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Attorneys for Local 1107

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NEVADA SERVICE EMPLOYEES UNION, Complainant, vs. CLARK COUNTY WATER RECLAMATION DISTRICT, Respondent.	CASE NO.: 2024-030

PROHIBITED PRACTICES COMPLAINT

Complainant, Nevada Service Employees Union, SEIU Local 1107 ("Local 1107" or "Union"), by and through its counsel of record, Christensen James & Martin, Chtd., hereby makes the following Prohibited Practices Complaint pursuant to NRS 288.270 and 288.280 against Clark County Water Reclamation District ("WRD") (Local 1107 and the WRD are hereinafter referred to as the "Parties").

STATEMENT OF PARTIES AND JURISDICTION

1. Local 1107, at all relevant times, was and is an Employee Organization as defined in NRS 288.040.

2. Local 1107's address is 2250 S. Rancho Dr., Suite 165, Las Vegas, NV 89102.

3. At all relevant times, the WRD was and has been a local government employer within the meaning of NRS 28.060.

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4. WRD's address is 5857 East Flamingo Road, Las Vegas, NV 89122.

5. At all relevant times, Local 1107 was the exclusive bargaining representative of two bargaining units of employees at WRD: bargaining-eligible supervisory employees ("Supervisory Unit") and bargaining-eligible non-supervisory employees ("Non-Supervisory Unit").

6. The Government Employee-Management Relations Act (the "Act") is codified in Nevada Revised Statutes Chapter 288 and governs the collective bargaining obligations of the Parties.

7. This Board has jurisdiction under NRS 288.280 to hear and determine "[a]ny controversy concerning prohibited practices."

8. The Board has further jurisdiction under NRS 288.110(2) to "hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of this chapter by…any local government employer…local government employee…[or] any employee organization."

FACTS RELEVANT TO THE PROHIBITED PRACTICES

9. Local 1107 and WRD are parties to two collective bargaining agreements ("CBAs")—one for the Supervisory Unit and one for the Non-Supervisory Unit—both of which were effective from July 1, 2021, through June 30, 2024.

10. The parties were engaged in negotiations in July 2024 to reach successor CBAs.

11. On or about June 11, 2024, a WRD employee, who is also a Union member, threw a case that contained a non-functioning paintball gun into a WRD garbage dumpster.

12. The paintball gun was garbage and had not worked for years.

13. It was the employee's intent to throw the item away as WRD allows employees to discard unwanted items into its garbage dumpsters.

14. Someone else at WRD decided to go dumpster diving, recovered the case, and discovered the trashed paintball gun, who then reported the item to WRD Human Resources.

15. WRD reviewed surveillance video and discovered the identity of the employee who threw the trash into the garbage dumpster.

16. WRD interviewed the employee who acknowledged that he was simply throwing trash away.

17. The employee was represented by the Union who argued at least these points: that the item was broken, it could not be used to harm anyone, and even a baseball bat left in a car from a baseball game can be considered to be a weapon under WRDs policy and policy application.

18. WRD then issued a "one week (40 hours) without pay" suspension against the employee.

19. In issuing the suspension, WRD recognized that the employee was throwing away what he considered to be garbage.

20. In issuing the suspension, WRD recognized that the paintball gun was nonfunctional.

21. In issuing the suspension, WRD recognized that the employee was throwing a nonfunctional item away in its dumpster as had been previously allowed.

22. In issuing the suspension, WRD recognized that the employee had no intent to bring a weapon to work, but that the employee believed that he was simply throwing away "trash."

23. In issuing the suspension, WRD applied its policies inconsistent with their language.

24. WRD told the employee, "Had the District taken into consideration the statements made by the Union on your behalf which undermined the extreme gravity of

the conduct violation; the outcome would warrant the District's highest level of discipline (termination)."

25. WRD's statement(s) are direct evidence of anti-union animus.

FIRST CAUSE OF ACTION

[Interfere, Restrain, Coerce]

26. Local 1107 hereby incorporates the allegations contained in the preceding paragraphs verbatim.

27. NRS 288.270(1)(a) states that it is a prohibited practice to "[i]nterfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter."

28. WRD's motive or intent regarding interference, restrain, or coercion is immaterial to whether its conduct and/or statements is a violation of NRS 288.270(1)(a).

29. WRD engaged in interfering, restraining, and coercive conduct by asserting that the Union's participation in the investigation and disciplinary process warranted more severe discipline than what was being imposed.

30. WRD's actions alleged herein have a chilling effect to employee(s) exercising rights under the Act.

31. There is no substantial or legitimate business reason for WRD's interfering, restraining, or coercive conduct.

32. The Union and the employee have been damages by WRD's actions alleged herein.

SECOND CAUSE OF ACTION

[Discrimination to Discourage Union Membership/Participation]

33. Local 1107 hereby incorporates the allegations contained in the preceding paragraphs verbatim.

34. NRS 288.270(1)(c) states that it is a prohibited practice to "[d]iscriminate in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization."

35. NRS 288.270(1)(e) states that it is a prohibited practice to "otherwise discriminate against an employee … because the employee has formed, joined or chosen to be represented by any employee organization."

36. The employee, as a member of Local 1107, had a right to be represented by Local 1107 pursuant to NRS 288.150(1) in relation to the WRD's actions alleged herein.

37. WRD presented itself as the benevolent employer who was granting the employee a reprieve from Local 1107's representation activities that WRD asserted warranted the employee's employment termination.

38. WRD engaged in impermissible discrimination by ignoring its own investigatory findings, practices, and policy language when imposing discipline on a union-member-employee.

39. WRD's actions are generally discriminatory in nature as they discourage and/or have a chilling effect on employees utilizing Local 1107's representation by asserting that such representation may justify harsher discipline.

REMEDIES

WHEREFORE, Complainant respectfully prays as follows:

1. For an order directing WRD to cease and desist its conduct.

2. For an order directing WRD to do the following:

   a. Post notices of its violations in conspicuous places in its facilities,

   b. Post statements with the violation notices that employees have a legal right to be represented by the Union and that WRD will not retaliate against employees for their participation in the Union or engaging in a protected activity, and

c. Have the notices and statements read allowed to employees during meetings.

3. For such other relief deemed just and proper.

DATED this 6th day of September 2024.

CHRISTENSEN JAMES & MARTIN, CHTD.

By: */s/ Evan L. James*
Evan L. James, Esq.
Nevada Bar No. 7760
7440 W. Sahara Avenue
Las Vegas, NV 89117
Attorneys for Local 1107

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2024, I caused a true and correct copy of the foregoing Complaint to be filed via email, as follows:

Employee-Management Relations Board
emrb@business.nv.gov

I hereby certify that on September 6, 2024, I served a true and correct copy of the foregoing Complaint on Respondent via certified mail, return receipt requested, to the following:

Clark County Water Reclamation District
5857 East Flamingo Road
Las Vegas, NV 89122

CHRISTENSEN JAMES & MARTIN, CHTD.

