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-B**

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** was entered in the above-entitled matter on April 15, 2021.

A copy of said order is attached hereto.

DATED this 15th day of April 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 15th day of April 2021, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

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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** **PANEL D** **ITEM NO. 861-B**

On April 15, 2021, 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 Employee-Management Relations Act (EMRA); NAC Chapter 288 and NRS Chapter 233B.

The operative complaint claims two primary violations – a violation of a duty to bargain in good faith and interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

Specifically, it is alleged that Respondents committed a prohibited practice by circumventing its duty to bargain in good faith with Complainant, the now exclusive representative, when it unilaterally changed the employees' shifts during Complainant's organizing campaign at the Desert Regional Center (DRC). By making said unilateral change, Respondents failed to maintain the status quo.

Complainant also asserts that Respondents interfered, restrained, or coerced employees in the exercise of their rights under the EMRA because the timing of Respondents' changes to employee shift lengths were intended to or had the effect of interfering with employee free choice to select an exclusive representative by encouraging employee defection from supporting Complainant as well as

undermining employee organizing to form their union. In other words, the operative Complaint (as well as the pre-hearing statements and Amended Notice of Hearing) makes clear that Complainant asserts that Respondents' changes interfered, restrained, or coerced employees in the exercise of various rights established under the EMRA.

The Department of Health and Human Services (the Department) operates the DRC, a treatment center for persons with intellectual and developmental disabilities. Located on the DRC campus is an intermediate care facility (ICF), which is a "24/7" facility where persons requiring intensive treatment reside. While the ICF at the DRC is the only state-run ICF in Nevada, the Department operates other "24/7" facilities that serve different populations. In particular, the Divisions of Child and Family Services and Public and Behavioral Health both operate "24/7" facilities serving their respective target populations. The Department employees charged with day-to-day care of the persons served at the ICF are the Developmental Support Technicians (DSTs). The DSTs fall within Bargaining Unit F and are the subject of the organizing efforts at issue in this case.

The EMRA was amended in 2019 to grant certain rights for state employees, becoming effective on June 12, 2019.[1] In June of 2018, the Department began granting Complainant's request for meeting spaces at the DRC campus to discuss union business with employees. While Complainant has been generally organizing for quite some time, the organizing campaign came into full swing specifically for the purpose of exclusive representation under Senate Bill 135 in roughly mid-2018 with the expectation of the EMRA's amendment coming to fruition.

According to Respondents, by Fall 2019, the Department determined that DSTs were responsible for a significant percentage of overtime. The Department decided to adopt the subject change in a memo dated December 16, 2019, with an effective date for the change of January 13, 2020.

Complainant filed their original petition with the Board on September 20, 2019. However, Complainant withdrew said petition as a preliminarily analysis by Board staff showed Complainant would be below the majority threshold. Complainant filed an amended petition on November 8, 2019.

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[1] 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).

On November 22, 2019, Board staff issued an audit report on the amended petition, which showed Complainant failed to obtain the requisite support (49.1%). This audit report was presented to the Board at our December 17, 2019 meeting. A December 18, 2019 addendum to the audit report notes that at said meeting, the Board gave Complainant until January 13, 2020 to submit the requisite authorization cards as Complainant stated they did not realize certain hourly workers were included in the unit due to failing to receive a requested employee list from NSHE. Complainant filed the needed authorization cards on December 18, 2019 (giving Complainant 50.4% evidence of support). The Board met on January 14, 2020, deliberated on the amended petition, and upon motion designated Complainant as the exclusive representative for Unit F. The Board issue the formal designation order on January 22, 2020.

DISCUSSION

As indicated, Complainant asserts two primary violations.

The Duty to Bargain in Good Faith

NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to bargain in bad faith with a recognized employee organization and a unilateral change to the bargained for terms of employment is regarded as a *per se* violation of this statute. A unilateral change also violates NRS 288.270(1)(a). *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *Jackson v. Clark County*, Case No. 2018-007, Item No. 837 (2019).[2] Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized

[2] As stated in a previous order in this case, Count 2 of the operative complaint is brought pursuant to NRS 288.270(1)(e) (which also derivatively violates NRS 288.270(1)(a)). 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." 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. Unless statutorily distinct, the general basic premise of a failure to bargain in good faith is applicable to the Executive Department. *See* NRS 288.620 ("To the greatest extent practicable, any decision issued by the Board before October 1, 2019, relating to the interpretation of, or the performance under, the provisions of NRS 288.270 shall be deemed to apply to any complaint arising out of the interpretation of, or performance under, the provisions of this section.").

bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002); *Kerns v. LVMPD*, Case No. 2017-010 (2018).

In addition to certain NLRB related precedent discussed herein, Complainant's support for a failure to bargain in good faith violation in this case hinges on the Board's 1991 decision involving a local government employer in *Clark County Public Employees Ass'n, SEIU Local 1107 v. Housing Auth. Of the City of Las Vegas*, Case No. A1-045478, Item No. 270 (1991).[3]

In said decision, the Board held that the employer had no duty to bargain until the Board's certification. Citing to NRS 288.150(1), the Board noted the plain language requiring negotiation with the "designated representatives of the recognized employee organization...." The Board held that the employer "was correct only to the extent it had no duty to bargain until the Board's certification". The Board noted that "recognition ... is assumed to immediately follow certification unless it is appealed."

However, the Board then found that the employer was required to maintain the status quo during the course of the association's organizing effort, and the unilateral changes which it implemented were violations of this obligation. The Board held: "The unilateral changes which the Authority implemented during the Association's organizing effort ... were not constructively scheduled prior to commandment of the organizing effort, clearly altered the status quo and constitute violations of the Authority's duty to bargain in good faith." The Board based this decision off of NLRB related precedent (though as we explain further herein, there seems to have been some confusion in regards to those citations regarding a violation of the duty to bargain in good faith (which derivatively violates NRS 288.270(1)(a)) and a violation of NRS 288.270(1)(a) based on NRS 288.140 (or NRS 288.500 as applicable to the Executive Department and Section 7 rights under the NLRA)).

The Board cannot reconcile said second holding[4] of *Clark County Public Employees Ass'n, SEIU Local 1107* with the plain and unambiguous language of the EMRA, as amended applicable to the Executive Department, as well as the NLRA and applicable NLRB precedent.

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[3] *See also Riebeling v. Housing Auth. of the City of N. Las Vegas*, Case No. A1-045552, Item No. 358 (1995) (citing the same cases and reasoning as well as relying on local government provisions).

[4] The holding being that the employer was required to maintain the status quo (and hence not make unilateral changes) as this violated *the duty to bargain in good faith*. To the extent *Clark County Public Employees Ass'n, SEIU Local 1107* is

Preliminarily, the EMRA is plain and unambiguous, which we are obligated to follow (we note that even if the EMRA was deemed ambiguous, Complainant failed to present any legislative history or other permissible aides of statutory interpretation which dictate a different result).

It is a prohibited practice for the Executive Department willfully to "[r]efuse to bargain collectively in good faith **with an exclusive representative** as required in NRS 288.565." NRS 288.620(b) (**emphasis** added). "As soon as practicable **after the Board designates an exclusive representative** of an unrepresented bargaining unit pursuant to NRS 288.400 to 288.630, inclusive, **the exclusive representative shall engage in collective bargaining** with the representative designated pursuant to subsection 1...." NRS 288.565(3) (**emphasis** added). "'Exclusive representative' means a labor organization that, **as a result of its designation by the Board**, has the exclusive right to represent all the employees within a bargaining unit **and to engage in collective bargaining** with the Executive Department ...." NRS 288.430 (**emphasis** added). "**Collective bargaining** and supplemental bargaining entail a mutual obligation of the Executive Department **and an exclusive representative** to meet at reasonable times and to bargain in good faith with respect to...."). NRS 288.500(2) (**emphasis** added). "An **exclusive representative shall**: ... [i]n good faith and on behalf of each bargaining unit that it represents, individually or collectively, bargain with the Executive Department ...." NRS 288.540(1)(b) (**emphasis** added).

The plain and unambiguous language of the EMRA thus makes crystal clear that the duty to bargain does not arise until the Board designates an exclusive representation. In this, the Board in *Clark County Public Employees Ass'n, SEIU Local 1107* agreed with based on language applicable to local governments. However, based on NLRB related precedent, the Board deviated and found that even though there was no duty to bargain, the employer was required to maintain the status quo and

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deemed inconsistent with the Board's order herein, we expressly overrule it. However, we note that our holding is limited to the Executive Department and the amended EMRA, as applicable. *Clark County Public Employees Ass'n, SEIU Local 1107* was based on the EMRA's provisions applicable to local government employers. As it is unnecessary to our determination herein, we do not analyze whether the result would be different for local government employers. *Ebarb v. Clark County*, Case No. 2018-006, Item No. 843-C (2020), *citing 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).

hence not make impressible unilateral changes. Yet, there is a critical distinction between the EMRA and the NLRA on which that federal precedent was based.[5]

A decision from the Illinois Labor Board (ILB) (based on Appellate Court of Illinois precedent) is instructive.[6] In that case, the "the issue on appeal [was] whether the Employer had a duty to bargain with the Union prior to the Board issuing the three certifications, and whether it therefore violated Section 10(a)(4) when it unilaterally implemented changes to its employees' health insurance benefits." *Service Employees International Union, Local 73, Charging Party And Sarah D. Culbertson Memorial Hospital*, Respondent, 21 PERI ¶ 6 (January 5, 2005). "The Charging Party argue[d] that the recent addition of Section 9(a)(5) to the Act, which allows the Board to designate a labor organization as an exclusive representative without an election if the union demonstrates a showing of majority interest, stands for the proposition that an employer's duty to bargain attaches at the time of the filing of a majority interest petition." *Id.*

"The Board first addressed the question of when an employer's duty to bargain arises in 1989 in *Chief Judge of the Circuit Court of Cook County*, 5 PERI ¶ 2024 (IL SLRB 1989), *aff'd.* 196 Ill.App.3d 238, 553 N.E.2d 415, 6 PERI ¶ 4016." "In *Chief Judge* the union, relying on the National Labor Relations Act, 29 U.S.C. §§ 151-169, and federal case law, contended that the duty to bargain begins not upon certification but after the union prevails in an election. *Citing*, *NLRB v. Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977)." *Id.* "However, the Board, as upheld by the Illinois Appellate Court, found that the language of the NLRA and the Act were materially different."

