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Fraternal Order Of Police
Nevada C. O. Lodge 21

FILED
September 11, 2024
State of Nevada
E.M.R.B.
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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

FRATERNAL ORDER OF POLICE
NEVADA C. O. Lodge 21,

Complainant,

and

EXECUTIVE DEPARTMENT OF
THE STATE OF NEVADA and its
DEPARTMENT OF CORRECTIONS,

Respondent

Case No.: 2024-031

AMENDED PROHIBITED PRACTICES COMPLAINT

Complainant, FRATERNAL ORDER OF POLICE NEVADA C. O. Lodge 21 ("FOP Lodge 21") by and through undersigned counsel Adam Levine, Esq. complains and alleges as follows:

1. FOP Lodge 21 is a labor organization within the meaning of NRS 288.048 and is the recognized bargaining representative for Units "I" and "N" which comprise the nonsupervisory, and supervisory, Category III peace officers employed by Respondent.

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2. Respondent is the Executive Department of the State of Nevada as set forth in NRS 288.042 and includes its Department of Corrections ("NDOC") which employs many of the members of Units I and N at correctional facilities throughout the State of Nevada.

3. Maximum custody inmates have been housed at Ely State Prison ("ESP"). Maximum custody inmates are more dangerous, and require higher levels of correctional officer staffing/supervision, and different types of equipment, then lower-level offenders incarcerated by NDOC.

4. In August 2024 FOP Lodge 21 learned that NDOC intended to transfer its maximum custody inmates from ESP to High Desert State Prison ("HDSP"), and transfer the Protective Custody ("PC") inmates housed at HDSP to ESP.

5. The corrections officers and supervisors at HDSP have not all been previously trained on the handling, supervision and transportation of maximum custody inmates, and the facilities at HDSP are not currently adequate to safely house/maintain such maximum custody inmates in a manner which does not put the employees represented by FOP Lodge 21 at unnecessary risk.

6. HDSP lacks adequate equipment and staffing to safely permit corrections officers/supervisors to handle, supervise and/or transport such maximum custody inmates. The lack of equipment includes, but is not necessarily limited to, adequate numbers of the proper type of mechanical restraints, adequate numbers of radios, adequate numbers of less lethal weapons such as Pepper Ball Launchers and related ammunition, and provisions for lethal weapons coverage/response(s) in the event correctional staff is attacked by such maximum custody inmates under circumstances which could lead to death or serious bodily injury.

7. In connection with the transfer of the PC inmates from HDSP to ESP, NDOC is having correctional trainees, who have not yet even attended a Category III POST Academy, prepare an inventory inmate property for transport. Because such trainees are not yet qualified to do so, this

creates a safety hazard for other employees as the trainees are not properly trained to look for and/or recognize contraband.

8. Safety of the employee is a subject of mandatory bargaining under NRS 288.150(2)(r).

9. FOP Lodge 21 made a demand to bargain over the safety implications of NDOC's planned move of the maximum custody inmates from ESP to HDSP and PC inmates to ESP, and that any such move of inmates not take place until bargaining is completed.

10. The Executive Department and NDOC have refused to delay the transfers pending the outcome of bargaining.

11. On September 3, 2024 a TEAMS meeting was held with Bachera Washington, who is the Administrator of the Division of Human Resource Management ("DHRM") and who is also the head of the Labor Relations Unit, and Deputy Director of Operations for NDOC Brian Williams where the safety issues and the demand to bargain were reiterated.

12. Respondent again failed and/or refused to bargain the safety implications of the proposed move, and began transporting maximum custody inmates from ESP to HDSP on September 5, 2024.

13. On September 8, 2024 a group of maximum custody, death row, and high risk prisoners ("HRP") arrived by bus at HDSP. Initially, these inmates were being escorted by three (3) corrections officers, and the inmates were restrained with leg shackles. During the course of the day, orders were given to drop the number of escorting officers down to two (2) officers, and later to one (1) officer, and the inmates further had their lag shackles removed. The reason for reducing the escort staff and removing the leg shackles was management's belief that the escort to the units was taking too long.

14. On September 8, 2024 Bachera Washington responded to FOP Lodge 21 with a letter refusing to engage in either supplemental or impact bargaining over the safety implications caused by NDOC's decision to move maximum custody inmates from ESP to HDSP.

15. That the actions of Respondent as set forth above constitute a failure to bargain in good faith in violation of NRS 288.270(1)(a) and (e).

WHEREFORE, FOP Lodge 21 requests the following relief from the Board:

1. Issue findings that one or more prohibited practices were committed by Respondent;

2. Issue orders to Respondent to cease-and-desist in the transportation of maximum custody inmates until bargaining over the safety implications of such transportation and housing of maximum custody inmates at HDSP is completed;

3. Issue an order for costs and award attorney's fees in favor of FOP Lodge 21; and

4. Order such other and further relief as the Board deems necessary under the broad remedial powers conferred pursuant to NRS 288.110(2).

DATED this 11th day of September, 2024.

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

FRATERNAL ORDER OF POLICE NEVADA C.O. LODGE 21,

Complainant,

vs.

EXECUTIVE DEPARTMENT OF THE STATE OF NEVADA[1],

Respondent.