By: */s/ Carma Johnson*
Carma Johnson

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Attorneys for Respondent

STATE OF NEVADA

EMPLOYEE-MANAGEMENT RELATIONS BOARD

NEVADA SERVICE EMPLOYEES UNION, Complainant, vs. CLARK COUNTY WATER RECLAMATION DISTRICT, Respondent.	)	Case No: 2024-030 **RESPONDENT CLARK COUNTY WATER RECLAMATION DISTRICT'S MOTION TO DISMISS THE NEVADA SERVICE EMPLOYEE UNION'S COMPLAINT and RESPONDENT'S REQUEST FOR ATTORNEY FEES AND EXPENSES**

Respondent, Clark County Water Reclamation District ("CCWRD" or the "Respondent"), by and through its counsel of record, Mark J. Ricciardi, Esq. of the law offices of Fisher & Phillips LLP, hereby moves the Employee-Management Relations Board ("EMRB" or the "Board") for an order dismissing the Nevada Service Employees Union, SEIU Local 1107's (the "Union" or "Complainant") Complaint ("Complaint"). This Motion is based on NAC 288.240(3) NAC 288.375, NRS 288.270, and the pleadings on file with the Board and the following Memorandum of Points and Authorities, and any oral argument permitted by the Board.

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MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

CCWRD and the Union are parties to two Collective Bargaining Agreements ("CBAs"). On September 6, 2024, the Union filed the instant Complaint against CCWRD, alleging prohibited practices under NRS 288.270(1)(a) and (c), including interference with employee rights and discouraging Union membership. These claims are based solely on a constitutionally protected comment made by CCWRD in a written disciplinary document issued to an employee. Because the statement is constitutionally protected, the Union's Complaint lacks merit and should be dismissed.

II. STATEMENT OF FACTS

CCWRD acknowledges that, for the purposes of this Motion only, the Board must accept the Union's material factual allegations as true. On or about June 11, 2024, a CCWRD employee ("Employee"), a member of the bargaining unit represented by the Union, threw a case that contained a non-functioning paintball gun into a dumpster in the workplace. Someone else at CCWRD later discovered and reported the trashed paintball gun to the CCWRD Safety and Security. CCWRD reviewed the surveillance video to identify the Employee and interviewed him with the Union present. During the interview, the Union argued that the item was broken, could not be used to harm anyone, and that even a baseball bat could be considered a weapon under CCWRD's policy and its application. On July 3, 2024, the CCWRD issued the Employee a one-week suspension without pay.[1] In the written suspension document CCWRD acknowledged that the Employee discarded into a dumpster what he considered "trash," accepted the Employee's claim that the paintball gun was "non-functional," and that the Employee had

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[1] Neither the Union nor the employee filed a timely grievance contesting the discipline under the terms of the CBA. Nor does the Complaint question the propriety of the discipline imposed.

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no intent to bring a weapon to work.[2] *See* written suspension document, attached as Exhibit A. The written suspension document also included the following statement by the District:

> Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination).

See Complaint, Paragraph 24.[3]

On September 6, 2024, the Union filed the instant Complaint against CCWRD. The Union's sole claim is that by making the above statement in the suspension document CCWRD engaged in prohibited practices by interfering with, restraining, and coercing employees in the exercise of their rights according to NRS 288.270(1)(a), (c), and (e). The Union also claims that by making the statement CCWRD discriminated against employees and discouraged them from using the Union as their representative.

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[2] Nothing in NRS Chapter 288 or NAC Chapter 288 bars the Board from considering an exhibit attached to a motion. The NAC sections dealing with the complaint (NAC 288.200) and answer (NAC 288.220) expressly prohibit attaching exhibits to an answer or complaint. However, the NAC sections dealing with a motion (NAC 288.231 and 288.240) do not mention a limitation on attaching exhibits. The Union bases its entire Complaint on the signed Employee Suspension document; therefore, the contents of the Employee Suspension document should reasonably be considered on a motion to dismiss. Courts ruling on motions to dismiss pursuant to Civil Procedure Rule 12 follow this commonsense approach. *See Beddall* v. *State St. Bank & Trust Co.*, 137 F.3d 12, 16–17 (1st Cir. 1998) (providing that, with respect to a motion to dismiss, the court could consider an agreement that the complaint discussed, that was in the record, and that the parties did not contest as being unauthentic); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."), *overruled on other grounds by Galbraith v. County. of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir. 2002); *Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 393, 990 P.2d 184, 185 (1999) (providing that federal court interpretations of the Federal Rules of Civil Procedure are persuasive authority).

[3] Notably, the Employee Suspension document provides the following context for the statement:

> The fact that you brought a gun (functioning or otherwise) to work is a serious violation of District policies. When a weapon is brought onto property there is no way to initially determine whether it is functioning or not. This conduct impacts the safety and security of all staff of the District. Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination). However, based solely on your testimony which accepted responsibility for your actions as well as conveying your understanding of the seriousness of the safety implications of the conduct, together with the personal circumstances which resulted in the serious lack of judgment, it has been determine to suspend you for one week[.]

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III. ARGUMENT

A. Applicable Standard Of Review.

The EMRB has the power to dismiss, without hearing, any complaint (or claim) where "no probable cause exists to support the Complainant's allegation that Respondent has committed a prohibited labor practice" in violation of NRS Chapter 288. *Asch v. Clark County Sch. District et al.*, Item No. 314, Case No. A1-045541 (May 19, 1993). Indeed, NAC 288.375 specifically allows the Board to dismiss a matter if "no probable cause exists for the complaint." NAC 288.375(1). In reviewing the pleadings to determine whether "probable cause exists," the Board applies the same standard as a motion to dismiss under NRCP 12(b)(5). Therefore, the Board must dismiss the complaint if it finds, after accepting all the allegations of the complaint as true and drawing every reasonable inference in the complainant's favor, that there is no set of facts which can be proven which would entitle the complainant to recovery. *See Pankopf v. Peterson*, 124 Nev. 43, 45 (2008) (citation omitted).

B. Besides Protecting Employee Rights, The Employee-Management Relations Act Also Protects Employers' Rights.

Under Nevada Law, local government employers are prohibited from interfering, restraining, coercing or discriminating against an employee because of membership in a union. NRS 288.270 (1). That said, absent such a violation, nothing in Chapter 288 muzzles an employer or limit's an employer's right to express it views, arguments, or opinions about unions or their activities. For over three decades the EMRB has recognized the fundamental constitutional right of a local government employer to express its views and opinions.