"Specifically, the Board compared Section 10(a)(4) of the Act to Section 8(a)(5) of the NLRA. Section 10(a)(4) of the Act reads as follow:

> It shall be an unfair labor practice for an employer or its agents to refuse to bargain collectively in good faith with a labor organization which is the *exclusive representative*

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[5] *State, Dep't of Bus. & Indus., Office of Labor Com'r v. Granite Const. Co.*, 118 Nev. 83, 88, 40 P.3d 423, 426 (2002) (**emphasis** added) ("When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, **only if the state and federal acts are substantially similar** and the state statute does not reflect a contrary legislative intent.")

[6] As further detailed, the Illinois Public Relations Act is substantially similar to the EMRA in regards to the duty to bargain. Indeed, as detailed above, the language in the EMRA is even stronger and clearer than that of the Illinois Public Relations Act.

> of public employees in an appropriate unit, including, but not limited to, the discussion of grievances with the exclusive representative. (Emphasis added).

In comparison, Section 8(a)(5) of the NLRA reads:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the *representatives* of his employees, subject to the provisions of Section 9(a). (Emphasis added)."

Id. (*emphasis* in original). "Moreover, the Board noted that under Section 3(f) of the Act a labor organization is an exclusive representative only if it has been: ... *designated by the Board* as the representative of a majority of public employees in an appropriate bargaining unit in accordance with the procedures contained in th[e] Act." *Id.* (*emphasis* in original).

"In contrast, the Board noted that Section 9(a) of the NLRA provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit shall be the exclusive representatives of such unit." *Id.* "Based on this language the Board found that under the NLRA, the duty to bargain can and does exists when a union is selected by the employees as their exclusive representative." *Id.* "Contrary to the NLRA, the Board found that it was clear that under the Act, an employer's duty to bargain extended only to an exclusive representative ... which a union becomes only when it is designated by the Board pursuant to the Act's representation procedures, and not when it is selected by the employees." *Id.* (internal citations omitted).

"Both the Board and the Illinois Appellate Court expressly concluded that the differences between the statutory language in the Act and the NLRA rendered inapplicable federal precedent requiring employers to recognize and bargain with a union during the interval between its election by a majority of unit employees and the issuance of agency certification." *Id.*

The ILB held the same line of reasoning applied in the matter before them, and "[t]he statutory language in the Act and the NLRA still differ, rendering any federal precedent inapplicable." *Id.* The ILB explained further: "Although *Chief Judge* is binding case law, it is important to note that the decision was rendered in the context of a representation election." *Id.* "Thus, the issue of first impression is whether there is anything in the newly added majority interest language that requires the Board to come to a different result in the context of a Section 9(a)(5) majority interest petition." *Id.* "It is the Union's position that, in light of this recent amendment to the Act, the Board should reconsider its position with regard to the time at which the duty to bargain arises." *Id.* "Specifically, the Union

argues that Section 9(a)(5) of the Act stands for the proposition that the Employer's duty to bargain attaches, at the latest, at the time of the filing of a majority interest petition." *Id.*

The ILB held that "the Union's argument over looks the fact that the Act does not include the 'designated or selected by the employees' language of Section 9(a) of the NLRA, and therefore does not provide for a duty to bargain to attach at the time a union is selected by a majority of employees." *Id.*[7]

This decision is instructive as it clearly explains the statutory distinctions between the Illinois Public Relations Act (which mirrors the EMRA) and the NLRA. This is of critical importance as the duty to bargain arises at different points in time under the NLRA and the EMRA (primarily after an election or showing of majority interest as further detailed herein under the NLRA and not until designation under the EMRA in regards to the current dispute). As further explained, the federal precedent mandating maintaining the status quo (and not making unilateral changes) is based on when the duty to bargain arises under to the NLRA. Since the duty arises at different points in time pursuant to the plain and unambiguous language of the EMRA, the federal precedent is inapplicable to the case at hand. *See supra* note 5.

"It is settled law that an employer **may not unilaterally change its employees' wages or other working conditions <u>when it is subject to the statutory duty to bargain</u>** with a designated representative of its employees." *N.L.R.B. v. Allied Prod. Corp., Richard Bros. Div.*, 548 F.2d 644, 652 (6th Cir. 1977) (**emphasis** added), *citing N.L.R.B. v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962); *N.L.R.B. v. McCann Steel Co.*, 448 F.2d 277 (6th Cir. 1971). In *Allied Prod. Corp., Richard Bros. Div.*, the court noted that they did not agree that "an employer may freely make unilateral changes until a union has been certified as the bargaining representative of its employees." *Allied Prod. Corp., Richard Bros. Div.*, 548 F.2d at 653. The Sixth Circuit explained that "our circuit decided that the fact that an established Christmas bonus was reduced only one day after the election of the union, but before

[7] ILB additionally explained: "Moreover, and of critical importance, is the fact that the language in Section 9(a)(5) of the Act mirrors the language found in Section 3(f) of the Act." *Id.* "Section 9(a)(5) reads that the Board 'shall designate an exclusive representative for purposes of collective bargaining when the representative demonstrates a showing of majority interest by employees in the unit.'" *Id.* "Such language makes clear that Board designation is still required in order for a labor organization to become an exclusive representative of unit employees." *Id.* "Additionally, there is no legislative history to suggest that a different outcome in the majority interest situation was intended." *Id.* "Thus, notwithstanding the Board's current case law, the legislature still chose to provide only Board designation of an exclusive representative and did not allow for employee selection." *Id.*

certification, did not negate violation of s 8(a)(5)." *Id.* The 6th Circuit upheld: "**It is the election the choice of the union as the employees' bargaining representative that gives rise to the employer's duty to bargain. An employer's objections to certification do not relieve it of that duty.**" *Id.* (**emphasis** added). *See also King Radio Corp. v. N. L. R. B.*, 398 F.2d 14, 17 (10th Cir. 1968) ("Since the Union received a majority of the votes at the election, King, although it filed objections to the election, acted at its peril in unilaterally changing working conditions before the certification."); *W.A. Krueger Co.*, 299 NLRB 914, 1226 (1990) (**emphasis** added) ("The gravamen of the complaint allegations is that the Respondent unlawfully made unilateral changes in employees' wages and terms and conditions of employment **after the election but before the certification of results.**"); *N.L.R.B. v. Zelrich Co.*, 344 F.2d 1011, 1013 (5th Cir. 1965) ("respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withholding the Christmas bonus, by unilaterally granting wage increases and by specifically refusing to bargain with the Union at a time when the Union was entitled to recognition as the collective bargaining representative of the employees."); *Highland Superstores*, 301 NLRB 199, 208 (1991) (**emphasis** added) ("Rather, **the Company's duty to refrain from unilateral action arose when the Union's majority status was shown in June 1988 by the tally of ballots** which led to the Union's certification"); *N.L.R.B. v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 869 (5th Cir. 1966) ("If an employer refuses to bargain on the ground the election which preceded the certification was invalid, it does so at its own risk"); *Peabody Coal Co. v. N.L.R.B.*, 725 F.2d 357, 365 (6th Cir. 1984) (**emphasis** added) ("An employer violates section 8(a)(5), when, **although subject to a duty to bargain**, it makes unilateral changes in existing terms and conditions of employment without first notifying the collective bargaining agent."); *cf. Comcast Corporation*, 45 NLRB AMR 31 (2014) (**emphasis** added) ("**Here, the parties were still in the pre-election period. Therefore, the employer had no duty to maintain the status quo.**").

In addition to receiving majority of votes in the election, a representative can also be "selected" pursuant to the NLRA by possessing authorization cards signed by a majority of the employees in a unit. *Schaub v. Spen-Tech Mach. Corp.*, 925 F. Supp. 1220, 1227 (E.D. Mich. 1996) ("Despite the Sixth Circuit's declaration in *Allied Products*, the Supreme Court has explicitly stated that, in addition to a valid election, 'possession of cards signed by a majority of the employees authorizing the union to

represent them for collective bargaining purposes' could also subject an employer to a duty to bargain collectively. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597, 89 S.Ct. 1918, 1931–32, 23 L.Ed.2d 547 (1969)."). As explained by the Court in *Schaub*, there was reason "to believe that Spen–Tech violated §8(a)(5) when it made unilateral changes in employment conditions **while it was subject to a duty to bargain**." *Id.* (**emphasis** added); *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 596, 89 S. Ct. 1918, 1930–31, 23 L. Ed. 2d 547 (1969) (holding that besides an election, an alternative route to majority status and being "selected" is through the possession of authorization cards signed by a majority of the employees, citing to 29 U.S.C. §§ 158-159); *Teamsters Local 14 v. Las Vegas Police Protective Ass'n Civilian Employees, Inc.*, Case No. 2018-031, Item No. 839-B (2020); *but see Linden Lumber Div., Summer & Co. v. N. L. R. B.*, 419 U.S. 301, 305–06, 95 S. Ct. 429, 432, 42 L. Ed. 2d 465 (1974) ("While we have indicated that cards alone … do not necessarily provide such 'convincing evidence of majority support' so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt.'"); *N.L.R.B. v. Prineville Stud Co.*, 578 F.2d 1292, 1296 (9th Cir. 1978) ("There is no automatic duty to bargain when an employer is notified that a majority of employees within an appropriate unit have signed union authorization cards."); *N.L.R.B. v. Westinghouse Broad. & Cable, Inc., (WBZ-TV)*, 849 F.2d 15, 21 (1st Cir. 1988).

In other words, the duty to bargain arose after the election or sometimes upon submission of cards evidencing majority support. *See, e.g., W.A. Krueger Co.*, 299 NLRB 914, 1226 (1990) ("We note that an employer in an organizational campaign has no preexisting obligation to bargain with the Union. The status quo for such an employer is to act unilaterally."). As detailed, this is found within the language of the NLRA.[8] Solely because the union had yet to be certified did not change the result.