Case No. 2024-031

RESPONDENT'S MOTION TO DISMISS COMPLAINANT'S COMPLAINT

Respondent, Executive Department of the State of Nevada (hereafter "Respondents" or "State"), by and through its counsel, Aaron Ford, Attorney General of the State of Nevada, Josh Reid, Special Counsel – Labor Relations, and Steven O. Sorensen, Deputy Attorney General, hereby moves the Government Employee-Management Relations Board (hereafter "EMRB" or the "Board") to dismiss the Prohibited Practices Complaint ("Complaint") filed by the Fraternal Order of Police Nevada C.O. Lodge 21's (hereafter "FOP" or "Union") for failure to state a claim upon which relief can be granted, failure to

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[1] The Caption has been adjusted to remove "the Department of Corrections" pursuant to NAC 288.030(4).

exhaust contractual remedies, and a lack of probable cause. The grounds for the State's Motion are set forth in the following Memorandum of Points and Authorities.

Dated this 9th day of October, 2024.

AARON FORD
Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On December 29, 2022, the EMRB issued an order granting FOP recognition as the exclusive representative of Bargaining Unit I, which consists of non-supervisory Category III Peace Officers. On May 11, 2023, the State and FOP agreed to terms on a Collective Bargaining Agreement, effective July 1, 2023, through June 30, 2025 (the "CBA"). The CBA contains extensive provisions regarding safety, training, and equipment.

On September 20, 2023, the EMRB issued an order granting FOP recognition as the exclusive representative of Bargaining Unit N, which consists of supervisory Category III Peace Officers. The State and FOP began negotiations for an initial collective bargaining agreement for Unit N on July 22, 2024.

On or about August of 2024, James Dzurenda ("Dzurenda"), Director of the Department of Corrections for the State of Nevada ("NDOC") informed staff of the decision to transfer certain prisoners between Ely State Prison ("ESP") and High Desert State Prison ("HDSP") to accommodate operational needs. Some of the prisoners moved from ESP

to HDSP were designated as "maximum-security" inmates, although many of the prisoners were designated as being below "maximum-security." HDSP already regularly housed "maximum security" inmates for varying lengths of time.

Following the announcement of the prisoner transfer, Dzurenda and Deputy Director Brian Williams met with representatives of FOP, including President Paul Lunkwitz ("Lunkwitz") on August 19, 2024. During the August 19th meeting, Dzurenda advised the FOP representatives that NDOC had a plan in place to address their safety concerns. After the August 19th meeting between Lunkwitz, Williams, and Dzurenda, Lunkwitz emailed the State of Nevada's Administrator of Human Resources, Bachera Washington[2] ("Washington") an email entitled "Demand for negotiations over Safety in Bargaining unit I," in which Lunkwitz demanded to bargain over the prisoner transfer's impact on the safety of FOP employees. On August 21, 2024, Washington sent a response to Lunkwitz stating the State's position that the prisoner transfer did not constitute a change in working conditions, but that the State would meet with FOP representatives on September 3, 2024, to discuss any concerns.

On September 3, 2024, the State made a written request to FOP to schedule collective bargaining negotiations for both Unit I and Unit N pursuant to NRS 288.565(2)(a) for the next biennium. The first collective bargaining session was scheduled for September 26, 2024.

At the September 3, 2024, meeting, Lunkwitz and FOP General Counsel Adam Levine, demanded that the prisoner transfer be halted until FOP's safety concerns could be addressed. FOP raised various concerns during the meeting, although many seemed unrelated to the issue of the transfer and were issues that FOP acknowledged had been problems "for years." Representatives from the State asked Lunkwitz to provide a list of safety concerns which Lunkwitz said he would provide. Later in the day on September 3, 2024, Lunkwitz sent a document to Washington entitled "safety bargaining HDSP" that

[2] Bachera Washington is Governor Lombardo's designated representative for collective bargaining negotiations pursuant to NRS 288.565(1).

contained a list of purported safety concerns broken into the categories of "Training," "Equipment," "Physical Structures," "Staffing" and "Additional Safety Concerns."

On September 8, 2024, Washington sent a letter to Lunkwitz reiterating the State's position that the prisoner transfer did not constitute a change in working conditions and explaining that, as safety had already been negotiated in the CBA, that FOP could file a grievance if FOP or its members felt that the negotiated-for safety provisions had been violated. Washington's letter also reiterated the State's position that the NDOC's mission to protect "the safety of the public" from violent offenders and the NDOC Director's statutory authority with respect to the transfer of inmates between NDOC institutions under NRS Chapter 209 were clear management rights and were not mandatory subjects of bargaining pursuant to NRS 288.500(3).

On September 26, 2024, the State and FOP began collective bargaining negotiations for agreements for both Unit I and Unit N[3] for the next biennium (effective July 1, 2025, through June 30, 2027) pursuant to NRS 288.565(2)(a).

On, or around, the end of September 2024, NDOC completed the prisoner transfer between ESP and HDSP.

II. MOTION TO DISMISS STANDARD

A. LACK OF PROBABLE CAUSE

NAC 288.375(1) states that the EMRB may dismiss a matter "(i)f the Board determines that no probable cause exists for the complaint…" The EMRB has held that "dismissal pursuant to NAC 288.375(1) is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Cynthia M. Thomas v. Las Vegas Metropolitan Police Department,* EMRB Case No. A1-045804. To meet its burden, the moving party must show that there is an absence of evidence supporting one or more of the elements of the non-moving party's case. *See Id.*

As is further outlined below, the FOP Complaint lacks probable cause because: 1)

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[3] The State and FOP had already begun collective bargaining negotiations for the current biennium pursuant to NRS 288.565(2)(a) on July 22, 2024.