In *Ormsby County Teachers Association vs. Carson City School District*, EMRB Case No. A1-045339, (1981), the employer school district distributed to employees a written response to the union's Negotiations Update. The union claimed that the written response was designed to undermine the confidence in the membership of the union, its officers and bargaining representatives and create dissention and derision within the

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membership. *Id.* at 1. In dismissing the complaint, the Board made it clear that "a communication by an employer with an employee organization is an exercise of its Constitutional right of free speech." *Id.* at 3.

The Board looked to Section 8(c) of the National Labor Relations Act ("NLRA"), 29 USC Section 158, for guidance on how best to balance employee rights to engage in union activities with employer free speech rights. The *Ormsby* Board quoted the NLRA with approval:

> [S]ection 8(c) of the NLRB Act, which states: "The expressing of any views, argument or opinion or the dissemination thereof whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this subchapter if such expressions contain no threat of reprisal or force or promise of benefit.

Id. at 3.

C. The Statement Made By CCWRD Is Not A Threat Of Reprisal, Force, Or A Promise Of Benefit.

The Union's Complaint alleges that CCWRD engaged in prohibited practices under NRS 288.270(1)(a), (c), and (e) due to a single written statement (without context) expressing CCWRD's opinion on the Union's handling of their representation of an employee:

> Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination).

Complaint, Paragraph 24.

The Complaint lacks specific allegations showing that the employer's statement was anything but a constitutional exercise of free speech; it did not rise to the level of a "threat of reprisal, force, or a promise of benefit." CCWRD's statement instead expressed CCWRD's opinion (and ultimate rejection) of the Union's argument –*i.e.*, that bringing a non-functioning gun on CCWRD property is not serious. Prior interpretations of the law make it clear: CCWRD has a right to express its view by commenting on (and

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rejecting) the poorly formed argument the Union representative made at the investigatory interview. CCWRD was incontrovertibly justified in exercising a reasonable degree of prudence in articulating the basis for the discipline it administered.

The Nevada Supreme Court has acknowledged that National Labor Relations Board ("NLRB") decisions have been helpful to the Board when interpreting and applying Chapter 288. *Truckee Meadows v. Int'l Firefighters*, 109 Nev. 367, 375 (1993). It is especially appropriate here where the relevant NLRA prohibitions are nearly identical to the prohibitions under NRS 288. *Compare* NLRA Section 8(a)(1) and (3); (29 USC 158 (a)) *with* NRS 288.270(1).

In cases just like this, the NLRB has long held that employer expression of opinions, even opinions sharply critical of a union, whether made directly to, or in the presence of bargaining unit members, do not constitute an unfair labor practice. For example, in *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 369 NLRB 111 (2020), the NLRB upheld the right of a high-level manager to tell employees, that "he could not believe they had selected 'these union negotiators,' noting that the negotiators 'can't get you anything and you should just leave the room[.]'" The NLRB concluded that such a statement was a lawful expression of opinion. The manager's statements conveyed no more than an "emotionally charged expression of a negative opinion that did not contain any threat of reprisal or force or any promise of benefit." *Id.* at 5.

Similarly, in *ExxonMobil Research & Engineering Company, Inc*., 370 NLRB No. 23 (2020), the NLRB concluded that a statement made by the employer's lead negotiator to the bargaining unit employees suggesting that the "Union was the reason that the unit employees had not received improved benefits" was nothing more "than a statement of his point of view as to the Union's conduct." *Id.* at 7.

The United States Court of Appeals for the District of Columbia Circuit also interprets the NLRA in a similar way. During a discussion with a union representative within earshot of employees, the store manager said that "union representatives are jerks,"

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"unions are outdated and ridiculous," "union dues are ridiculous," and that the employees "did not need a union… the union stole money from its members[]." *Fred Meyer Stores, Inc. Relations Bd.*, 865 F.3d 630, 642 (D.C. Cir. 2017). The court concluded that those statements were not sufficiently coercive to establish a violation of the NLRA. *Id.* The court noted that the statements could be interpreted as a mere "expression of frustration directly responding to considerable provocation from a union representative" and "not a threat or even a statement of forward-looking policy." *Id*.

Even a statement made by the employer in the presence of employees that the union's business manager was "the most arrogant son of a bitch I've ever met who wants to run your union like Hitler" was found by the NLRB to be protected speech by the employer. *Erickson Trucking Service, Inc., d/b/a Erickson's, Inc*., 366 NLRB No. 171 at 2. (2018). The Board added, "[a]n employer may lawfully criticize the union… and the remark did not convey a threat or imply a sense of futility." *Id.*

Here, CCWRD's statement amounts to nothing more than its dissatisfaction with (and ultimate rejection of) a Union representative's argument against the administration of discipline – *i.e*., that bringing a non-functional gun on CCWRD's campus is not a serious infraction. CCWRD must articulate the basis for any discipline it administers, and in doing so, it inarguably has a right to explain the difference between being dismissive of a concern over campus security versus taking ownership of a poor decision that created security concerns. Indeed, the CCWRD's explanation "contain[s] no threat of reprisal or force or promise of benefit." Even if the Union were to argue that CCWRD's singular statement is disparaging, even that is insufficient to find a prohibited practice violation. *See Sears, Roebuck & Co.*, 305 NLRB 193, 193 (1991) ("Words of disparagement alone concerning a union, or its officials are insufficient for finding a violation of Section 8(a)(1)"). By any measure, CCWRD's statement is constitutionally protected and therefore is not an appropriate basis for the Union to bring its prohibited practice Complaint.

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IV. CONCLUSION

For all these reasons, CCWRD respectfully requests that the Board dismiss the Union's Complaint with prejudice.

V. REQUEST FOR ATTORNEY FEES AND EXPENSES

Because the Complaint lacks any merit whatsoever, and to deter further attempts to chill an employer's right to free speech, CCWRD also requests that the Union be ordered to pay its attorney fees and expenses.

Respectfully submitted,

FISHER & PHILLIPS, LLP

By: */s/ Mark J. Ricciardi, Esq.*
MARK J. RICCIARDI, ESQ.
300 South Fourth Street
Suite 1500
Las Vegas, Nevada 89101
Attorneys for Respondent

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CERTIFICATE OF ELECTRONIC SERVICE

This is to certify that on the 9th day of October 2024, the undersigned, an employee of Fisher & Phillips LLP, electronically served the foregoing **RESPONDENT CLARK COUNTY WATER RECLAMATION DISTRICT'S MOTION TO DISMISS THE NEVADA SERVICE EMPLOYEE UNION'S COMPLAINT and RESPONDENT'S REQUEST FOR ATTORNEY FEES AND EXPENSES** to EMRB (emrb@business.nv.gov) and the following:

CHRISTENSEN JAMES & MARTIN, CHTD.
EVAN L. JAMES, ESQ.
elj@cjmlv.com
DYLAN J. LAWTER, ESQ.
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By: /s/ Sarah Griffin
An employee of Fisher & Phillips LLP