[8] As explained by the ILB, Section 9 provides: "Representatives **designated or selected** for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment…." Sec. 9 [§ 159] (**emphasis** added). Under the NLRA, it is an unfair labor practice of an employer to "refuse[] to bargain collectively **with the representatives**, subject to provisions of sec. 9(a)…." Sec. 8 [§ 158] (**emphasis** added). The EMRA contains different standards. NRS 288.620, NRS 288.565, NRS 288.430, NRS 288.540, NRS 288.500. Indeed, the Nevada Supreme Court has found NLRB election related precedent inapplicable to local governments based on differences between the NLRA and EMRA. *Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, 134 Nev. 716, 429 P.3d 658 (2018). "This is true 'even if the statute is impractical.'" *Id.* at 721. *See also Teamsters Local 14 v. Las Vegas Police Protective Ass'n Civilian Employees, Inc.*, Case

As the duty to bargain arose, the employer could no longer make unilateral changes and hence had to maintain the status quo. **The various NLRB precedent cited mandating an employer maintain the status quo (and not make unilateral changes) is not applicable here as the Board is required to follow the plain and unambiguous language of the EMRA (again, Complainant failed to provide any legislative history or other permissible aides of statutory construction to the contrary).**

A closer look as the decisions cited by the Board in *Clark County Public Employees Ass'n, SEIU Local 1107* verifies the analysis. *See, e.g.*, *Camden Housing Auth.*, 13 NJPER ¶ 18191 ("Housing … violated its duty to bargain in good faith by adopting resolution, delaying payment of employees' annual salary increments, one day prior to PERC's certification of newly elected majority bargaining representative."); *Pensacola Junior College*, 13 FPER ¶ 18150 ("unilaterally altering the status quo regarding promotions and yearly step increases during negotiations for the parties' first collective bargaining agreement."); *California State University vs. California Faculty Assn.*, 9 NPER CA-18090 (April 29, 1987) (union was already the exclusive representative in a case concerning events during the latest round of negotiations); *State of New Jersey (Corrections), Respondent, and New Jersey Law Enforcement Supervisors Association, Charging Party; State of New Jersey (Corrections) Respondent, and New Jersey Superior Officers Law Enforcement Ass'n*, 46 NJPER ¶ 49 ("The status quo represents that situation which affords the least likelihood of disruption during the course of negotiations for the new contract.").

As Respondents were not subject to the duty to bargain in good faith, they were free to make unilateral changes without violating their duty to bargain in good faith. In other words, we find that the obligation to maintain the status quo and not make unilateral changes, in this context, does not attach until the duty to bargain arises. Thus, Respondents did not violate NRS 288.620(1)(b) and derivatively NRS 288.270(1)(a)[9].

No. 2018-031, Item No. 839-B (2020) (explaining further distinctions as well as noting "[t]his was despite the fact that the EMRA was modeled after the NLRA, the EMRA contained similar language as the NLRA regarding election standards, the Board had historically used the majority of the votes cast standard since its inception … and there was no indication in the legislative history that the EMRA sought to impose a new and unheard of aberration from election standards (or any objective evidence to impose such a heightened standard.)"). As we have repeatedly explained, it is for the Legislature to make the law, not this Board.

[9] As we explained in a prior order in this case: "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." As should be obvious by the

NRS 288.500 RIGHTS

As indicated, a violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA. *See supra* note 9. It is of critical importance when analyzing applicable NLRB related precedent to not confuse or conflate the rights upon which a NRS 288.270(1)(a) (or Sec. 8(a)(1) under the NLRA) violation is found.[10]

NRS 288.270(1)(a) provides that it is a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA. NRS 288.500 bestows certain rights including "[f]or the purposes of other mutual aid or protection" to "[o]rganize, form, join and assist labor organizations… and engage in other concerted activities".[11]

As we have explained, 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 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

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plain language in NRS 288.270(1)(a), we have not held that NRS 288.270(1)(a) may be violated absent some right guaranteed under the EMRA. *See, e.g., Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 100, 715 P.2d 1321, 1323 (1986); *Ormsby County Teachers Ass'n v. Carson City Sch. Dist.*, Case No. A1-045405, Item No. 197 (1987); *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 476, 998 P.2d 1178, 1180 (2000); *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 678, 119 P.3d 1259, 1261 (2005); *Nevada Serv. Employees Union, Local 1107, AFL-CIO v. Clark County*, Case No. A1-045759, Item No. 540B(2005); *Kilgore v. City of Henderson*, Case No. A1-045763, Item No. 550H (2005); *Reno Police Supervisory and Employees Ass'n v. City of Reno*, Case No. A1-045923, Item No. 694 (2009); *Eason v. Clark County*, Case No. A1-046109, Item No. 798; *Am. Ship Bldg. Co. v. N. L. R. B.*, 380 U.S. 300, 308, 85 S. Ct. 955, 962, 13 L. Ed. 2d 855 (1965) ("To establish that this practice is a violation of s 8(a)(1), it must be shown that the employer has interfered with, restrained, or coerced employees in the exercise of some right protected by s 7 of the Act."); *N. L. R. B. v. Transp. Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971) ("Sections 8(a)(1) and 8(a)(3) implement the rights guaranteed to employees by § 7.")

[10] In addition to the distinction involving a violation of the duty to bargain in good faith (Sec. 8(a)(5) under the NLRA), we note that Complainant did not allege a violation of NRS 288.270(1)(c) (Sec. 8(a)(3) equivalent under the NLRA). As such, a violation of NRS 288.270(1)(c) is not at issue in this case. This is important when analyzing the various case applications.

[11] In contrast to the previous analysis, the EMRA and NLRA are substantially similar in this respect and, as such, the federal precedent is persuasive absent an indication to the contrary. *See supra* note 5. *Compare* NRS 288.620, NRS 288.270, NRS 288.500(1)(a) *with* 29 U.S.C. § 158(a)(1) (Sec. 8) ("to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]"), 29 U.S.C. § 157 (Sec. 7) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, … and to engage in other concerted activities for the purpose of … other mutual aid or protection….").

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).

Complainant asserts that Respondents violated Section (1)(a) by interfering with employee rights to organize and bargain collectively guaranteed under the EMRA. Specifically, Respondents' actions of changing employees' shift lengths during Complainant's organizational campaign. Complainant notes that employees, pursuant to NRS 288.500, have the right to "[o]rganize, form, join and assist labor organizations, engage in collective bargaining … and engage in other concerted activities".

Complainant argues that "[a]lthough unilateral changes to mandatory subjects of bargaining during a union's organizing campaign, like unilateral changes to mandatory subjects of bargaining during the collective bargaining relationship, are *per se* prohibited practices under NRS 288.270(a) and (e), Respondents' actions interfered with the employees' rights to organize and bargain collectively guaranteed under NRS Chapter 288 and the Act." Specifically, "the evidence demonstrates that Respondent's unilateral reduction to employee shifts discouraged employees from organizing to form their union with Complainant."

Respondents counter that the shift length changes did not interfere with Complainant's organization campaign. Respondents contend the Board follows the NLRB in applying the *American Freightways*, *infra*, test when considering a claim of an unlawful unilateral change during an organizing campaign. Respondents additionally cite *In re Noah's Bay Area Bagels, infra*, as well as *True Temper, infra*, for the proposition that an employer may adduce "a persuasive business reason demonstrating the timing of the [alleged unilateral change] was governed by factors other than the union campaign."

Preliminarily, as explained, Respondents' actions did not tend to interfere, restrain, or coerce any employees in the exercise of their right to engage in collective bargaining through their exclusive representative. Based on the plain and unambiguous language of the EMRA, the obligation to maintain the status quo and not make unilateral changes does not attach until the duty to bargain arises, and thus Respondents' actions did not tend to interfere, restrain, or coerce any employees in the exercise of the aforementioned right.

The question remains as to whether Respondents interfered, coerced, or restrained with employees' other NRS 288.500 rights.

In *American Freightways Co.*, 124 NLRB 146, 14 (1959)[12], the Board did not agree with the test applied by the Trial Examiner. The NLRB held: "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *Id.* "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Id.* The NLRB then applied the test and found "that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8(a)(1) of the Act." *Id.* As such, the NLRB provided for the additional conclusion of law:

> By granting certain benefits to its employees, and by changing certain terms and conditions of employment, including the advance posting of holidays, payment of overtime in a holiday week, and the changing of its emergency leave policy, at a time when the unions were seeking to organize the employees involved, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Id.; see also In Re Am. Tissue Corp., 336 NLRB 435, 441-42 (2001) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed."); *Advanced Life Sys. Inc. v. Nat'l Labor Relations Bd.*, 898 F.3d 38, 47 (D.C. Cir. 2018) ("Unlike Section 8(a)(1), violations of Section 8(a)(3) require proof of the employer's motive or animus."); *Am. Fed'n of Teachers, Afl-Cio d/b/a Washington*

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[12] Interestingly, in our 1991 decision of *Clark County Public Employees Ass'n, SEIU Local 1107, supra*, the case was primarily based on a violation of the duty to bargain in good faith, and derivatively, NRS 288.270(1)(a). Thus, the Board's citation to *American Freightways Co., Inc.* should be viewed with caution. *See supra* note 10 and accompanying text; *see also Clark County Public Employees Ass'n*, Item No. 270, at 1, 3-4, 21-22 ("The unilateral changes which the Authority implemented during the Association's organizing effort … were not constructively scheduled prior to commencement of the organizing effort, clearly alerted the status quo and constitute violations of the Authority's duty to bargain in good faith."), 22-23 ("in contravention of its duty to bargain regarding the changes in benefits … in contravention of its duty to bargain regarding said changes …."), 23 ("While the Authority's motivation for making the subject changes irrelevant and not at issue in the dispute" (citing *American Freightways Co.*) "the actions of the Authority … were designed and intended to circumvent the Authority's duty to bargain…." *See also supra* Section on Duty to Bargain in Good Faith and discussion of cited cases in *Clark County Public Employees Ass'n, SEIU Local 1107*. However, the Board did hold "it [was] clear that the unilateral implementation of said changes during the Association's organizing effort had the same effect as conduct which interferes with the rights of the employees to organize …." *Id.* at 23, 31. *See also, e.g.*, N.*L.R.B. v. Otis Hosp.*, 545 F.2d 252, 254 (1st Cir. 1976) (explaining that "[n]either the Administrative Law Judge nor the Board distinguished between sections 8(a)(1) and (a)(3), though the statutory language and case law suggest that the requirements for establishing violations of each section differ. An employer violates section 8(a)(1) if the effect and purpose of his actions can be said to impinge upon the employees' rights to unionize.").