The Complaint is silent with respect to the essential elements set by the EMRB for a unilateral change claim; 2) The decision to transfer prisoners between NDOC correctional institutions is a clear management right and is not a mandatory subject of bargaining; 3) The Complaint fails to claim a change to FOB member's terms and conditions of employment; 4) The Complaint fails to allege that the State breached or altered the FOP Unit I CBA; 5) The Complaint fails to cite a policy that was changed by the State; 6) The Nevada Legislature provides limited opportunities to open and existing CBA with a State employee union outside of the time periods set by NRS 288.565; 7) The EMRB cannot grant the injunctive relief requested in the FOP Complaint, and; 8) The prisoner transfer has already been completed, making this controversy moot.

B. FAILURE TO EXHAUST CONTRACTUAL REMEDIES

NAC 288.375(2) states that the Board may dismiss a complaint "if the parties have not exhausted their contractual remedies…" The EMRB has held that it does not have jurisdiction over a complaint which alleges only contractual violations. *See Adonis Valentin v. Clark County Public Works*, EMRB Case No. A1-046010; *Stacey D. Madden v. Regional Transportation Commission of Southern Nevada*, EMRB Case No. A1-045959. As is further outlined below, as required by NRS 288.505(1)(a), Article 21 of the FOP CBA contains a grievance procedure that ends in final and binding arbitration.

III. ARGUMENT

A. THE PARTIES HAVE NOT EXHAUSTED THEIR CONTRACTUAL REMEDIES

i. Safety Provisions of the CBA

Although the FOP Complaint is sparse on details and cites to an NRS section that the State is not subject to,[4] it appears to that the FOP is alleging that the prisoner transfer will lead to unsafe conditions at HDSP. As such, FOP should consider themselves fortunate

[4] The Executive Department is not subject to NRS 288.270(1)(e). It is understood that the Board considers NRS 288.270(1)(e) to be nearly identical to NRS 288.620(1)(b), but a reading of the statute would seem to distinguish NRS 288.620(1)(b) from NRS 288.270(1)(e) and the LMRA.

that they negotiated an extensive safety article in their CBA. The relevant parts of the CBA are as follows:

Article 10.1.1 of the CBA establishes that "Employees, supervisors, and managers shall comply with all safety rules, regulations, and practices as may be prescribed in order to provide safe working conditions."

Article 10.1.2 states that "Employees and the Employer are expected to comply with all established safety and health practices and standards."

Article 10.1.4 states that "the Employer shall provide a work environment in accordance with safety standards established by the Nevada Occupational Safety & Health Act (NOSHA), and for Category III peace officers the Nevada Peace Officer Standards & Training (POST), including the following:

10.1.4.1 Providing safe and healthy working conditions and practices....

10.1.4.3 Providing appropriate health and safety training....

10.1.4.5 Maintaining State-owned fleet vehicles and equipment"

Article 10.2 discusses Personal Protective Equipment ("PPE") and states:

"10.2.1 The Employer will provide required safety devices, PPE, and safety apparel, including that used in the transporting of offenders, patient, and/or clients in accordance with safety standards established by the OSHA and NOSHA.

10.2.2 The Employer will provide employees with orientation and/or training to perform their jobs safely and in the safe operation of the safety equipment prior to use as required by Federal, State, and local guidelines.....

10.2.3 The Employer will follow its policies and procedures regarding safety training for all employees."

Given the above CBA provisions, it is hard to envision what safety concern could possibly fall outside of the CBA and need to be negotiated. Article 10.1.4.1's requirement that the employer provide "safe and healthy working conditions and practices" alone would seem to encompass any concern that FOP could have. If FOP does not feel that the State is providing safe and healthy working conditions in relation to the prisoner transfer or any

other aspect of their members' employment a contractual remedy is clearly available.

ii. FOP Failed to File a Grievance

Article 21 of the CBA defines a grievance as "an act, omission, or occurrence that an employee believes to be an injustice relating to any condition arising out of the relationship between the Employer and an employee, including, but not limited to, compensation, working hours, working conditions, membership in the Union, the administration and interpretation of [the CBA], the applicability of any law, rule, or regulation relating to the employee's employment, imposition of discipline, or other adverse employment action."

Even though FOP has expansive safety provisions in their CBA and can grieve "working conditions" per Article 21, FOP and its members curiously failed to file a single grievance on any of the myriad of alleged safety issues related to the prisoner transfer. If the safety issues raised in FOP's complaint are valid, they clearly fall within the Safety Article 10 of the CBA. With the Grievance Article 21 allowing the grieving of working conditions, there is nothing that prevented FOP from filing a grievance and submitting this matter to binding arbitration.

As stated above, NAC 288.375(2) states that the Board may dismiss a complaint "if the parties have not exhausted their contractual remedies…" and the Board does not have jurisdiction over a complaint which alleges only contractual violations. *See Adonis Valentin v. Clark County Public Works*, EMRB Case No. A1-046010; *Stacey D. Madden v. Regional Transportation Commission of Southern Nevada*, EMRB Case No. A1-045959

Due to the fact that FOP had a contractual remedy available to them with regards to any alleged safety issues and did not file a grievance, they failed to exhaust their contractual remedies, and the Board should dismiss their Complaint.