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EXHIBIT A

"The Clean Water Team"

CLARK COUNTY
WATER RECLAMATION DISTRICT

EMPLOYEE NAME: **Reid Engstrom**	TITLE: **WRD WW Collection System Operator**
DIVISION: **Collection System**	DATE: **July 3, 2024**
NAME/TITLE OF SUPERVISOR COMPLETING FORM: **Otis Johnson, Collection System Manager**	

TYPE OF ACTION:

- ☐ DOCUMENTED ORAL WARNING
- ☐ WRITTEN REPRIMAND
- ☒ **SUSPENSION (4 DAYS/40 HRS)**
- ☐ ADMINISTRATIVE LEAVE PENDING TERMINATION
- ☐ ADMONISHMENT
- ☐ FINAL WRITTEN WARNING
- ☐ INVOLUNTARY DEMOTION

DATE AND TYPE OF LAST ACTION:
N/A

DESCRIPTION OF INCIDENT:
On June 12, 2024, the WRD Human Resources office received information that a gun case containing what initially appeared to be a gun was found in a dumpster near the Collection System Services building. Subsuquently, the weapon was determined to be a pneumatic (air) gun. Surveillance video was reviewed, and it was determined that on the morning prior, June 11, 2024, you disposed of the gun case containing the gun in the dumpster. As such, an investigation was prompted, and you were provided your Weingarten (NLRB v. J. Weingarten Inc., 420 U.S. 251(1965)) notification and you participated in an investigatory meeting on June 17, 2024.

During the course of the investigation, surveillance video showed on the morning of June 11, 2024, you pulled up in your personal vehicle behind your assigned District vehicle. You removed the gun case from your personal vehicle and placed it in your District vehicle. You proceeded to go inside the Collection System building and came out to your District vehicle about 30 minutes later. On your way out of the plant, you stopped by the dumpster and threw the gun case with the gun in the dumpster.

During your investigative interview, you were forthcoming about the incident. You admitted to bringing the weapon case, which contained a non-functioning paintball gun. You also stated that the gun had not worked for years, and you decided to dispose of it. You did not want to throw it away at home due to a personal matter which you explained. You placed the gun in your vehicle and when you got to work decided to throw it away, as it is common for employees to throw items in the District dumpster.

You stated you had no malicious intent; you were simply throwing out trash and could not have imagined that it would be found. During the interview, you fully recognized the error in judgment and understand the implications that come with bringing a weapon to work. You acknowledged the seriousness of your actions especially given today's climate involving workplace violence and shootings in particular. During the investigatory interview, the Union appeared to downplay the seriousness of the infraction by stating the non-functioning gun could not hurt anyone and stated that even a baseball bat can be considered a weapon. These points do not negate the fact that you brought a weapon onto District property, a violation so serious it would warrant a termination.

The fact that you brought a gun (functioning or otherwise) to work is a serious violation of District policies. When a weapon is brought onto property there is no way to initially determine whether it is functioning or not. This conduct impacts that safety and security of all staff of the District. Had the District taken into consideration the statements made by the Union on your behalf which undermined the extreme gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination). However, based solely on your testimony which accepted responsibility for your actions as well as conveying your understanding of the seriousness of the safety implications of the conduct, together with the personal circumstances which resulted in the serious lack of judgement, it has been determined to suspend you for one week (40 hours) without pay starting July 9, 2024 to the end of business day July 12, 2024.

Your actions have violated the following wholly or in part:

- District Administrative Policy 002 – Code of Conduct: "R. Unauthorized possession of…firearms, or other dangerous weapons… on District premises, including same in employees' vehicles and/or personal possessions."

- District Administrative Policy 022 – Workplace Violence Prevention: "I. Examples of Prohibited Conduct… D. Possessing…a weapon while on district premises or engaged in district business. i. A weapon is defined for the purpose of this policy as any instrument that can be used… to emit a projectile that poses a reasonable risk of injury to an individual and is utilized in a way outside of the intended purpose."

- District Safety and Security Policy, SEC-008 – Possession of Weapons: "No weapons may be brought on to District property… Violations of this policy by employees may result in disciplinary action, up to and including termination…"

REQUIRED CORRECTIVE ACTION:
You must never bring a weapon on District property. You must abide by all District policies and procedures including the Code of Conduct Policy, the Workplace Violence Prevention Policy, the Possession of Weapons Policy, and any other related policies in the District Administrative Manual or the District Merit Personnel System. Please refer to listed policies for a more detailed explanation of proper procedures regarding professional workplace conduct and other pertinent information in order for you to meet the required corrective action. Failure to comply with the required corrective action/or further infractions may result in further progressive discipline up to and including termination.

The union, on behalf of an employee, may submit a grievance in writing to the General Manager within ten (10) working days of receipt of this action. Upon written request to Human Resources, the employee shall have all suspensions removed that were issued more than thirty-six (36) months prior to the request, provided that no ensuing discipline occurred. Because you have received this suspension during this evaluation period, you shall not be entitled to an annual merit increase on your next anniversary date pursuant to Article 21 of the SEIU Contract Bargaining Agreement.

If you feel you may have personal problems contributing to your unsatisfactory conduct, please feel free to call 1-844-819-4771 to contact the Employee Assistance Program.

I have read, discussed, and understand the contents of the above memo.

Employee Signature: Reji S. Eapen

(Your signature does not indicate that you agree, only that you have been presented with this information.)

Date: 7-3-24

CC: SEIU

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Attorneys for Local 1107

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NEVADA SERVICE EMPLOYEES UNION, Complainant, vs. CLARK COUNTY WATER RECLAMATION DISTRICT, Respondent.	CASE NO.: 2024-030

OPPOSITION TO MOTION TO DISMISS

Complainant, Nevada Service Employees Union, SEIU Local 1107 ("Local 1107" or "Union"), by and through its counsel of record, Christensen James & Martin, Chtd., hereby opposes Clark County Water Reclamation District's ("WRD") Motion to Dismiss ("Motion").

I.

SUMMARY

Both explicit and implicit threats are unprotected speech that constitute an unfair labor practice. *UPMC and SEIU Healthcare Pennsylvania*, 366 NLRB No. 142, 24, 2018 NLRB LEXIS 318, *112, 211 L.R.R.M. 2413, 2018 WL 3738345. The Employee-Management Relations Board ("EMRB") is concerned about any employer conduct that chills employees' ability to associate in a union. *Clark County Classroom Teachers Association v. Carson City School District*, Item No. 237, Case No. A1-045435 (Dec. 13,

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1989). Because the Clark County Water Reclamation District's ("WRD") written statement confirmed that Union representation subjected the employee to employment termination, the statement directly impacts employee association rights and Union representation, and it violates the Employee-Management Relations Act ("EMRA").

II.