State Nurses Org. Project, &/or Am. Fed'n of Teachers, Afl-Cio & Washington State Nurses Org. Project & Commc'ns Workers of Am., Local 7901, No. 19-CA-190619, 2019 WL 7168880 (Dec. 23, 2019) (citing to the *American Freightways* test with approval); *Prod. & Laquae Leslie, an Individual*, No. JD(NY)-06-17, 2017 WL 1295416 (Apr. 6, 2017) ("the Board's test for 8(a)(1) violations does not turn on the actor's motive or the success or failure of the attempted coercion."); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339, fn. 3 (2000) ("It is well established that the motive behind employer statements regarding the consequences of unionization is not relevant; rather, such statements violate Sec. 8(a)(1) if they have a reasonable tendency to interfere with, restrain, or coerce union activities"); *Caterpillar Tractor Co.*, 242 N.L.R.B. 523, 532, n. 30 (1979) ("We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act, *enforced*, 638 F.2d 140 (9th Cir. 1981)"); *National Aluminum*, 242 N.L.R.B. 294, 298 (1979) ("Defeat of those [Section 7] rights by employer action does not necessarily depend on the existence of an anti-union bias."); *Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item No. 237 (1989) ("some conduct by its very nature contains the implications of the required intent. In such cases the natural foreseeable consequences of an employer's actions may justify the conclusion that … interference was intended. Thus, the existence of … interference may be inferred by the Board based upon its experience in the labor management relations area."); *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227, 83 S. Ct. 1139, 1144, 10 L. Ed. 2d 308 (1963); *Ormsby County Teachers v. Carson City Sch. Dist.*, Item No. 197, Case No. A1-045405 (1987); *Caterpillar Tractor Co.*, 242 NLRB 523, 532 (1979) ("Contrary to Respondent's allegation, no proof of antiunion bias or coercive intent or effect is necessary for a finding of a Section 8(a)(1) violation, where the employer engages in conduct which, it may reasonably be said, interferes with the free exercise of employee rights under the Act.").

As indicated, while Respondents concede that *American Freightways, supra*, is applicable, they additionally cite *In re Noah's Bay Area Bagels, infra*, as well as *True Temper, infra*, for the proposition that an employer may adduce "a persuasive business reason demonstrating the timing of the [alleged

unilateral change] was governed by factors other than the union campaign." As further detailed below, Respondents' also primarily argue they made the change due to overtime costs – in other words, Respondents seemingly contend the NRS 288.270(1)(a) violation turns on their purpose or motive for making the change (*i.e.*, Respondents did so because they wanted to decrease overtime costs and not to interfere, restrain or coerce employees' in the exercise of NRS 288.500 rights).

As also indicated, the Board has generally stated that one component to the claim of interference with a protected right is that "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)[13].

In *Medco*, when dealing with the Section 8(a)(3) discrimination claim, the Fourth Circuit noted that "an employer violates this section 'only if its actions are motivated by anti-union animus.'" *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 741 (4th Cir. 1998). In contrast, when analyzing the distinct Section 8(a)(1) interference of Section 7 rights claim, the Court explained, "If protected activity is implicated, the well-settled test for Section 8(a)(1) violations is whether, "under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees." *Id.* at

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[13] *Contra Reno Police Protective Ass'n*, 102 Nev. at 101, 715 P.2d at 1323 (applying the burden shifting approach common in cases of discrimination), *citing N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394, 103 S. Ct. 2469, 2470–71, 76 L. Ed. 2d 667 (1983), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994) (noting the "complaint alleg[ed] that an employee was discharged because of his union activities"); NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) ("by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"); *N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 909 (1st Cir. 1981), *abrogated on other grounds by N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983) ("Wright Line discharged Lamoureux because of his union activity, in violation of section 8(a)(3) of the Act."); *Champion Parts Rebuilders, Inc., Ne. Div. v. N.L.R.B.*, 717 F.2d 845, 853 (3d Cir. 1983) ("Under the Board's *Wright Line* analysis, the Company's failure to meet its burden of persuasion that it had a non-discriminatory reason for its action results in a finding for the General Counsel."); *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980) ("In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1)", "After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act."); *N.L.R.B. v. United Sanitation Serv., Div. of Sanitas Serv. Corp.*, 737 F.2d 936, 939 (11th Cir. 1984) ("The question of an employer's motivation in section 8(a)(3) cases is a question of fact to be resolved by the Board from a consideration of all the evidence."); *In the Matter of the Reno Police Protective Ass'n v. The City of Reno*, Case No. A1-045334, Item No. 115 (1981) ("The thrust of the complaint is … that by demoting Butterman from probationary sergeant to patrolman the city has engaged in a prohibited practice by discriminating against Butterman, president of the Association, because of his office in the Association…."); *Riebeling v. Housing Auth. of the City of N. Las Vegas*, Case No. A1-045552, Item No. 358 (1995) ("Eliminating the positions and contracting out the work of employees who are attempting to unionize certainly is discriminatory and does discourage union membership/organization"); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, at 2, filed June 30, 2020, unpublished deposition (Nev. 2020).

745. "It matters 'not whether the [employer's] language or acts were coercive in actual fact.' Our inquiry instead focuses on 'whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate.' This question of '[w]hether particular conduct is coercive is a 'question essentially for the specialized experience of the NLRB,' and we grant considerable deference to its determinations." *Id.* (internal citations omitted).

The Court continued: "We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement. '[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated.'" *Id.* "This determination is also squarely within the expertise of the Board. '[I]t is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Id.* As such, the Court explained: "Consequently, an independent violation of § 8(a)(1) exists when (1) an employer's action can be reasonably viewed as tending to interfere with, coerce, or deter (2) the exercise of protected activity, and (3) the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's § 7 rights." *Id.*

The Court further explained: "An employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity." *Id.* "This is true even if an employee has yet to exercise a right protected by the Act." *Id.* "The rationale for this rule is straightforward. Section 8(a)(1) reaches all acts by employers that 'interfere with, restrain, or coerce' their employees' exercise of protected rights, *see* 29 U.S.C. § 158(a)(1), and this requires that the section reach employer conduct even when employees have yet to engage in protected activity." *Id.* "As we state above, the test is not whether the employer's action was coercive in fact, but whether it reasonably tends to coerce or deter the exercise of protected rights." *Id.* The protection afforded by Section 7 "applies even to activities that do not involve unions or collective bargaining." *Id.* at 746. The Court explained that "[u]nlike violations of § 8(a)(3), an employer's antiunion motivation is not a required element of § 8(a)(1)." *Id.* at 747.

Regardless, in this case, the distinction does not change the result – in other words, Respondents committed a violation even if considering Respondents' justification, purpose, or motive. Moreover,

Respondents failed to justify their action with a substantial and legitimate business reason that outweighs the employee's NRS 288.500 rights. This is not only supported by over 50 years of federal persuasive precedent as well as the plain language of the EMRA and prior EMRB decisions (cited above and further below), but also by Respondents' own citations.

As indicated, Respondents cite *In re Noah's Bay Area Bagels* as well as *True Temper* for the proposition that an employer may adduce "a persuasive business reason demonstrating the timing of the [alleged unilateral change] was governed by factors other than the union campaign."

In *In Re Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), the NLRB adopted the ALJ's recommendation dismissing the allegation of unlawful warning of distribution of union literature, finding that "the respondent could prohibit such conduct on a nondiscriminatory basis." In this case, which is not directly applicable to the matter at hand, the Board stated the test regarding granting benefits during the critical period is for the purpose of influencing the employees' vote in an election.[14] *Id.*

As distinguishable from the matter at hand, it was found that "based on the unusual and exigent circumstances confronting the Respondent at the same time that the Union was filing its petition to represent the Telegraph store employees, the Respondent has established a legitimate business reason for restoring the Prudential plan on a companywide basis at all of its stores—including the Telegraph store—during the critical period prior to the election." *Id.* at 190. "Thus, the parent company announced the change in health benefit plans about 2 months before the April 4 filing of the representation petition." *Id.* "Immediately following the announcement of the change, the Respondent began attempting to persuade its parent company to restore the Prudential plan." *Id.* "The actual April 1 implementation of the change, and the accompanying companywide expressions of employee distress about the loss of the Prudential plan, began just a few days before the start of the critical period." *Id.* "Given the importance of employee confidence in their health care insurance and benefit plan, the

[14] Specifically: "It is well established that the mere grant of benefits during the critical period is not, *per se*, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits." *Id.*

urgent expressions of companywide employee distress over their loss of the Prudential plan, and the reasonable prospect of at least some weeks passing before the finalization of the representation proceeding, we find that the Respondent has presented a persuasive business reason for immediately announcing the restoration of Prudential plan benefits companywide as soon as it received permission from the parent company on April 10 to restore such benefits." *Id.* "Thus, we find that the Respondent has established that the timing of the announcement and implementation of the restoration of Prudential plan benefits was governed by factors other than the union campaign." *Id.*; *see contra Csc Holdings, LLC & Cablevision Sys. New York City Corp., A Single Emp. & Commc'n Workers of Am., Afl-Cio*, 2014 L.R.R.M. (BNA) ¶ 172659 (N.L.R.B. Div. of Judges Dec. 4, 2014) (distinguishing *In Re Noah's Area Bagels*, noting "I find that Respondent's reliance on these cases is misplaced since they do not stand for the proposition that Respondent seems to be asserting that the fact that an increase in wages or benefits is granted corporatewide is sufficient to establish that its granting such benefits for employees at one facility (where there is union organization) is unrelated to union organizational activities and lawful.").

In *True Temper Corp.*, 127 NLRB 839, 840 (1960), the NLRB affirmed the Trial Examiner's order. In that matter, during the organizational campaign, the employer announced and granted a wage increase to its employees. "The complaint alleges that during the month of April 1958, Plant Manager Borer announced and granted a wage increase to its employees for the purpose of discouraging union activities."[15] *Id.* at 842.