B. NO PROBABLE CAUSE EXISTS FOR THE COMPLAINT

i. Standard for a Unilateral Change Claim

While the FOP Complaint is completely silent as to the legal theory, legal authority or EMRB precedent upon which the Complaint is based, the EMRB has established a "unilateral change theory" when determining whether an employer has changed the terms

and conditions of employment without first bargaining in good faith with a union. Under the unilateral change theory, a government employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith concerning the mandatory subjects of bargaining. *See Service Employees International Union, Local 1107 v. Clark County*, Case No. 2021-017, Item No. 880 (2022); *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). To prevail on a unilateral change claim, a complainant must establish that: (1) The employer made a change to the employee's terms and conditions of employment; (2) The employer breached or altered the CBA or established past practice; (3) The employer's action was taken without bargaining with the exclusive representative over the change; (4) The change is not merely an isolated breach of contract, but amounts to a change in policy, i.e., the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment; and (5) The change in policy concerns a matter within the scope of representation. *See Service Employees International Union, Local 1107 v. Clark County*, Case No. 2021-017.

ii. The Decision to Transfer of Prisoners between Correctional Institutions is Not a Mandatory Subject of Bargaining

Under Nevada law, the NDOC Director is "responsible for the supervision, custody, treatment, care, security and discipline of all offenders under his or her jurisdiction." NRS 209.191(4). NRS 209.291 gives the NDOC Director express authority to transfer prisoners between NDOC institutions.[5] Both ESP and HDSP are NDOC "institutions" under Nevada law, which NRS 209.071 defines as "a prison designed to house 125 or more offenders within a secure perimeter." Neither ESP or HDSP are designated under Nevada law as "maximum custody" or "medium custody" institutions. The decision to move maximum

[5] NRS 209.291(1) states: "The Director may transfer an offender: (a) From one institution or facility to another within the Department; or (b) To other government agencies in accordance with classification evaluations and the requirements of treatment, training, security and custody of the offender."

custody prisoners between institutions does not require the licensing or approval of any regulatory agency, and it is entirely within the discretion of the NDOC Director. As the EMRB has determined in the past, because the NDOC Director's express authority from the Nevada Legislature to determine which prisoners will be housed within an NDOC institution, the EMRB does not have the authority to review NDOC Director's decision to transfer maximum custody prisoners between NDOC institutions. *See Clark County Education Association, et. al. v. Clark County School District*, Case No. 2020-008, Item No. 869 (2020); *City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474-75, 653 P.2d 156, 158 (1982).[6]

In addition to the discretion granted by the Nevada Legislature to the NDOC Director in NRS Chapter 209, State and local government employers have the express management right in NRS 288.150(3) to determine the "safety of the public," "appropriate staffing levels and work performance standards, except for safety considerations," "the content of the workday, including without limitation workload factors, except for safety considerations," "the quality and quantity of services to be offered to the public," and "the means and methods of offering those services." NRS 288.500(5) could not be clearer in stating that these "subject matters are outside the scope of mandatory bargaining" and the State "is not required to negotiate those matters."

While the determination to house which prisoners within an NDOC Institution is clearly a management right and not a mandatory subject of bargaining, NRS 288.150(2)(i) designates "safety of the employee" a mandatory subject of bargaining. As such, as outlined above, Article 10 FOP Unit I CBA contains extensive employee safety provisions requiring

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[6] See also, *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); *City of Henderson v. Kilgore*, 122 Nev. 331, 333, 131 P.3d 11, 12 (2006); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case No. Al-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. Al-04611, Item No. 796 (2014); see e.g., *Flores v. Clark Cty.*, Case No. Al-045990, Item No. 737 (2010); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), aff'd *Bonner v. City of North Las Vegas*, Docket No. 76408, 2020 WL 3571914, at 3 filed June 30, 2020, unpublished deposition (Nev. 2020); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018).

the State to "provide a work environment in accordance with safety standards established by the Occupational Health & Safety Administration (OSHA), the Nevada Occupational Safety & Health Act (NOSHA), and for Category III peace officers the Nevada Peace Officer Standards & Training (POST)."[7]

iii. The FOP Complaint Failed to Claim a Change to their Employee's Terms and Conditions of Employment.

The FOP Complaint does not allege that the decision to transfer maximum custody inmates from ESP to HDSP, and medium custody inmates from HDSP to ESP, changed the terms and conditions of their members' employment. The FOP Complaint does not allege that HDSP was not built to house maximum custody inmates, or that it has never housed maximum custody inmates in the past. FOP did not allege this in their Complaint because they know that it would not be true.

No provision in the FOP Unit I CBA gives FOP members the right to determine the type of prisoners, whether they be minimum custody or maximum custody prisoners, they are assigned to supervise. The job titles and class specifications for FOP Bargaining Unit I employees that are assigned to ESP and HDSP, Correctional Officer, Correctional Officer Trainee and Senior Correctional Officer, do not contain limitations on the type of offenders that they may be assigned to control within an NDOC institution. These job titles are also not tied to specific NDOC institutions, and subject to the terms of the FOP Unit I CBA, employees with these job titles can be transferred between NDOC institutions.[8] Category III Peace Officers are defined in NRS 289.489 as "a peace officer whose authority is limited to correctional services, including the superintendents and correctional officers of the

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[7] For comparison purposes, the collective bargaining agreements for the City of Henderson Police Officers, the City of Henderson Police Supervisors, the Las Vegas Peace Officers Association, the Las Vegas Peace Officers Supervisors Association, the Las Vegas Metropolitan Police Department and the Reno Police Protective Association do not contain articles for safety. The City of North Las Vegas Corrections Non-Supervisors collective bargaining agreement does contain a safety article, but it is a total of five sentences.