FACTS

WRD threatened an employee by directly stating that utilizing Union representation and the Union's corresponding speech on the employee's would subject him to the harshest form of discipline. To wit, "Had the District taken into consideration the statements made by the Union on your behalf which undermined the extreme gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination)." Complaint at 3-4, ¶ 24.

III.

ARGUMENT

1. The EMRB has already ruled that speech can violate the EMRA.

The EMRB has stated the following:

> Previously this Board has held that in examining whether speech violates MRS 288.270 [sic], we must use the "totality of circumstances" test and the "reasonably foreseeable effect" approach to such problems. *See Clark County Classroom Teachers Association v. Carson City School District*, Case No. A1-045435, Item No. 237 (December 13, 1989), and *Ormsby County Teachers Association v. Carson City School District*, Case No. A1-045339, Item No. 114 (April 22, 1991).

Clark County Association of School Administrators v. Clark County School District, Item No. 394, Case No. A1-045593, 1996 NVEMRB LEXIS 17, *19 (Oct. 24, 1996). The EMRB's statement in *Clark County Association of School Administrators* confirms that speech may violate the EMRA. Therefore, WRD's motion to dismiss must be denied because it is based solely on the legally incorrect argument that speech cannot violate the EMRA. The EMRB should, on this point alone, deny WRD's motion.

Caselaw from the National Labor Relations Board ("NLRB") and federal courts is consistent with the EMRB's rule and standard set forth in *Clark County Association of School Administrators*. In the labor law context, the first amendment to the U.S. Constitution provides no additional free speech protection to parties beyond what is stated in 29 U.S.C. § 158(a)(1). *See Fed.-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1248 (5th Cir. 1978) (employer free speech rights are included in and limited by 29 U.S.C. § 158(a)(1), which states that while the expression of any view will ordinarily not constitute evidence of an unfair labor practice, expressions that contain a "threat of reprisal" for engaging in union activity are not protected). This includes statements that *implicitly* contain a threat of reprisal, as such statements are not entitled free speech protections under 29 U.S.C. § 158(a)(1). The following quotation from a federal court case drives the point home:

> Likewise, it is an unfair labor practice to threaten reprisal for union support or promise benefits for anti-union activity. *Santa Fe Drilling, supra*, 416 F.2d 725 at 729, *Luisi Truck Lines, supra*, 384 F.2d 842 at 845. ***The threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening***. *Colonial Corporation v. NLRB*, 427 F.2d 302, 305-6 (6th Cir. 1970). ***No proof of an anti-union motive need be found if the employer's discriminatory conduct is inherently destructive of important employee rights.*** *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34, 18 L. Ed. 2d 1027, 87 S. Ct. 1792 (1967).

NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970) (emphasis added).

Therefore, any statement that may reasonably be construed "as a warning not to engage in union activity" is not protected speech and is subject to an unfair labor practice claim. *See McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 938 (9th Cir. 1981) (enforcing an NLRB petition seeking to enforce an order that reasonably interpreted employer communications as such a warning, based on "inferences from the record" that the NLRB "was free to draw.").

All of this is consistent with United States Supreme Court case law indicating that employers may not rely on the first amendment as a defense when they make statements that violate labor laws. For example, an employer's prediction regarding the likely economic consequences of unionization ***that are outside his control*** is generally protected by the first amendment to the U.S. Constitution. But there is a very large and very important exception to this general rule. "If there is ***any implication*** that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities ... the statement is no longer a reasonable prediction based on available facts but a threat of retaliation ... and as such without the protection of the First Amendment." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 579, 89 S. Ct. 1918, 1922 (1969) (emphasis added).

At issue in our Case is an express statement from WRD that declares Union representation and related speech made by Union representatives subject the employee to heightened discipline, and that WRD does the employee a favor by ignoring the Union's representation activities. Any assertion that WRD's statement is free from intimidation and coercion is a mere declaration of position. Such a declaration ignores both the express and implied threat and the opposing benefit contained in the statement made by WRD to the employee, which conveys the following message: 'Utilize the Union and get fired, or deal directly with WRD and remain employed.'

2. Informing an employee that Union representation can get him fired is not protected speech.

The facts are clear: WRD asserted, whether explicitly or implicitly, that Union representation would have gotten the employee fired had WRD not been willing to benefit the employee by overlooking the Union's representation. The EMRB has previously explained why such conduct and communications are problematic:

> Similarly, as set forth in *International Union of Operating Engineers v. County of Lyon*, Case No. A1-045451, Item No. 240 at 4, this Board has recognized that the position of

> an employer may be formidable in relations to the employees and any statements made cannot be easily ignored by them. As stated in *Ormsby*, at 3:
>
> "The United States Supreme Court has expressly stated that although an employer's intent or motive to discriminate or to interfere with Union rights is a necessary element of an unfair labor practice, specific evidence of the employer's subjective intent is not required when the employer's conduct inherently encourages or discourages union membership."

Clark County Association of School Administrators, No. A1-045593, Item No. 394 (October 24, 1996). In our Case, WRD wielded its formable power over the employee by asserting that Union representation was making his situation worse and that WRD was willing to benefit the employee by only imposing a forty-hour unpaid suspension of employment *for placing garbage in a dumpster*.

The EMRB set the standard for analyzing WRD's conduct and statement as follows:

> [I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employers [sic] motive or whether the coercion succeeded or failed. The 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. *American Freightway Company*, 124 NLRB 146, 147, 44, LRRN 1302 (1959).

Clark County Classroom Teachers Association, Item No. 237, Case No. A1-045435; *see also AFSCME, Local 4041, v. State Of Nevada, Department Of Corrections, High Desert State Prison*, Case No. 2020-002 (April 15, 2021), (quoting *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 741 (4th Cir. 1998) ("'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.'")).

WRD's self-serving declaration in its Motion that its statement and conduct do not offend the EMRA cannot reasonably be sustained. WRD unwittingly highlighted why its statement that Union representation would get the employee fired but WRD's

benevolence kept the employee employed is so dangerous. WRD asserts, "Neither the Union nor the employee filed a timely grievance contesting the discipline under the terms of the CBA. Nor does the Complaint question the propriety of the discipline imposed." Motion at 2, n. 1. Any reasonable person can read WRD's statement to mean that if an employee continues to make use of Union representation, the employee's employment will be terminated, and that it is best for you all to sit down, shut up, and enjoy WRD's promise of continued employment by accepting the imposed discipline. It is also noteworthy that WRD engaged in its threats during contract negotiations with the Union. *See* Complaint at 2, ¶ 10. How better to intimidate Union membership and the Union's bargaining team during negotiations than to declare that the Union better watch what it says or its members will be hassled and fired? Such conduct cannot be tolerated under the EMRA if, as alleged, it has a chilling effect on employees' rights to associate as members of an employee organization. *Clark County Classroom Teachers Association v. Carson City School District*, Item No. 237, Case No. A1-045435. WRD's motion to dismiss must therefore be denied.