"Respondent, on the other hand, adduced evidence to establish that the wage scale at the Union City plant when Respondent purchased that plant in 1955 was very low, and that its April and July increases were part of an overall plan, in effect long before organizational activities began, to bring the wage scale at Union City in line with comparable 'captive handle' plants operated by Respondent as production and efficiency improved at the newly remodeled and enlarged Union City plant." *Id.* at 843. "Respondent likewise adduced testimony to establish that the granting of fringe benefits in the

[15] As indicated above, under the NLRA (and corresponding provision of the EMRA not alleged here), it is an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Sec. 8(a)(3) [§ 158]. "General Counsel disclaims any suggestion that the April 23 letter was independently violative of Section 8(a)(1) of the Act." *Id.* at 843, n. 4.

way of paid holidays, rest periods, and installation of vending machines was merely designed to, and had the effect of, equating the working conditions at the newly remodeled and enlarged Union City plant to the working conditions at plants of Respondent which had already been established for some time." *Id.*

The Trial Examiner held: "I am satisfied and I find that the announcement and granting of the wage increases on April 21 and July 21 was an implementation of an overall wage program for the Union City plant which had been in effect long before the union activities began, and was not for the purpose of undermining the Union's organizational campaign." *Id.* "I find also the granting of the fringe benefits was attributable to Respondent's desire to bring the working conditions at the newly reopened Union City plant to a par with the working conditions at Respondent's other plants and to do so as quickly as the physical and operating conditions of the plant permitted." *Id.*

In rejecting a *per se* violation, the Trial Examiner cited to *Hudson Hosiery Company*, 72 NLRB 1434, 1437 (a case decided before *American Freightways*), noting that "[w]hat is unlawful under the Act is the employer's granting or announcing such benefits (although previously determined upon bona fide) for the purpose of causing the employees to accept or reject a representative for collective bargaining." *Id.*[16]

The Trial Examiner noted: "The doctrine here enunciated serves the purpose of immunizing employees from economic coercion in their choice of a bargaining representative. At the same time, it avoids the otherwise paradoxical result of compelling employees to forfeit benefits which would otherwise accrue merely because they are seeking to exercise their statutory right to select a bargaining representative." *Id.* at 843.

In analyzing the general test of *American Freightways*, *supra*, the Trial Examiner reasoned:

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[16] *See also, e.g., N.L.R.B. v. Otis Hosp.*, 545 F.2d 252, 254 (1st Cir. 1976) ("On a similar theory, to grant benefits during a union organizing campaign has been held to violate section 8(a)(1) if, at the time, the employer knew or should have known that a union was organizing or that an election was pending, and if the benefits were granted with the purpose of interfering with the employees' rights to organize."); *Struthers-Dunn, Inc.*, 228 NLRB 49, 69 (1977) ("The Board's test for determining the validity of a wage increase during the pendency of a representation petition is whether it is given 'for the purpose of inducing employees to vote against the union'. *Tonkawa Refining Co.*, 175 NLRB 619 (1969), *enfd.* 434 F.2d 1041 (C.A. 10, 1970). And the burden is on the employer to come forward with an explanation for the timing other than the election.").

> On its face this broad language would seem to overrule, at least *sub silentio*, the rulings in cases like *Hudson Hosiery*. However, it is an elementary principle of Anglo-American jurisprudence that a judicial or quasi-judicial tribunal normally passes only on the case before it and, absent cogent indication to the contrary, the tribunal should not be taken as having laid down a broad new principle of law or as having overruled, *sub silentio*, a prior line of authority. I do not believe the Board has done so in the *American Freightways* case. It is significant, it seems to me, **that in that case some of the changes made were unexplained departures from company policy not previously contemplated or in effect. Moreover, in that case the changes were announced a month and a half after a petition for representation was filed with the Board. Under these circumstances the Board could reasonably conclude as it did that Respondent's conduct necessarily tended to interfere with the free exercise of employee rights under the Act and that the employer's lack of an antiunion motive was immaterial.** Viewed from another perspective, the Board could conclude that under the circumstances of the *American Freightways* case, the employees there involved, on the basis of their knowledge, would be restrained in the exercise of their organizational rights.
>
> **This is a far cry, it appears to me, from saying that under any set of facts and at any stage of an organizational campaign, 'it may reasonably be said' that a change in wages or working conditions 'tends to interfere with the free exercise of employee rights under the Act.'** *American Freightways*, *supra*. I do not read the cited case as so holding. **In the instant case where the changes in wages and working conditions were made at the preliminary stages of an organizational campaign, where they were made pursuant to company policy and pattern which had been established before the organizational campaign started, where information concerning that policy and pattern was made available to the employees, and where there is no probative evidence that the changes were made 'for the purpose of' coercing the employees in their choice of a bargaining representative, I perceive no basis for concluding that Respondent's action tended to interfere with the free exercise of employee rights under the Act.**
>
> Accordingly, I find that Respondent did not, by granting the wage raises of April 21 and July 21, and by granting fringe benefits during that period, violate Section 8(a)(1) of the Act.

Id. at 843-44 (**emphasis** added).

The evidence illustrates that even if the analysis provided above in *True Temper* and *In re Noah's Bay Area Bagels* is applicable, those cases actually support a finding of a violation here. Not only was the change "not previously contemplated or in effect", they were announced in what could be deemed a critical time in this case. Unlike the matter in *True Temper*, the change was not made at the preliminarily stages of an organizational campaign[17], not made pursuant to company policy established

[17] Because the change was announced soon before designation, it is a red herring that Complainant had been generally organizing for some time or over 20 years (as well as in consideration with the timing of Respondents' other actions detailed herein). *See also infra* note 19 and accompanying text.

before the organizational campaign reasonably began[18], and Respondents failed to credibly explain the timing of their action (as further detailed below). Moreover, the change was announced roughly a month in a half after Complainant filed their amended petition.

As conceded by Respondent, they did not even determine that DSTs were responsible for a significant percentage of overtime until fall of 2019, let alone contemplate or commence the changes needed. The Department decided to adopt the subject change in a memo dated December 16, 2019, with an effective date for the change of January 13, 2020.

As explained, the EMRA was amended in 2019 to grant certain rights for state employees becoming effective on June 12, 2019. In June of 2018 (well before Respondents made the above determination), the Department began granting Complainant's request for meeting spaces at the DRC campus to discuss union business with employees. While Complainant has been generally organizing for quite some time, the organizing campaign came into full swing specifically for the purpose of obtaining exclusive representation under Senate Bill 135, roughly mid-2018, with the expectation of the EMRA's amendment coming to fruition (though perhaps generally a bit earlier in late 2017 when they reached out to the Department to be able to make a presentation at new employee orientations).[19] Jeanine Lake credibly testified that they were optimistic about a collective bargaining bill being passed in the 2019 legislative session (which indeed happened), and thus they "beefed up" the organizing campaign. Specifically, they made a request to the Agency manager of DRC to be permitted to have a

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[18] Those decisions, as well as related ones cited herein, make clear the changes were related to a company policy and pattern or an overall wage program already contemplated. In contrast, Respondents' general, roughly 30-year-old, 1992 Change of Work Assignment, Reinstatement, Open Hiring Procedure policy, while permitting changes in working assignments subject to notice, does not even discuss overtime earned pursuant to lunch breaks (or even overtime generally). Indeed, the policy was created well before the specific problems with overtime in this case were an issue. As Dr. Thompson-Dyson testified, the Department did not program or scheduled the change prior Complainant organizing in the middle of 2018.

[19] As we explained in a prior order in this case, "Indeed, in our designation orders we noted that the Board will process a 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). Senate Bill 135 (the bill granting collective bargaining rights to state employees) was introduced in February 2019. At a minimum, it was reasonable for Complainant to ramp up organizing efforts at this time. As should be obvious, it is often an enormous undertaking to organize employees – hence the guidance provided by the NLRB and Office of the General Counsel. Lake also testified that that their legislative agenda is prepared usually six months ahead of time before any legislative session begins.

meeting at the facility in June of 2018. They wanted to share the Union's legislative agenda of what benefits employees can receive.

As also previously indicated, Complainant filed their original petition with the Board on September 20, 2019. Yet, Complainant had to withdraw said petition due to lacking in majority support. In November, Complainant's majority status was still in question. It wasn't until December 18th that Complainant evidenced a slim 50.4% majority support. The Board then met on January 14, 2020 to deliberate on the Complainant's petition and designate them as the exclusive representation (again with the formal designation order issued on January 22, 2020).

The Department decided to adopt the subject change during what could be deemed a critical time for Complainant - in a memo dated December 16, 2019 when Complainant's majority status was still in question.[20] The effective date for the change was set for January 13, 2020 – just one day before the Board met and orally designated Complainant as the exclusive representative. *Cf. N.L.R.B. v. Curwood Inc.*, 397 F.3d 548, 554 (7th Cir. 2005) ("It would seem odd indeed to allow an employer to trample over an employee's Section 7 rights with impunity, so long as it does so the day (or minute) before the representation petition is filed.").

As Complainant contends, when management took this action, employees felt silenced, didn't have the energy to belong or continue being active in the union, felt intimidated, and felt the employer could do anything. Jeanine Lake credibly testified that some employees no longer desired to talk about the union to their co-workers. Moreover, the employees used their lunch breaks to speak to other employees about joining the union and conducting other organizing activity – breaks which were seemingly targeted. Lake testified the employees felt silenced and didn't have the energy to belong or continue being active for the union. They felt intimidated, and if the employer could do this, they could do just about anything. The employees reached out to her because they had been organizing and now

[20] Though we note the important point is not simply the timing of the announcement, but whether based on the totality of circumstances, Respondents' actions interfered, restrained, or coerced employees in their right to organize. As explained herein, we find that Respondents' actions did so (as well as finding testimony related thereto credible). The Complainant eventually becoming the exclusive representative is a red herring. *See infra* note 24 and accompanying text. Respondents' actions interfered or restrained employees' in the exercise of their right to organize, form, join and assist Complainant – for example, employees' confidence in exercising these rights was diminished and in some instances extinguished (Edmonds credibly testified that a main deterrent in signing up employees is fear that they will be retaliated against for doing so, and Respondents' actions caused employees to longer want to exercise their rights under the EMRA (with some members even rescinding their authorization cards)).

they didn't feel like they should because they didn't know what would happen next. They were concerned about the connection to signing up and how that might cause management to retaliate further.