[8] Article 9.17.1.1 states that "[t]he Employer shall have the right to assign and reassign duties among employees in a class within a work area."

Department of Corrections," and there are not separate subcategories for peace officers that supervise maximum custody inmates versus minimum custody inmates. Accordingly, an FOP Unit I employee cannot claim that the terms of conditions of their employment have changed because they are assigned to work at an NDOC institution that changes the custody designation of the inmates they are assigned to supervise.

iv. FOP Fails to Claim that the State Breached or Altered the CBA

Assuming that the allegations in the FOP Complaint are true, FOP's Complaint fails to assert that the State is in violation of any provision of the current FOP Unit I CBA. The FOP Complaint does not even mention or cite a single provision of the FOP Unit I CBA. The EMRB has ruled that establishing that the employer is in violation of the applicable union's CBA is a necessary element of any unilateral change theory prohibited practices complaint. Accordingly, FOP's failure to assert a violation of the FOP Unit I CBA is a fatal flaw in the Complaint that requires that it be dismissed pursuant to NAC 288.375(1). As was outlined above, had the FOP asserted that the State is violating the FOP Unit I CBA, FOP would be required by Article 22.5.2 of the FOP Unit I CBA to follow the Grievance Procedure under the CBA, which ends in final and binding arbitration.

v. The FOP Complaint Fails to Cite a Policy that was Changed by the State.

The FOP Complaint fails the EMRB's probable cause standard because it fails to specify a specific policy change made by the State. *See Service Employees International Union, Local 1107 v. Clark County*, Case No. 2021-019, Item No. 881, Conclusion of Law No. 8. Under the unilateral change theory, the union is required to show that the unilateral change "amounts to a change in policy, i.e., the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment." *See Service Employees International Union, Local 1107 v. Clark County*, Case No. 2021-017. A complaint that simply raises "general concerns" about a management decision is not a basis to support a prohibited practices complaint. *See Id.*, Findings of Fact No. 8. A

determination by the NDOC Director under his authority granted under NRS 209.291(1), a statute that has been in place since 1977, to transfer maximum custody prisoners is not a change in policy relating to an employee's terms and conditions of employment within the meaning of NRS Chapter 288.

C. THE NEVADA LEGISLATURE PROVIDES LIMITED OPPORTUNITIES TO RE-OPEN AND EXISTING CBA

When the Nevada Legislature passed SB 135 during the 2019 Legislative Session, it created a series of strict timelines for the negotiation, approval and term of a CBA between a State employee bargaining unit and the State. Unlike local government CBAs, State CBAs are tied to the biennial budgets passed by the Nevada Legislature and approved by the Governor. The Legislature expressly intended to preserve its constitutional role to appropriate money, and that "the collective bargaining process itself will not lead to an expenditure of funds absent the appropriation of those funds by the Legislative body." Testimony of Steven Kreisberg in support of SB 135, Senate Committee on Government Affairs, April 4, 2019. This is clear in both the plain language of NRS Chapter 288 and the legislative history of SB 135. These timeline provisions include: 1) CBAs between State employee unions and the Executive Branch may not have a term that extends beyond two fiscal years (NRS 288.550 and NRS 288.565(3)); 2) Collective bargaining between State employee unions and the Executive Branch must begin on or before October 1st of each even-numbered year (NRS 288.565(2)(a)); 3) Before collective bargaining may begin, the Executive Branch and the union must agree on both a mediator and an arbitrator to handle any impasse in negotiations, and determine the dates when such a mediation or arbitration will occur (NRS 288.565(b)); 4) If the parties cannot agree on a CBA within "120 days after the date on which the parties began negotiations or on or before February 1" either party may request mediation (NRS 288.570); 5) Impasse mediation may not last longer than 10 days (NRS 288.575(1)); 6) Impasse arbitration proceedings must begin on or before February 15th of an odd-numbered year (NRS 288.575(2)); 7) The impasse arbitrator must render a decision on or before March 5th of an odd-numbered year, and; 8) All CBAs must

be approved by the State Board of Examiners at a public hearing (NRS 288.555).

In addition to these strict timelines for collective bargaining, the Legislature requires all State employee union CBAs to contain a "nonappropriation clause that provides that any provision of the collective bargaining agreement which requires the Legislature to appropriate money is effective only to the extent of legislative appropriation." See NRS 288.505(1)(c). If a provision of a CBA requires an act of the Legislature to take effect, that "provision becomes effective, if at all, on the date on which the act of the Legislature becomes effective." NRS 288.560(2). Considering that the Nevada Constitution limits legislative sessions to 120 days every odd-numbered year, if there's a CBA provision that requires an appropriation from the Legislature, and the CBA is approved at any time outside the 120-day legislative session, that provision will be void.

In both NRS 288.270(1)(e) and the LMRA, the duty to bargain contains no time restrictions and is not restricted to being only in the context of negotiating a collective bargaining agreement. NRS 288.565 clearly only obligates the State to bargain in the context of a collective bargaining agreement at very specific times. No duty is put on the State to bargain outside of those times or outside of the context of bargaining an entire collective bargaining agreement. Local governments do not have the same restrictions on collective bargaining in NRS Chapter 288, and the governing boards of local governments are only limited by the three-day notice requirement in the Nevada Open Meeting Law found in NRS Chapter 241 to meet and take action to approve a CBA.