3. Accepting WRD's argument that its statement is speech free from consequence would be insidious because WRD's "speech" limits the Union's and the employee's speech and representation activities.

WRD is not free to make statements that discourage union activity or speech. "The Board is concerned with any activity which may, in practice or on its face, have a chilling effect upon the right of public employees to associate as members of an employee organization." *Clark County Classroom Teachers Association*, Item No. 237, Case No. A1-045435. WRD's assertion that termination of the employee was warranted "[h]ad the District taken into consideration the statements made by the Union on your behalf" (Comp. ¶ 24) is clear evidence that it may punish employees merely for inviting the Union to perform its usual and expected function—arguing a position on behalf of the employees. *See* Complaint at 3 ¶ 17. The last thing a Union steward or contract representative wants to do is get an employee fired. Yet, that is exactly what WRD

asserts may result from arguments (or declarations of fact) being made by Union representatives. In this particular case, the Union's statements, which WRD claims were worthy of employment termination, were in reality both innocuous and factual: (1) the discarded item was broken, (2) the discarded item could not be used to harm anyone, and (3) even a baseball bat left in a car from a baseball game could be considered to be a weapon according to WRD's unreasonable interpretation of its own policy.

WRD has not disputed that these were the statements made by the Union representative or that the statements are factually incorrect, nor could WRD challenged these allegations at present because state agencies like the EMRB, when considering motions to dismiss, must generally accept as true the factual allegations made in a petition or complaint and may not consider factual matters outside the petition. *St. Francis Parkside Lodge v. Dep't of Health & Rehab. Servs.*, 486 So. 2d 32, 33 (Fla. Dist. Ct. App. 1986) (agencies must accept as true the factual allegations of the petitions and may not consider any factual matters outside the complaint); *Price v. Labor Comm'n*, 2021 UT App 138, ¶ 1 n.1, 504 P.3d 723, 725 (when reviewing an administrative order granting a motion to dismiss, courts "accept the facts as alleged…and consider those facts and all reasonable inferences therefrom, in a light most favorable" to the petitioner).

WRD's assertion that neither the employee nor the Union filed a grievance regarding the discipline is clearly duplicitous. Why would any employee or Union representative file a grievance challenging discipline when WRD fired a shot across the bow to its employees declaring that if they or the Union adopt positions that WRD does not like employees will be fired? There should be no question that WRD's statement is intimidating, coercive, and has a tendency to interfere with the employee's rights and the Union's representation activities. Adopting WRD's position would lead to the harmful effect of allowing one party's "speech" to discourage and displace another party's speech.

4. The case law cited by WRD addresses issues not present in this case.

WRD cites numerous cases that are inapplicable to this Case. For example, WRD cites *Ormsby County Teachers Association vs. Carson City School District*, EMRB Case No. A1-045339 (1981) in declaring that its statements are without consequence. In *Ormbsby*, the speech issue dealt with the school district's response to specific statements made by the association to its members during a collective bargaining update. Of course, the school district was allowed to defend itself and present its position. But in our Case, WRD was not making a statement about policy or factual disagreements; it asserted that by ignoring statements made by a Union representative, it was doing the employee a favor by merely continuing to employ him. *Ormsby* does not apply to the present situation.

WRD also cites *ExxonMobil Research & Eng'g Co.*, 370 NLRB No. 23 (2020) for the proposition that may engage in speech disparaging the Union's representation activities. In *Exxon*, the NLRB laid out the law that disparaging remarks about a union may constitute an unfair labor practice, *e.g.*, a "statement 'clearly calculated to mislead employees as to the Union's conduct with regard to restoration of ... benefits' amounted to 'interference, restraint, and coercion that unlawfully tended to undermine the Union," but the NLRB then concluded that a statement asserting that non-union employees got more paid time off because they were not members of the union was not "objectively false or misleading" and therefore could not constitute disparagement. *Exxon*, at 7 (citing *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9 (2016)). In our Case, WRD's statement that Union representation can get the employee fired is objectively coercive and misleading because the employee is entitled to representation free from WRD's overlord oppressive tactics. *See* NRS 288.140, 288.150, and 288.170.

WRD's other cited cases fail for similar reasons. In *Fred Meyer Stores, Inc. Relations Bd.*, 865 F.3d 630, 642 (D.C. Cir. 2017), the court found no unfair labor practice where an employer representative called a union representative names and

challenged the need for union because "a reasonable onlooker would interpret Dostert's statements as an expression of frustration directly responding to the events that had just transpired, not a threat or even a statement of forward-looking policy." *Id.* at 642. The court then proceeded to contrast its findings with *Turtle Bay Resorts*, 353 N.L.R.B. 1242, 353 (2009), in which an unfair labor practice was found when an employer representative threatened employees who met with a union organizer. *Fred Meyer Stores, Inc. Relations Bd.* at 642. Our Case is unlike *Fred Meyer* because WRD's comments were thought out and written down rather than made in the heat of verbal sparring, and the comments are clearly threatening of punitive action for engaging the Union, like those detailed in *Turtle Bay Resorts*.

Note that "specific evidence of the employer's subjective intent is not required when the employer's conduct inherently encourages or discourages union membership." *Clark County Association of School Administrators*, at *20 (citation omitted). WRD cannot avoid the fact that it made written statements clearly indicating that Union representation may subject employees to enhanced discipline, including loss of their jobs. WRD engaged in a quintessential prohibited labor practice because such statements are objectively harmful to both the employee and the Union, and the EMRB already has sufficient evidence to so rule. At the very least, Local 1107 is entitled to proceed to a hearing in an effort to prove that the statement made by WRD constitutes a prohibited labor practice.

IV.

CONCLUSION

WRD effectively filed a summary judgment motion. It cited inapplicable caselaw and then declared that its statements were consistent with that caselaw. The standard for dismissal is probable cause, and WRD's motion never bothered to address the EMRB's standard used to evaluate speech issues, which is an objective standard using the totality of the circumstances and the reasonably foreseeable effect of the challenged statement.

There should be no dispute that WRD's written statement that Union representation can result in heightened disciplinary action is extremely concerning. There should also be no dispute that WRD's written statement may reasonably be construed as a warning not to engage in union activity (i.e., a warning not to allow a Union representative to be present at or to make statements during a meeting related to employee discipline). For this reason alone, the Motion to Dismiss must be denied. Furthermore, WRD's claim that attorney's fees and expenses should be paid by the Union is clearly unwarranted and must be denied.

Because the principal facts are undisputed, the EMRB should rule that not only is there probable cause for the Complaint but also that the statement violates the EMRA. WRD's Motion must be denied, and the Board should issue a ruling in favor of the Union that WRD committed a prohibited labor practice. Alternatively, the Board may schedule a hearing to evaluate the totality of the circumstances and the effect of the challenged statement.