When the organizing staff was in full swing, they would try to meet with employees as much as possible including lunch breaks. They weren't allowed to "just walk into the group homes where the employees work." With the change, the employees would be unable to leave their home as previously allowed for lunch. The change would also require the subject employees to take their working lunch in the presence of clients they serve – no longer would they be able to go off campus. As Kenneth Edmonds credibly testified, organizers would provide them with Subway and the like. Moreover, Edmonds testified that they have several different departments on campus, and they couldn't understand why they were doing this just to the technicians (why they were only taking the non-working lunch breaks away from them). Edmonds described Respondents' actions as a fear tactic designed to prevent employees from signing up.

The majority of testimony showed the Department's concern was that overtime was expensive.[21] Dr. Lisa Thompson-Dyson testified that the policy of allowing overtime when DST's worked through lunch had been in place for quite some time, and DSTs often worked through their meal period (Edmonds testified that he'd been working as a DST at the DRC for under 4 years and had been earning overtime on a frequent basis). Specifically, they had received reports from the finance office that they needed to watch OT (though not necessarily eliminate it) and it was impacting their budget. While there was a vague reference to "running out of money", given the totality of the circumstances as further explained, no credible testimony or other evidence was presented that there was an immediate need to institute the subject change – in other words, credible testimony was lacking that the change occurred at the time it did because they would run out of money.

Dena Schmidt stated generally that they were notified by their Director's Office in early 2019 "to start to look at our – they had raised the concern of our continuing overtime." Schmidt testified the change did not eliminate all overtime at the location in question, just automatic overtime. In other words, Schmidt admitted the change only affected some specific overtime (as evidenced by the

[21] Respondents submitted evidence in support thereof as well as questioning related thereto.

change), and thus, we do not find credible that it needed action during the organizational campaign (she also stated the lunch overtime was only one of the issues brought to their attention).

Interestingly, Dr. Thompson-Dyson admitted that they had discussions about overtime, trying to find ways to decrease unnecessary overtime, since her arrival in June of 2018 (she also testified that she first learned that this was becoming expensive for the agency "[w]hen we were getting reports and some cautions to watch from our business office and those who were, I believe, our finance office"). *See Tonkawa Ref. Co.*, 175 NLRB 619 (1969) ("Respondent had exhibited little urgency about honoring this pledge until the Union appeared on the scene [and] the announcement and granting of the raises were timed during the preelection campaign'".); *Am. Feather Prod.*, 248 NLRB 1102, 1108 (1980) ("there is no persuasive showing why they were precipitously announced and implemented immediately following the Union's demand for recognition and its petition for an election. Such timing compels the inference that the purpose of the improvements was to discourage employee interest in the Union. There is no apparent sound business reason which required these measures in mid-October or why management's promises, already long delayed, could not have waited until after the election.").

In *Honolulu Sporting Goods Co.*, Ltd., 239 NLRB 1277 (1979) (a case in which motive was relevant), the NLRB held that "we are convinced from the record evidence that, but for the Union's organizational campaign, Respondent would never have instituted the major revision in its basic wage structure during that particular period of time." The NLRB explained: "Thus, while the process used for determining the rates set forth in Honsport's revised pay schedules, *i.e.*, the taking of an area wage survey, was in conformance with company policy, there was no company policy which mandated the revision of schedules or the taking of surveys at the time such actions were taken herein." *Id.*

The NLRB noted: "And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increases to the organizational campaign … the 'absence of conditions or threats pertaining to the particular benefits conferred' is not 'of controlling significance.' Under settled Board policy, a grant or promise of benefits during the critical preelection period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action. No such explanation can be found in the present record.'" *Id.* The NLRB concluded: "However, in view of all the facts and circumstances set forth

above--particularly the timing and extensive nature of the upward revisions in Respondent's basic wareh Duse rate structures--we find that the May 28 pay raise (effective retroactive to May 1) was granted in response to the Union's campaign and was, therefore, violative of Section 8(a)(1) of the Act." *Id.*; *see also Ohio New & Rebuilt Parts, Inc.*, 267 NLRB 420, 422 (1983) ("Respondent did not, however, adduce any testimony which would reveal that the new safety director promulgated the attendance policy under discussion prior to the commencement of the union organizational campaign, and it offered no reason for selecting July 20 as the date for implementation of the policy.").

The First Circuit, in *N.L.R.B. v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275, 276 (1st Cir. 1975), dealt with a section 8(a)(1) violation case based upon an employer's granting of benefits to his employees. The First Circuit held: "However, we believe that the timing of the company's August 20 announcement of wage benefits, made two weeks before the election, does support the Board's finding of a violation on that basis." *Id.* "Merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly." "**This is an entirely different situation from one where a sluggish and apathetic employer is suddenly galvanized into action by the appearance on the scene of a union.**" *Id.* (**emphasis** added). "While we hold that the company presented sufficient uncontradicted evidence of business purpose to avoid a finding of anti-union animus in the hiring of Foster and his development of the plan, we think it bore a separate and greater burden to explain why it announced the granting of the actual benefits only two weeks before the election." *Id.* "The Board has long required employers to justify the timing of benefits conferred while an election is actually pending." *Id.* "Justifying the timing is different from merely justifying the benefits generally." *Id.* "The company was, of course, entitled to try to explain why the particular date was selected; and the Board was entitled, if it chose, to believe the explanation." *Id.*; *see also Overstreet v. David Saxe Prods., LLC*, No. 218CV02187APGNJK, 2019 WL 332406, at *3 (D. Nev. Jan. 24, 2019) ("An important indicator of [the employer's] motive is whether there has been a change from the status quo. The timing of the wage increase and variations from the company's usual course of conduct can be evidence of improper motive."); *St. Francis Fed'n of Nurses & Health Pros. v. N.L.R.B.*, 729 F.2d 844, 850–52 (D.C. Cir. 1984) ("We agree with the ALJ that, under the facts of this case, the timing of the wage increase raised 'a strong presumption' that the Hospital intended to

interfere with the employees' section 7 rights."); *N.L.R.B. v. State Plating & Finishing Co.*, 738 F.2d 733, 740 (6th Cir. 1984) ("The presumption of improper motive has only been found rebutted when the details of the raises were established before the start of the election campaign.").

In addition to the above, it was conceded here that when the change went into effect, it was not completely effective. While the problems were remedied shortly thereafter (Edmonds indicated there was roughly a two month period of working a 9-hour shift after the change as well as other employees working more hours), it suggests Respondents could have waited even just a few days in order to have a well thought out implementation. As Edmonds credibly testified, when the change went into effect, there was a gap in coverage, and he volunteered to stay an extra hour and ended up doing that for roughly two months. It is clear the Respondents could have taken greater care to implement a carefully calculated plan, which of course would have taken more time to formulate, but instead chose to announce the change while Complainant's majority status was still in question. While some well thought out plans may have kinks upon implementation, the lack of credible explanation as to timing along with the other inconsistencies presented, as further detailed below, leads to the permissible inferences as to motive, even if it is material (or indicates a failure to justify the action with a substantial and legitimate business reason (one which we explain further herein did not outweigh employees' NRS 288.500 rights)). Edmonds testified that he initially worked more overtime after the change. Dr. Thompson-Dyson simply stated that "it created some [gaps in coverage] up front because we were -- because we did not do just a unilateral schedule change, you know, of time that people reported to work. So up front, there were some gaps and we worked with them by home to eliminate those gaps and to make sure they were covered."

In addition, Schmidt testified: "The other concern that we – that we've discussed many times in is our executive team meetings is the number of hours obtained by certain individuals. It's alarming. That certain individuals are working over a hundred hours OT in any given month, it raises concerns w health and safety concerns working that many hours." However, as indicated, the vast majority of testimony was related to overtime being expensive and the costs related thereto – not an immediate

need to institute changes for safety purposes.[22] Moreover, Respondent failed to present credible evidence that safety issues was more than just a concern, but an actual problem that needed remedying at the time of Respondents' actions (for example, Respondents could have easily provided testimony, a report of an incident, or other evidence had it been a credible problem that required action that time).

For example, the NLRB in *Champion Pneumatic Machinery Co.*, 152 NLRB 300, 306 (1965) was "present[ed] primarily [with] questions as to whether Respondent violated Section 8(a)(1) of the Act by promising and granting benefits to employees to induce them to refrain from supporting the Charging Party, and by suggesting and assisting in the formation of, and meeting with, an employee grievance committee." "Both at the hearing and through the amendment, however, General Counsel has pressed his position that the Company was guilty of 'independent' rather than 'derivative' violations of Section 8(a)(1) in meeting with employee representatives and changing working conditions as a consequence of such meetings." *Id.*

"At each meeting various safety problems were discussed, and the employees also voiced complaints over the language used in the plant by Superintendent Bertram." *Id.* at 303. "Some safety devices and improvements were promptly instituted." *Id.* "General Counsel in his brief refers specifically to safety glasses, goggles, a guard rail, and a ventilation fan."

The Trial Examiner noted: "This brings us to the question whether the Company in fact violated Section 8(a)(1) by making safety glasses and goggles available to all employees who wanted them, and by installing a guard rail and a ventilating fan." *Id.* at 304. "It also appears that the emergence of this Committee at the time of the union drive was not mere coincidence, for the testimony of both Embs' and Bertram's remarks at the meeting, suggests that the Company was aware of, and was seeking a vent for, employee grievances." *Id.* The Trial Examiner concluded it could not be found that the employer violated the NLRA by instituting safety measures – "It 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." *Id.* "But once they reached his attention, the employer had to choose between instituting safety measures or leaving matters in status quo until such

[22] When asked the same question (*i.e.*, any other issues besides overtime caused by DSTs working through meal periods), Dr. Thompson-Dyson responded only with cost related answers.

time as he cured his unfair labor practice by disestablishing the Committee." *Id.* "An employer, once he is aware of hazardous conditions in his plant, should not be deterred from curing or alleviating such conditions by a fear that his action will run afoul of this Act." *Id.* The Trial Examiner also noted, "I need only add, with respect to the Committee, that if its creation were to be held cognizable as an unfair labor practice, I would recommend that no relief issue in the light of its immediate abandonment, promptly following its inception, when the Union filed a representation petition." *Id.* at 305.

