any practice applicable to a local government (*see* discussion *supra* regarding applicability of statutory provisions). In other words, if the Board were to accept the Department's argument, it would create the perverse incentive for governments to intentionally initiate as many changes as possible to employees' rights knowing the Act had been made effective – essentially racing with this Board to make changes before the Board could simply complete said tasks. There is no basis in the statute or its history to conclude the employees' rights could not have been violated in any shape or form after it was enacted.[8]

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petition supported by a showing of interest even if it was gathered prior to the time when a question concerning representation could be raised. NLRB: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, AT SEC. 5 (2017); *see also, e.g.*, *Sheffield Corp.*, 108 NLRB 349, 350 (1954); *Covenant Aviation Sec., LLC*, 349 NLRB 699, 703 (2007); *A. Werman & Sons*, 114 NLRB 629 (1956). Of course, statutes must be read reasonably and by their plain language – it is clear that labor organizations could not be designated until each job classification was placed in a bargaining unit, otherwise it would not be clear what job classifications were being represented if an exclusive representative was certified for a bargaining unit before determining the specific make-up of that unit. In other words, unions were required to present a showing of interest which is usually presented by authorization cards from employees. Until an employee's job title was placed in a unit, it could not conclusively be determined that the union had majority support of the unit.

[7] https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6159/Overview ("Effective June 12, 2019"); *see also* Sec. 55 ("This act becomes effective upon passage and approval."); Sec. 53 ("As soon as practicable after the effective date of this act but not later than August 1, 2019"); *see, e.g.*, *State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992).

[8] Of course, the Board does not opine on whether the employees' rights were actually violated.

Again Sections 53 and 53.5 of SB 135 do not provide (nor does the legislative history support) for Respondents' contention that the heads of state agencies retained their authority in ALL respects to establish the terms and conditions of employment while the Board considered regulations to organize the bargaining units.[9] For the foregoing reasons, allowing Respondents' argument to come to fruition would allow Respondents to circumvent the Act as amended which came in effect to protect employees. In other words, the Department would have the Board ignore whether they violated *the employees' rights* on whom the union represents.

The Board notes that in the declaratory order in the matter of *Nevada Highway Patrol Ass'n v. State of Nevada Dep't of Public Safety*, Case No. 2020-011, Item No. 865 (2020), it laid the extensive obligations of representation that are provided by the union. *See also Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 479, 998 P.2d 1178, 1182 (2000). Here, Count 1 for relief is based on NRS 288.270(1)(a) which, as indicated above, applies to the Executive Department. As indicated, Respondents appear to advance the proposition that they could not violate state employees' rights given to them in any shape or form when the Act became effective in 2019 until the Board's regulations were adopted. Pursuant to NRS 288.270(1)(a), "[t]he test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Juvenile Justice Supervisors Ass'n v. County of Clark*, Case No. 2017-020, Item No. 834 (2018), *citing Clark Cty. Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item 237 (1989). There are three elements to a claim of interference with a protected right: "(1) the employer's action can

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[9] Respondents cite to the NLRB decision of *Champion Pneumatic Machinery Co.*, 152 NRLB 300, 306 (1965) arguing that it rejected the rule that "all wages and other working conditions must remain fixed" from the moment "a campaign is instituted" in support of Respondents' conclusion that sections 53 and 53.5 of SB 135 provide that state governments should retain all control over its employees during the Board completing ancillary tasks. Yet, this is not what the case stands for. In this case, the NLRB adopted as its order that of the Trial Examiner's. While this matter could have an impact of the substantive charges, it plainly does not have an effect on the question of whether the employees' rights arose when the law became effective or not until after the Board adopted its regulations. The Board notes that the decision purports to hold that it could not be found that "an employer violates the Act by instituting these safety measures" explaining that "[i]t may be true that but for his illegal act in sponsoring the grievance committee the employer would not have installed the protective devices, for the matters might not have come to his attention. But once they reached his attention, the employer had to choose between instituting safety measures or leaving matters in status quo until such time as he cured his unfair labor practice by disestablishing the Committee, or perhaps until the union campaign had ended". *Champion Pneumatic Mach. Co.*, 152 NLRB 300, 304 (1965). The Trial Examiner also found that "that the statement [promising a benefit] violated Section 8(a)(1)", and "[t]his is not a case where an election was imminent". *Id.* at 305-06. Moreover, the question presented was whether the respondent violation Section 8(a)(1) of the NLRA, not a failure to bargain in good faith concerning mandatory subjects of bargaining. *See id.* at 301. Finally, the Trial Examiner made explicit factual findings which necessarily necessitated a hearing on the merits. *See generally id.*

be reasonably viewed as tending to interfere with, coerce, or deter; (2) the exercise of protected activity [by NRS Chapter 288]; and (3) the employer fails to justify the action with a substantial and legitimate business reason." *Billings and Brown v. Clark County*, Item No. 751 (2012); *citing Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1988); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 101, 715 P.2d 1321, 1323 (1986). In other words, Respondents seemingly would have this Board rule that simply because Complainant was not recognized as the exclusive representative when the violation allegedly took place, Complainant is prohibited from representing the employees for any violations that took place prior thereto as well as perhaps the employees' rights could not even be violated until the Board adopted regulations placing positions into the established occupational groups already provided by statute. This proposition seemingly lacks any direct authority as well as being in direct contravention to the purposes and policies of the Act to protect employees.

As indicated, nothing in the EMRA or the legislative history supports this absurd and unreasonable reasoning and it is black letter law that no portion of a statute should be interpreted to produce an absurd or unreasonable result. Importantly, the Board notes that the employees' rights under the EMRA are not determined by which bargaining units their job classifications/titles were placed into. Instead, NRS 288.270 (and its corresponding provisions detailed above) provides rights to state employees. SB 135, Sec. 19.1(a) defines "employee" as a person who "[i]s employees in the classified service of the State pursuant to chapter 284 of NRS." Codified at NRS 288.425; *see also* NRS 288.400 (indicating that purpose of SB 135 is to grant certain rights as well as establish "standards and procedures that protect the rights of employees"). However, the Board will not foreclose the reconsideration of this issue and expects clarification from the parties in their pre-hearing statements as to their respective positions.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss the Complaint is DENIED.

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IT IS FURTHER ORDERED that pre-hearing statements shall be due within 21 days of the date of this Order.

Dated this 23rd day of September 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: _____
BRENT C. ECKERSLEY, Chair

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

AFSCME, LOCAL 4041, Complainant, v. STATE OF NEVADA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGING AND DISABILITY SERVICES DIVISION, DESERT REGIONAL CENTER; DR. LISA THOMPSON-DYSON, RESIDENTIAL DIRECTOR, Respondents.	Case No. 2020-001 **NOTICE OF ENTRY OF ORDER** **ITEM NO. 861-A**

TO: Complainant and its attorney of record, Fernando Colon, Associate General Counsel, AFSCME Office of the General Counsel;

TO: Respondents and their attorneys of record, Roger L. Grandgenett II, Esq. and Neil C. Baker, Esq. and Littler Mendelson, P.C.

PLEASE TAKE NOTICE that the **ORDER ON RESPONDENTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** was entered in the above-entitled matter on September 23, 2020.

A copy of said order is attached hereto.

DATED this 23rd 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 23rd day of September 2020, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

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BRUCE SNYDER
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