DATED this 23rd day of October 2024.

CHRISTENSEN JAMES & MARTIN, CHTD.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, I caused a true and correct copy of the foregoing Opposition to Motion to Dismiss to be filed via email, as follows:

Employee-Management Relations Board
emrb@business.nv.gov

I hereby certify that on October 23, 2024, I served a true and correct copy of the foregoing Opposition to Motion to Dismiss via email to the following recipient(s):

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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

NEVADA SERVICE EMPLOYEES UNION, Complainant, vs. CLARK COUNTY WATER RECLAMATION DISTRICT, Respondent.	Case No: 2024-030 **RESPONDENT CLARK COUNTY WATER RECLAMATION DISTRICT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE NEVADA SERVICE EMPLOYEE UNION'S COMPLAINT and RESPONDENT'S REQUEST FOR ATTORNEY FEES AND EXPENSES**

Respondent, Clark County Water Reclamation District ("CCWRD" or the "Respondent"), by and through its counsel of record, Mark J. Ricciardi, Esq., and Judy Sanderlin, Esq. of the law offices of Fisher & Phillips LLP, hereby replies to the Nevada Service Employees Union's (the "Union" or "Complainants" or "Local 1107") Opposition to CCWRD's Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Union's arguments misunderstand the protections for employer speech under NRS 288 and related case law and seek to convince this Board that *any and all* critical comments about a union are somehow prohibited by law. To the contrary, an employer has undeniable free speech protections in expressing its opinion of union conduct. Here,

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CCWRD's statement at issue, made to a single employee to explain the rationale of discipline prescribed during a disciplinary action, does not (by any objective measure) amount to a threat or coercion under the Employee-Management Relations Act ("EMRA"). Finding such a statement to be unlawful would effectively eviscerate the free speech protections afforded an employer. Because the statement is protected as free speech under NRS 288, the Union's claims lack any legal basis, justifying the dismissal of the Complaint with prejudice against CCWRD.

II. ARGUMENT

1. The Language Used by CCWRD in the Disciplinary Document did not Amount to an Unlawful Threat or Promise of Benefit of Any Kind.

a. The Union Cannot Ignore that CCWRD's Comment is Protected Free Speech.

The Union would have this Board believe that CCWRD's position somehow hinges on the idea that "speech alone" cannot violate the EMRA. *See* Opposition at 2:25-27. The Union misrepresents CCWRD's position. CCWRD never claimed that all speech is immune from scrutiny. To be clear, CCWRD's position is straightforward: **speech only crosses the line when it contains a threat of reprisal, force, or promise of benefit** — something profoundly missing here.

Furthermore, the Union's mischaracterization conveniently overlooks fundamental legal standards that prove the Union's position wrong. In the absence of threats of reprisal, force, or promise of benefit, speech that criticizes union activity is, in fact, legally protected.

> [S]ection 8(c) of the NLRB Act, which states: "The expressing of any views, argument or opinion or the dissemination thereof whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this subchapter if such expressions contain no threat of reprisal or force or promise of benefit.

Ormsby County Teachers Association vs. Carson City School District, EMRB Case No. A1-045339, (1981).

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The Union cannot be allowed to avoid the dismissal of its Complaint by ignoring this authority. Indeed, the Union's Opposition is almost exclusively focused on mischaracterizing the statement made by CCWRD through exaggeration, tortured implications, and objectively unrealistic hypotheticals. It remains that CCWRD's comment is lawful protected free speech because it is free from threats or promises of benefits – it is not unlawful merely because the Union takes offense to the content of the message.

b. Based on a Plain Reading of the Words in the Disciplinary Document, CCWRD Did not Make an Unlawful Threat.

The disciplinary document issued by CCWRD lacks any language that could reasonably be interpreted as a threat against union activity or membership, whether explicit or implicit:

> The fact that you brought a gun (functioning or otherwise) to work is a serious violation of District policies. When a weapon is brought onto property there is no way to initially determine whether it is functioning or not. This conduct impacts the safety and security of all staff of the District. Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination). However, based solely on your testimony which accepted responsibility for your actions as well as conveying your understanding of the seriousness of the safety implications of the conduct, together with the personal circumstances which resulted in the serious lack of judgment, it has been determined to suspend you for one week[.]

Motion to Dismiss at 3:24-28.

Grasping at straws, the Union baldly argues that CCWRD's opinion on the lack of merit of the Union's opposition to the discipline of an employee constitutes an implicit threat. Yet the Union has failed to cite a single case where an employer's opinion on the quality of a union's representation constitutes an unlawful implicit threat. It is instructive that the NRLB has offered various examples of what constitutes an unlawful threat – none of which are analogous to the facts at hand. For instance, in *Cadillac of Naperville, Inc. v. National Lab. Relations Board,* 14 F.4th 703 (2021), the court found that a statement

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by an employer threatening to make employees' "lives harder by ramping up enforcement of company rules" could be reasonably understood as a threat of retaliation due to union activity, thus constituting an unfair labor practice. Similarly, in *NLRB v. Brookwood Furniture, Div. of U.S. Industries,* 701 F.2d 452 (1983), statements by supervisors such as telling an employee he was "fixing to get his ass in trouble" if he became involved with the union were considered implied threats of reprisal for union activities.

In the cases above, the comments involved overt threats of negative consequences directly aimed at discouraging union membership or union activity. The same simply can't be said for CCWRD's comment: "This conduct impacts the safety and security of all staff of the District. Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest level of discipline (termination)." There is no implicit threat of any kind. Instead, by its own words, CCWRD is stressing the importance of a specific policy that was violated and criticizing the union's attempt to minimize the severity of the violation.

An employer has every right to be critical of a union. In *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 369 NLRB 111 (2020), the NLRB upheld the right of a high-level manager to tell employees that "he could not believe they had selected 'these union negotiators,' noting that the negotiators 'can't get you anything and you should just leave the room[.]'" The Board emphasized that statements rooted in expressing opinions, even critical, are protected. *Id.* at 5. CCWRD's statement about bringing a weapon onto the property and how the Union downplayed the gravity of the situation is directly in line with the rationale in *Richfield*. CCWRD's statement expressed concern about campus security and policy adherence without insinuating any reprisal related to union activities. Furthermore, CCWRD's statement, "Had the District taken into consideration the statements made by the Union on your behalf which undermined the gravity of the conduct violation; the outcome would warrant the District's highest

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level of discipline (termination)," was well-advised insofar as it explains CCWRD's rationale for the discipline to ensure that it didn't create an improper precedent in future events where employee accountability is absent. Further proving the lawful nature of CCWRD's comments, there can be no question that the same criticisms made of the Union's position could be made to the employee directly in support of discipline being administered. In other words, CCWRD has the right to address the merit (or lack thereof) of representations made on an employee's behalf in opposition to employee discipline. Even with the Union's attempt to twist the context of CCWRD's statement, the Union has not shown any contemporaneous coercive behavior or context to show a violation of NRS 288.