In contrast, it appears the matter was initially raised out of concerns in costs, not safety. Respondents failed to present credible evidence that the measures taken were necessary at that time. Further, Respondents failed to present credible evidence that the specific measures would alleviate the alleged safety issue (again, it was conceded not all overtime was extinguished (just lunch breaks) as well as additional overtime was still required after the change (and Schmidt's concern above was in response to questioning on all overtime) – indeed, now some employees would be required to take a working lunch who would have otherwise been permitted a break). Moreover, unlike the current case, the unfair labor practice alleged in *Champion Pneumatic Machinery Co.* had an "immediate abandonment, promptly following its inception, when the Union filed a representation petition." *Id.* Even further, Dr. Thompson-Dyson admitted that they had discussions about overtime, trying to find ways to decrease unnecessary overtime, since her arrival in June of 2018. Yet, they waited until January 2020 (roughly over a year and half) to implement the changes.[23] The memo was additionally clear that the change was made "to align with industry standards" and did not mention safety as an issue.

In conclusion, while we view this as a close case, Respondents' actions willfully interfered, restrained, or coerced any employee in the exercise of protected activity, and Respondents failed to justify the action with a substantial and legitimate business reason that outweighed the employees' NRS 288.500 rights.[24]

[23] Or, according to Dena Schmidt who stated generally that they were notified by their Director's Office in early 2019, roughly a year.

[24] *See also Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item No. 237 (1989) ("some conduct by its very nature contains the implications of the required intent. In such cases the natural foreseeable consequences of an employer's actions may justify the conclusion that … interference was intended. Thus, the existence of … interference may be inferred by the Board based upon its experience in the labor management relations area."). Respondents argue that the complaint is moot because the Board remedied any injury Complainant may have suffered by designating it the exclusive representative.

REMEDY

In *American Freightways*, *supra*, the NLRB "order[ed] Respondent to cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act … by changing the terms and conditions of employment: provided, however, that nothing in this Order shall be construed as requiring the Respondent to vary or abandon … any term or condition of employment which has heretofore established." *American Freightways Co.*, 124 NLRB at 148-49. Further, to cease and desist "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act". *Id.*

The NLRB additionally ordered "the following affirmative action which the Board finds will effectuate the policies of the Act: (a) Post at its offices, in conspicuous places, including all places where notices to employees are customarily posted, copies of the notice attached hereto marked 'Appendix.' Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material" and "(b) Notify the Regional Director for the Second Region in writing, within 10 days from the date of this Order, as to what steps Respondent has taken to comply therewith." *Id.* at 149-50.

The Board finds the remedy appropriate and orders as such. *See also supra* note 24; *In Re Am. Tissue Corp.*, 336 NLRB at 451; *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB at 1347; *Caterpillar Tractor Co.*, 242 N.L.R.B. at 523, 537; *National Aluminum*, 242 N.L.R.B. at 303; *In Re Noah's Bay Area Bagels, LLC*, 331 NLRB at 191, 195-96, 204. Attached hereto marked "Appendix" is a copy of the requisite notice.

Noticeably absent was any direct authority whatsoever for this proposition that this somehow alleviated or negated the violation of employees' rights prior thereto. *See American Freightways Co.*, 124 at, 14 ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn … on whether the coercion succeeded or failed."). The proposition would also be in direct contravention to the purposes and policies of the EMRA as well as the plain language of NRS 288.500 (in other words, the fortitude of the employees was credibly affected as detailed above). It would further be unreasonable or absurd to conclude that the employees' rights were not interfered, restrained, or coerced simply because they now have an exclusive representative. Respondents' argument is essentially that the remedy for the violation has already been provided. As the Remedy Section herein explains, including the vast NLRB precedent on which it is based, the requirement to cease and desist as well as posting is designed to remedy the violation's harm including returning confidence, resilience, unity, and courage to employees. Unions are designed to pool the collective strength of employees which is weakened with division.

Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter.

FINDINGS OF FACT

1. The Department operates the DRC, a treatment center for persons with intellectual and developmental disabilities.

2. Located on the DRC campus is an ICF, which is a "24/7" facility where persons requiring intensive treatment reside.

3. While the ICF at the DRC is the only state-run ICF in Nevada, the Department operates other "24/7" facilities that serve different populations.

4. In particular, the Divisions of Child and Family Services and Public and Behavioral Health both operate "24/7" facilities serving their respective target populations.

5. The Department employees charged with day-to-day care of the persons served at the ICF are the DSTs.

6. The DSTs fall within Bargaining Unit F and are the subject of the organizing efforts at issue in this case.

7. In June of 2018, the Department began granting Complainant's request for meeting spaces at the DRC campus to discuss union business with employees.

8. While Complainant has been generally organizing for quite some time, the organizing campaign came into full swing specifically for the purpose of exclusive representation under Senate Bill 135 in roughly mid-2018 with the expectation of the EMRA's amendment coming to fruition.

9. By fall 2019, the Department determined that DSTs were responsible for a significant percentage of overtime.

10. The Department decided to adopt the subject change in a memo dated December 16, 2019, with an effective date for the change of January 13, 2020.

11. Complainant filed their original petition with the Board on September 20, 2019.

12. Complainant withdrew said petition as a preliminarily analysis by Board staff showed Complainant would be below the majority threshold.

13. Complainant filed an amended petition on November 8, 2019.

14. On November 22, 2019, Board staff issued an audit report on the amended petition, which showed Complainant failed to obtain the requisite support (49.1%).

15. This audit report was presented to the Board at our December 17, 2019 meeting.

16. A December 18, 2019 addendum to the audit report notes that at said meeting, the Board gave Complainant until January 13, 2020 to submit the requisite authorization cards as Complainant stated they did not realize certain hourly workers were included in the unit due to failing to receive a requested employee list from NSHE.

17. Complainant filed the needed authorization cards on December 18, 2019 (giving Complainant 50.4% evidence of support).

18. The Board met on January 14, 2020, deliberated on the amended petition, and upon motion designated Complainant as the exclusive representative for Unit F.

19. The Board issued the formal designation order on January 22, 2020.

20. Not only was the change "not previously contemplated or in effect", they were announced in what could be deemed a critical time in this case.

21. The change was not made at the preliminarily stages of an organizational campaign, not made pursuant to company policy established before the organizational campaign reasonably began, and Respondents failed to credibly explain the timing of their action.

22. Moreover, the change was announced roughly a month and a half after Complainant filed their amended petition.

23. As conceded by Respondent, they did not even determine that DSTs were responsible for a significant percentage of overtime until fall of 2019, let alone contemplate or commence the changes needed.

24. The Department decided to adopt the subject change in a memo dated December 16, 2019, with an effective date for the change of January 13, 2020.

25. Jeanine Lake credibly testified that they were optimistic about a collective bargaining bill being passed in the 2019 legislative session (which indeed happened), and thus they "beefed up" the organizing campaign. Specifically, they made a request to the Agency manager of DRC to be permitted to have a meeting at the facility in June of 2018.

26. When management took this action, employees felt silenced, didn't have the energy to belong or continue being active in the union, felt intimidated, and felt the employer could do anything.

27. Jeanine Lake credibly testified that some employees no longer desired to talk about the union to their co-workers.

28. Moreover, the employees used their lunch breaks to speak to other employees about joining the union and conducting other organizing activity – breaks which were seemingly targeted.

29. Lake testified the employees felt silenced and didn't have the energy to belong or continue being active for the union.

30. They felt intimidated, and if the employer could do this, they could do just about anything.

31. The employees reached out to her because they had been organizing and now they didn't feel like they should because they didn't know what would happen next.

32. They were concerned about the connection to signing up and how that might cause management to retaliate further.

33. When the organizing staff was in full swing, they would try to meet with employees as much as possible including lunch breaks.

34. They weren't allowed to "just walk into the group homes where the employees work."

35. With the change, the employees would be unable to leave their home as previously allowed for lunch.

36. The change would also require the subject employees to take their working lunch in the presence of clients they serve – no longer would they be able to go off campus.

37. As Kenneth Edmonds credibly testified, organizers would provide them with Subway and the like.

38. Moreover, Edmonds testified that they have several different departments on campus, and they couldn't understand why they were doing this just to the technicians (why they were only taking the non-working lunch breaks away from them).

39. Edmonds described Respondents' actions as a fear tactic designed to prevent employees from signing up.

40. The majority of testimony showed the Department's concern was that overtime was expensive.

41. Dr. Lisa Thompson-Dyson testified that the policy of allowing overtime when DST's worked through lunch had been in place for quite some time, and DSTs often worked through their meal period (Edmonds testified that he'd been working as a DST at the DRC for under 4 years and had been earning overtime on a frequent basis).

42. Specifically, they had received reports from the finance office that they needed to watch OT (though not necessarily eliminate it) and it was impacting their budget.

43. While there was a vague reference to "running out of money", given the totality of the circumstances as further explained, no credible testimony or other evidence was presented that there was an immediate need institute the subject change – in other words, credible testimony was lacking that the change occurred at the time it did because they would run out of money.

44. Dena Schmidt stated generally that they were notified by their Director's Office in early 2019 "to start to look at our – they had raised the concern of our continuing overtime."

45. Schmidt testified the change did not eliminate all overtime at the location in question, just automatic overtime.

46. In other words, Schmidt admitted the change only affected some specific overtime (as evidenced by the change) and thus we do not find credible that it needed action during the organizational campaign (she also stated the lunch overtime was only one of the issues brought to their attention).

47. Dr. Thompson-Dyson admitted that they had discussions about overtime, trying to find ways to decrease unnecessary overtime, since her arrival in June of 2018 (she also testified that she first learned that this was becoming expensive for the agency "[w]hen we were getting reports and some cautions to watch from our business office and those who were, I believe, our finance office").

48. It was conceded here that when the change went into effect, it was not completely effective.

49. While the problems were remedied shortly thereafter (Edmonds indicated there was roughly a two month period of working a 9-hour shift after the change as well as other employees

working more hours), it suggests Respondents could have waited even just a few days in order to have a well thought out implementation.

50. As Edmonds credibly testified, when the change went into effect, there was a gap in coverage, and he volunteered to stay an extra hour and ended up doing that for roughly two months.

51. It is clear the Respondents could have taken greater care to implement a carefully calculated plan, which of course would have taken more time to formulate, but instead choose to announce the change while Complainant's majority status was still in question.

52. Edmonds testified that he initially worked more overtime after the change. Dr. Thompson-Dyson simply stated that "it created some [gaps in coverage] up front because we were -- because we did not do just a unilateral schedule change, you know, of time that people reported to work. So up front, there were some gaps and we worked with them by home to eliminate those gaps and to make sure they were covered."