As such, any EMRB decision relating to the Executive Branch's duty to collectively bargain based on a unilateral change theory needs to consider whether the Executive Branch could conduct good faith collective bargaining negotiations on matters that may require action or an appropriation by the Legislature outside of the negotiation timelines found in NRS Chapter 288 for State employee unions. Considering that Legislature expressly intended to preserve its constitutional role to appropriate money in the collective bargaining process, the Executive Department's obligations with respect to what is commonly referred to as "impact bargaining" cannot be the same as those of local

government employers.

D. THE EMRB DOES NOT HAVE INJUNCTIVE POWERS

Considering that the State and FOP Unit N were in active collective bargaining negotiations when FOP made its August 19, 2024, demand to bargain, and that, pursuant to NRS 288.565(2)(a), collective bargaining was going to begin for the next biennium for FOP Units I and N in the next six weeks, the obvious motive for FOP's August 19th demand and the filing of this Complaint was to enjoin NDOC from making the prisoner transfer. "NRS Chapter 288 does not expressly grant the EMRB power to issue preliminary injunctive relief…" *See City of Henderson v. Kilgore*, 122 Nev. 331, 335-337 (2006). In the Complaint, FOP's requested relief is for the EMRB to issue a cease and desist regarding the transportation of maximum-security inmates. As FOP was aware that the prisoner transfer had begun when it filed the Complaint, the request for a Cease and Desist can only be interpreted as a request for preliminary injunctive relief. Because this Board does not possess preliminary injunctive authority (see *Id.*), this prayer for relief should be denied.

E. THE PRISONERS HAVE ALREADY BEEN TRANSFERRED

Two important facts that are not in dispute in the present case are that the prisoners at issue have already been transferred and that FOP and the State are currently engaged in collective bargaining negotiations for both Units I and N. The courts have held that a case if moot if it "seeks to determine and abstract question which does not rest upon existing facts or rights." *See NCAA v. Univ. of Nev. Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). Mootness is a question of justiciability. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). A complaint must allege facts sufficient to raise a justiciable controversy. *See* NAC 288.200. A case can become moot due to occurrences that take place after the beginning of a litigation despite the existence of a "live controversy" at the beginning of the litigation. *See Personhood Nev. v. Bristol* at 602.

Because the prisoners have already been transferred and the parties are engaged in active negotiations, the subject matter of this complaint is moot. Any issues related to safety that FOP wishes to address, may be addressed during the current negotiations. With

no further justiciable controversy, the Board should dismiss this Complaint as moot.

CONCLUSION

WHEREFORE, for the reasons set out above, Respondent hereby requests an Order dismissing the Complaint with prejudice, an award of attorney's fees and costs incurred by Respondent, and for such other relief as is appropriate.

DATED this 9th day of October 2024.

AARON FORD
Attorney General

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Attorneys for Respondent,
State of Nevada, Executive Department

1
CERTIFICATE OF SERVICE

2 I certify that I am an employee of the State of Nevada, Office of the Attorney General,
3 and that on this 9th day of October, 2024, I served a true and correct copy of the foregoing
4 RESPONDENT'S MOTION TO DISMISS by electronic service, addressed to:

5

6 Government Employee-Management Relations Board, emrb@business.nv.gov
7 Bruce Snyder, Commissioner, bsnyder@business.nv.gov
8 Daniel Marks, Esq., office@danielmarks.net
9 Adam Levine, Esq., alevine@danielmarks.net
10 Paul Lunkwitz, lunkwitzfop21@yahoo.com

11
12
13 */s/ Anela Kaheaku*
An employee of the Office of the Nevada
14 Attorney General

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24

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Fraternal Order Of Police
Nevada C. O. Lodge 21

FILED
November 12, 2024
State of Nevada
E.M.R.B.
12:09 p.m.

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

FRATERNAL ORDER OF POLICE
NEVADA C. O. Lodge 21,

Complainant,

and

EXECUTIVE DEPARTMENT OF
THE STATE OF NEVADA and its
DEPARTMENT OF CORRECTIONS,

Respondent

Case No.: 2024-031

OPPOSITION TO RESPONDENT'S MOTION TO DIMISS COMPLAINT

COMES NOW Complainant, Fraternal Order Of Police Nevada C. O. Lodge 21 ("FOP Lodge 21") by and through undersigned counsel Adam Levine, Esq. of the Law Office of Daniel Marks and files its Opposition to Respondent Executive Department of the State of Nevada's Motion to Dismiss Complainant's Complaint as follows:

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1 As noted in the State's Motion to Dismiss ("MTD") on August 19, 2024 Nevada Department of
2 Corrections (hereafter "NDOC") Director James Dzurenda informed FOP Lodge 21 that it intended at
3 some point in the future to move the maximum custody inmates housed at Ely State Prison ("ESP") to
4 High Desert State Prison ("HDSP"). Shortly thereafter FOP Lodge 21 demanded bargain over the
5 impact of the decision to move these maximum custody inmates., On September 3, 2024 FOP Lodge
6 21 sent to the State of Nevada Labor Relations Unit ("LRU") a detailed letter laying out the multiple
7 safety issues underlying the demand to impact bargain. (Exhibit "1"). The State of Nevada through the
8 person of Division of Human Resource Management Administrator Bachera Washington refused to do
9 so. (Exhibit "2"). Thereafter, FOP Lodge 21 filed its Complaint for the refusal to bargain the safety
10 impacts of NDOC's decision.