2. CCWRD's Comments Are Not Comparable to the Unlawful "Threats" Recognized by the NLRB and the Courts.

While there are indeed cases where employer statements have been found to violate NLRA Section 8 due to their coercive or threatening nature, comparable circumstances cannot be found here. *See for example*, *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410 (5th Cir. 1981) (NLRB found it unlawful when an employer broadly threatened a plant closure if employees unionize); *see also*, *Sysco Grand Rapids, LLC v. Nat'l Lab. Rels. Bd.*, 825 F. App'x 348 (6th Cir. 2020) (NLRB found violations of section 8 of the NLRA where the employer sent a letter warning all employees who voted for the union would suffer consequences such as job loss and restricted access to managers to discuss working conditions); *see also*, *Tellepsen Pipeline Services Co. v. NLRB*, 320 F.3d 554 (2003), (NLRB found it unlawful for a company president to interrogate employees and make statements to groups of employees implying job loss if the employees unionized).

Importantly, each of the above cases involve a direct connection to an employer's communications and an intent to prevent employees from unionizing. So, while words alone can constitute an unlawful threat when broadly distributed and aimed at obstructing the company's employees to unionize, none of these cases are analogous to CCWRD's

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statement – a written explanation of discipline delivered to only the affected employee and the Union, which included CCWRD's opinion of the quality of the Union's argument made in opposition to any discipline being administered.

3. The Cases Cited by the Union are Inapplicable and Otherwise Irrelevant.

The Union's Opposition is dependent on three inapplicable cases: *Clark County Classroom Teachers Association v. Carson City Sch. District,* Case No. A1-045435, Item No. 237 (December 13, 1989), *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981), and *Colonial Corp. v. NLRB*, 427 F.2d 302, 305-6 (6th Cir. 1970). Similar to *TRW-United Greenfield Div.*, *Sysco Grand Rapids, LLC,* and *Tellepsen Pipeline Services Co.*, all three of the cases cited by the Union reaffirm the proposition limiting unlawful communications to objective threats clearly aimed at, and resulting in, preventing union activity or engagement. Indeed, as discussed in greater detail below, *Colonial Corp*. is particularly unhelpful to the Union and is instead fully supportive of CCWRD.

In *Clark County,* a complaint arose from statements made by a principal at meetings of the Teacher Advisory Council where various teachers were present. The principal made statements that branded teacher communications with the union as "unprofessional conduct." That statement was threatening because "unprofessional conduct" is a basis for job termination under the applicable discipline statues. Further, the teachers testified about the "intimidating and coercive atmosphere" created by the principal's remarks, which directly discouraged their union participation. One member resigned to avoid union involvement. *Id.* As a result, under these circumstances, the Board found that the principal's statement was meant to "discourage involvement" and had a chilling effect on union engagement. *Id.* at 5.

Likewise, in *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981), the Court examined the lawfulness of the discharge of an employee, Robert H. Mourning ("Mourning"). Mourning was vocal about union issues, distributed union literature, and encouraged colleagues to support union efforts. *Id.* at 1. Mourning's supervisor and other

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company officials made statements to other employees that Mourning would not have been fired had he "not been so open about the union," cautioned employees against participating in union discussions, and signaled potential negative consequences. *Id*. at 6. The Board determined that the totality of the employer's actions "were designed to intimidate and discourage employees from union activity," violating NLRA Section 8. *Id.*

Here, in contrast to both *Clark County* and *McDonnell Douglas Corp.*, CCWRD's statement lacks overt threats or coercion to a contingent of employees. CCWRD's opinion regarding the lack of merit of the Union's position in relation to the administration of discipline was delivered to only the one affected employee and his Union representative. This is far different from the large audiences that received the employer comments in *Clark County* and *McDonnell Douglas Corp*. Additionally, in this case CCWRD's comment itself did not in any way suggest, and it cannot be reasonably implied, that unionization, membership, or engagement would result in negative consequences to one or more employees. Rather, CCWRD's communication is limited to an opinion that the Union's position on the administration of discipline was counterproductive to redressing the actions of the employee. Furthermore, contrary to *Clark County* and *McDonnell Douglas Corp*., a "threat" cannot be inferred or implied from the circumstances surrounding CCWRD's comments because there was no actual or resulting deterrence of unionization or union membership. There's not even a whisper of retaliatory intent in CCWRD's statements or the surrounding circumstances, and as such, the Union's Complaint must be dismissed.

The Union's reliance on *Colonial Corp. v. NLRB*, 427 F.2d 302, 305-6 (6th Cir. 1970) is simply misplaced because it offers the Union no support for its argument.

In *Colonial*, the employer's CEO held meetings with large groups of employees and specifically stated that because of the company's economic struggles and potential layoffs, "[a] union would not be in the best interest of Colonial's employees." *Id.* at 2.

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Notably, local citizens published and distributed a handbill entitled "Fairy Tales or Facts?" that warned against unionization and claimed Colonial would close if the union succeeded. *Id.* Colonial did not repudiate or adopt the handbill's content. *Id*. at 3. The Sixth Circuit concluded that the employer's statements were not coercive and did not constitute a threat of reprisal or promise of benefit. *Id.* at 5. The court emphasized that the statements were primary expressions of economic concerns and lawful opinions protected under 8(c) of the Act. *Id.* In other words, even statements that *directly* speak against unionization may be lawful. If the statements in *Colonial* are lawful, there can be no question that CCWRD's comments are also lawful - nothing more than a reasoned explanation and procedural outcome, not an attempt to undermine or discourage union support.

III. CONCLUSION

For these reasons, CCWRD respectfully requests that the Board dismiss the Complaint with prejudice.

IV. REQUEST FOR ATTORNEY FEES AND EXPENSES

Because the Complaint lacks any merit whatsoever, and to deter further attempts to chill an employer's right to free speech, CCWRD also requests that the Union be ordered to pay its attorney fees and expenses.

Dated this 13th day of November 2024.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

This is to certify that on the 13th day of November 2024, the undersigned, an employee of Fisher & Phillips LLP, electronically served the foregoing **RESPONDENT CLARK COUNTY WATER RECLAMATION DISTRICT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE NEVADA SERVICE EMPLOYEE UNION'S COMPLAINT and RESPONDENT'S REQUEST FOR ATTORNEY FEES AND EXPENSES** to EMRB (emrb@business.nv.gov) and the following:

EVAN L. JAMES. ESQ.
CHRISTENSEN JAMES & MARTIN, CHTD
elj@cjmlv.com

By: /s/ Sarah Griffin
An employee of Fisher & Phillips LLP