53. In addition, Schmidt testified: "The other concern that we – that we've discussed many times in is our executive team meetings is the number of hours obtained by certain individuals. It's alarming. That certain individuals are working over a hundred hours OT in any given month, it raises concerns w health and safety concerns working that many hours."

54. The vast majority of testimony was related to overtime being expensive and the costs related thereto – not an immediate need to institute changes for safety purposes.

55. Moreover, Respondent failed to present credible evidence that safety issues were more than just a concern, but an actual problem that needed remedying at the time of Respondents' actions (for example, Respondents could have easily provided testimony, a report of an incident, or other evidence had it been a credible problem that required action that time).

56. It appears the matter was initially raised out of concerns in costs, not safety.

57. Respondents failed to present credible evidence that the measures taken were necessary at that time.

58. Further, Respondents failed to present credible evidence that the specific measures would alleviate the alleged safety issue (again, it was conceded not all overtime was extinguished (just lunch breaks) as well as additional overtime was still required after the change (and Schmidt's concern

above was in response to questioning on all overtime) – indeed, now some employees would be required to take a working lunch who would otherwise been permitted a break).

59. Dr. Thompson-Dyson admitted that they had discussions about overtime, trying to find ways to decrease unnecessary overtime, since her arrival in June of 2018.

60. Yet, they waited until January 2020 (roughly over a year and half) to implement the changes (or roughly a year according to Schmidt).

61. 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 EMRA was amended in 2019 to grant certain rights for state employees, becoming effective on June 12, 2019.

4. NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to bargain in bad faith with a recognized employee organization and a unilateral change to the bargained for terms of employment is regarded as a *per se* violation of this statute.

5. A unilateral change also violates NRS 288.270(1)(a).

6. Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent.

7. 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."

8. NRS 288.656 provides that the parties shall engage in collective bargaining as required by NRS 288.540.

9. NRS 288.540 provides that bargaining shall concern "the wages, hours and other terms and conditions of employment for the employees", modeling the NLRA.

10. 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 subsection 2 of NRS 288.150, except paragraph (f) of that subsection.

11. Unless statutorily distinct, the general basic premise of a failure to bargain in good faith is applicable to the Executive Department.

12. We cannot reconcile a holding in *Clark County Public Employees Ass'n, SEIU Local 1107 v. Housing Auth. Of the City of Las Vegas*, Case No. A1-045478, Item No. 270 (1991), the holding being that the employer was required to maintain the status quo (and hence not make unilateral changes) as this violated *the duty to bargain in good faith*, with the plain and unambiguous language of the EMRA, as amended applicable to the Executive Department, as well as the NLRA and applicable NLRB precedent.

13. To the extent *Clark County Public Employees Ass'n, SEIU Local 1107* is deemed inconsistent with the Board's order herein, we expressly overrule it.

14. However, we note that our holding is limited to the Executive Department and the amended EMRA, as applicable.

15. Preliminarily, the EMRA is plain and unambiguous, which we are obligated to follow.

16. It is a prohibited practice for the Executive Department willfully to "[r]efuse to bargain collectively in good faith with an exclusive representative as required in NRS 288.565." NRS 288.620(b).

17. "As soon as practicable after the Board designates an exclusive representative of an unrepresented bargaining unit pursuant to NRS 288.400 to 288.630, inclusive, the exclusive representative shall engage in collective bargaining with the representative designated pursuant to subsection 1…." NRS 288.565(3).

18. "'Exclusive representative' means a labor organization that, as a result of its designation by the Board, has the exclusive right to represent all the employees within a bargaining unit and to engage in collective bargaining with the Executive Department …." NRS 288.430.

19. "Collective bargaining and supplemental bargaining entail a mutual obligation of the Executive Department and an exclusive representative to meet at reasonable times and to bargain in good faith with respect to…."). NRS 288.500(2).

20. "An exclusive representative shall: … [i]n good faith and on behalf of each bargaining unit that it represents, individually or collectively, bargain with the Executive Department …." NRS 288.540(1)(b).

21. The plain and unambiguous language of the EMRA thus makes crystal clear that the duty to bargain does not arise until the Board designates an exclusive representation.

22. There is a critical distinction between the EMRA and the NLRA on which that federal precedent was based.

23. A decision from the Illinois Labor Board (ILB) (based on Appellate Court of Illinois precedent) is instructive. *Service Employees International Union, Local 73, Charging Party And Sarah D. Culbertson Memorial Hospital*, Respondent, 21 PERI ¶ 6 (January 5, 2005).

24. The Illinois Public Relations Act is substantially similar to the EMRA in regards to the duty to bargain.

25. This decision is instructive as it clearly explains the statutory distinctions between the Illinois Public Relations Act (which mirrors the EMRA) and the NLRA.

26. This is of critical importance as the duty to bargain arises at different points in time under the NLRA and the EMRA (primarily after an election or showing of majority interest as further detailed herein under the NLRA and not until designation under the EMRA in regards to the current dispute).

27. The federal precedent mandating maintaining the status quo (and not making unilateral changes) is based on when the duty to bargain arises under to the NLRA.

28. Since the duty arises at different points in time pursuant to the plain and unambiguous language of the EMRA, the federal precedent is inapplicable to the case at hand.

29. In other words, the duty to bargain arose under the NLRA after the election or sometimes upon submission of cards evidencing majority support.

30. As detailed, this is found within the language of the NLRA.

31. As the duty to bargain arose, the employer could no longer make unilateral changes and hence had to maintain the status quo.

32. The various NLRB precedent cited mandating an employer maintain the status quo (and not make unilateral changes) is not applicable here as the Board is required to follow the plain and unambiguous language of the EMRA (again, Complainant failed to provide any legislative history or other permissible aides of statutory construction to the contrary).

33. As Respondents were not subject to the duty to bargain good faith, they were free to make unilateral changes without violating their duty to bargain in good faith.

34. In other words, we find that the obligation to maintain the status quo and not make unilateral changes, in this context, does not attach until the duty to bargain arises.

35. Thus, Respondents did not violate NRS 288.620(1)(b) and derivatively NRS 288.270(1)(a).

36. A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

37. In other words, as should be obvious by the plain language in NRS 288.270(1)(a), we have not held that NRS 288.270(1)(a) may be violated absent some right guaranteed under the EMRA.

38. A violation of NRS 288.270(1)(c) is not at issue in this case.

39. NRS 288.270(1)(a) provides that it a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA.

40. NRS 288.500 bestows certain rights including "[f]or the purposes of other mutual aid or protection" to "[o]rganize, form, join and assist labor organizations… and engage in other concerted activities".

41. In contrast to the previous analysis, the EMRA and NLRA are substantially similar in this respect and, as such, the federal precedent is persuasive absent an indication to the contrary.

42. Pursuant to NRS 288.270(1)(a), "[t]het 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."

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43. There are three elements to a claim of interference with a protected right: "(1) the employer's action can 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." Respondents' actions did not interfere, restrain, or coerce any employees in the exercise of their right to engage in collective bargaining through their exclusive representative.

44. We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement.

45. Respondents' actions did not interfere, restrain, or coerce any employees in the exercise of their right to engage in collective bargaining through their exclusive representative.

46. Respondents committed a violation even if considering Respondents' justification, purpose, or motive.

47. Moreover, Respondents failed to justify their action with a substantial and legitimate business reason that outweighs the employee's NRS 288.500 rights.

48. The evidence illustrates that even if the analysis provided above in *True Temper* and *In re Noah's Bay Area Bagels* is applicable, those cases actually support a finding of a violation here.

49. Senate Bill 135 (the bill granting collective bargaining rights to state employees) was introduced in February 2019.

50. At a minimum, it was reasonable for Complainant to ramp up organizing efforts at this time.

51. The Department decided to adopt the subject change during what could be deemed a critical time for Complainant.

52. Though we note the important point is not simply the timing of the announcement, but whether based on the totality of circumstances, Respondents' actions interfered, restrained, or coerced employees in their right to organize.

53. By merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly – this is an entirely different

situation from one where a sluggish and apathetic employer is suddenly galvanized into action by the appearance on the scene of a union.

54. The lack of credible explanation as to timing along with the other inconsistencies presented, leads to the permissible inferences as to motive, even if it is material (or indicate a failure to justify the action with a substantial and legitimate business reason (one which did not outweigh employees' NRS 288.500 rights)).

55. We find the remedy issued in *American Freightways*, *supra* (as well as related cases) appropriate and orders as such.

56. Respondents' argument that the complaint is moot is unpersuasive.

57. The proposition would also be in direct contravention to the purposes and policies of the EMRA as well as the plain language of NRS 288.500 (in other words, the fortitude of the employees was credibly affected as detailed above).

58. It would further be unreasonable or absurd to conclude that the employees' rights were not interfered, restrained, or coerced simply because they now have an exclusive representative. Respondents' argument is essentially that the remedy for the violation has already been provided.

59. The requirement to cease and desist as well as posting is designed to remedy the violation's harm including returning confidence, resilience, unity, and courage to employees. Unions are designed to pool the collective strength of employees which is weakened with division.

60. The test of interference, restraint, and coercion under NRS 288.270(1)(a) does not turn on whether the coercion succeeded or failed.

61. An award of fees and costs is not warranted in this case.

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

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ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Complainant, in part, and Respondents, in part, as set forth herein.

Dated this 15th day of April 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
GARY COTTINO, Presiding Officer

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
BRETT HARRIS, ESQ., Board Member

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the Employee-Management Relations Board having found we violated the Employee-Management Relations Act (NRS Chapter 288, EMRA), and in order to effectuate the policies and purposes of the EMRA, we hereby notify our employees that:

NRS 288.500 of the Act gives employees these rights:

To organize, form, join, and assist any labor organization

To act together for other mutual aid or protection

To engage in other concerted activities

To choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in NRS 288.500 of the Act by changing the terms and conditions of their employment: provided, however, that nothing in this Decision and Order requires us to vary or abandon any term or condition of employment which has been heretofore established.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in NRS 288.500 of the Act.

All our employees are free to become, to remain, or to refrain from becoming or remaining, members of any labor organization of their own choosing.

State of Nevada, Desert Regional Center of the Nevada Department of Health and Human Services

Employer.

Dated: _____

By: _____

_____

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.