11 **A. FOP LODGE 21'S COMPLAINT DOES NOT LACK PROBABLE CAUSE.**

12 The State's MTD argues that the Complaint filed by FOP Lodge 21 lacks probable cause
13 because it is silent with regard to the essential elements for a unilateral change claim. This is because it
14 is not a "unilateral change" claim; *it is a refusal to engage in impact/effects bargaining claim.*

15 It is undisputed that "safety of the employee" is a subject of mandatory collective bargaining
16 under NRS 288.150(2)(r). While the State correctly asserts that the decision to transfer inmates is a
17 management right, it ignores the fact that even where management exercises such rights, the impact or
18 effects of this management right are still subject to bargaining (i.e. "impact bargaining"). As
19 recognized long ago by *County of Washoe v. Washoe County Employees' Association*, Case No. A1-
20 045365 Item No. 159 (March 8, 1984), once a decision within the province of management rights is
21 made by the employer "the impact of that decision on employees is, in our view, a proper subject of
22 mandatory negotiations under provisions of NRS 288.150(2)". As explained by California's Public
23 Employee Relations Board ("PERB"):

24

> An employer violates the duty to bargain in good faith when it fails to afford a union reasonable advance notice and an opportunity to bargain before it either: (1) reaches a firm decision to establish or change a policy within the scope of representation, (*Public Employment Relations Bd. v. Modesto City Schools Dist*. (1982) 136 Cal.App.3d 881, 900.) or (2) implements a new or changed policy not within the scope of representation but having a foreseeable effect upon matters within the scope of representation. (Claremont.) Thus, making a firm decision to establish or change a policy on employee wages, hours or other terms and conditions of employment, without affording the union notice and an opportunity to bargain, violates the employer's duty to bargain in good faith. And implementing a new or changed policy not itself within the scope of representation (e.g., staffing levels) but having a foreseeable effect(s) on employee wages, hours or other terms and conditions of employment (e.g., safety or workload), likewise violates the employer's duty to bargain in good faith where implemented without affording the union notice and an opportunity to bargain over the foreseeable effect(s).

Santa Clara County Correctional Peace Officers' Association and v. County of Santa Clara, 2013 Cal. PERB LEXIS 24, PERB Decision No. 2321M (July 25, 2013).

On August 19, 2024 Director James Dzurenda of the Department of Corrections ("NDOC") announced that he was moving maximum custody inmates from Ely State Prison ("ESP") to High Desert State Prison ("HDSP"). Per the admission of the MTD, Director Dzurenda advised the representatives of FOP Lodge 21 that NDOC "had a plan in place to address [FOP's] safety concerns". This constitutes an admission that the move impacts "safety of the employee". However, if in fact NDOC did have a plan in place, it was not shared with FOP Lodge 21, much less subject to negotiations.

The obligation to impact bargain over safety is well-established. As explained by *King County v. Public Employee Relations Commission*, 94 Wash. App. 431, 972 P.2d 130 (1999):

> The National Labor Relations Board has stated that if a proposed change is of "legitimate concern" to the union, the employer should be required to bargain. Similarly, PERC "seriously considers any attempt to undermine the safety of employees" and, if the foreseeable risk to employees is "significantly aggravated" by a policy change, the employer must bargain.

972 P.2d at 135 citing *Northside Center for Child Development*, 310 N.L.R.B. 105 (1993) and *City of Centralia & International Ass'n of Fire Fighters Local 451*, Dec. 5282-A (PECB, June 18, 1996).

1 The State's MTD argues on pages 8-10 that the transfer of prisoners between correctional
2 institutions is not a mandatory subject of bargaining. While this is a technically true statement, it
3 matters not. As set forth above "safety of the employee" is a subject of mandatory bargaining, and
4 whereas conceded by the State that it implemented a new policy within its management prerogative,
5 and which impacts employee safety, but did not provide the union and an opportunity to bargain before
6 doing so, the State has violated its obligation to bargain in good faith. Therefore, there is probable
7 cause for the Complaint.

8 **B. THE UNION NEED NOT AVAIL ITSELF OF THE GRIEVANCE AND ARBITRATION MECHANISMS OF THE COLLECTIVE BARGAINING**
9 **AGREEMENT WHERE SUCH WOULD BE FUTILE.**

10 The State argues that the Complaint should be dismissed because FOP Lodge 21 has not
11 resorted to the grievance and arbitration mechanisms of the collective bargaining agreement. While
12 deferral to such mechanisms is preferred, it is also well-established that such deferral is not necessary
13 where it would be futile. As noted by the NLRB in *United Aircraft Corp.*, 204 N.L.R.B. 879 (1972):

14 > If the conduct here complained of, viewed in the context of serious past unlawful conduct, appears to establish a continuing pattern of efforts to defeat the purposes of our
15 > Act then, particularly if the evidence also should indicate that the parties' own machinery is either untested or not functioning fairly and smoothly, it would seem obvious that we
16 > could not reasonably rely on the parties' voluntary machinery fairly and promptly to resolve the underlying problem. In such a situation, therefore, the Act's purposes could
17 > best be served by our taking jurisdiction in the first instance.

18 > But if, on the contrary, there is now effective dispute-solving machinery available, and if the combination of past and presently alleged misconduct does not appear to be of such
19 > character as to render the use of that machinery unpromising or , then we ought not depart from our usual deferral policies.

20

21 Likewise, the California PERB has repeatedly recognized this principle. See e.g. *California School*
22 *Employees Association & ITS Chapter 41 v. Santa Anna Unified School District*, 2013 Cal. PERB
23 LEXIS 28, PERB Decision No. 2332 (2013) ("when the charging party demonstrates that resort of the
24 contract grievance procedure would be futile, exhaustion shall not be necessary"); *Oxnard Federation*

1 *of Teachers and School Employees Local 1273 v Oxnard Union High School District*, 2022 Cal. PERB LEXIS 4, PERB Decision No. 2803 (2022) (citing *California School Employees Association & ITS Chapter* 41, supra and noting "the parties' CBAs limit the arbitrator to only the interpretation or application of a contract term, which would not resolve the issues arising from the District's failure to bargain the effects of its decisions"). This principle is also recognized by NAC 288.375 which denotes that dismissal need not occur if there is a "showing of special circumstances or extreme prejudice".

Resort to the grievance and arbitration mechanisms of the collective bargaining agreement would be futile in the circumstances presented. The State disingenuously states "FOP should consider themselves fortunate that they negotiated an extensive safety article in their CBA" and then proceeds to cite portions of Article 10.1.4. (MTD at p. 6 of 16). However, the provisions of Article 10.1.4 require NDOC to provide a work environment in accordance with safety standards *established by the Nevada Occupational Safety & Health Act (NOSHA), and for Category III peace officers the Nevada Peace Officer Standards & Training (POST)*. Neither NOSHA nor POST have standards for the transport and housing of maximum custody inmates! Likewise, Article 2 which addresses Personal Protective Equipment ("PPE") only requires such PPE as mandated by the Federal Occupational Safety and Health Administration ("OSHA") and its Nevada counterpart. Neither entity adopt regulations for safety equipment or apparel for the transport of maximum custody prisoners.

An arbitrator's jurisdiction is limited to enforcement of the collective bargaining agreement as it exists. As explained long ago by the *United States Supreme Court in United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960):

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. If the actions of NDOC were simply alleged to be a violation of OSHA or NOSHA requirements or regulations, it would be reasonable to expect and/or required FOP Lodge 21 to first resort to the grievance and arbitration mechanisms of the CBA. However, an arbitrator confined to interpretation or application of the CBA cannot address the situation which is before the Board in this case – a determination by NDOC to move dangerous maximum custody inmates to an institution in which all of the facilities at the institution are not ready for such inmates, and more importantly where all of the staff is not yet trained or equipped for such inmates.

C. Nothing Within Senate Bill 135 Passed In 2019 Excludes The Executive Department Of The State Of Nevada From The Obligation To Engage In Impact Bargaining.

Pages 12 and 13 of the MTD argue that the amendment of NRS Chapter 288 through SB 135 in 2019 to expand collective bargaining to State of Nevada Executive Branch employees contains time limits by when bargaining must commence. The State argues "NRS 288.565 clearly only obligates the State to bargain in the context of a collective bargaining agreement at very specific times" and "[n]o duty is put on the State to bargain outside of those times or outside of the context of bargaining an entire collective bargaining agreement." The MTD seeks to distinguish bargaining by the State from that of local government, and is in essence arguing that the obligation to impact bargain does not exist for the State of Nevada Executive Department.

The State cites nothing from the legislative history of SB 135 to support its claim that the Legislature intended to exempt the Executive Department from the responsibility of impact bargaining which exists not just for local governments and the State of Nevada, but also exists in the public sector in other states, and more significantly in the private sector under the National Labor Relations Act.

Nothing within the time limits for the start of negotiations, or for impasse proceedings, supports this remarkable claim by the State. Likewise, the fact that state collective bargaining agreements require an "appropriations clause", and the benefits are subject to appropriations by the Legislature,

does not support the notion that the State is exempted from the obligation to bargain over the impact(s) of its decisions.

Local government collective bargaining likewise has time limits. Unlike the State which operates on a biennium budget, local governments operate on a fiscal year budget beginning July 1 of every year. This requires an employee organization to give notice of an intent to bargain by February 1 if the subject of negotiations requires the budgeting of money. NRS 288.180(1). Negotiations are presumptively to be concluded by April 1, and if six (6) negotiation sessions have occurred, and it is past April 1, and there is no likely prospect of an agreement, resort to the statutory impasse mechanisms may commence. See NRS 288.200(1). Those impasse procedures themselves have certain timelines. See NRS 288.200(2) and (4). Thus, the conclusion that the State should be exempt from the requirement of impact bargaining because it has "time limits", whereas local governments do not, is entirely unwarranted.[1]

Likewise, the fact that bargaining by the State is subject to legislative appropriations does not support the claim that the State is exempt from the requirement of impact bargaining. Rather, the obvious should be pointed out – *it doesn't cost of the State anything to bargain.* It is only the potential outcome of such bargaining which might in theory implicate legislative appropriations of money. However, this cannot actually be known where, as here, the State refuses to engage in bargaining in the first instance.

The State's MTD presents no argument that the move of prisoners from ESP to HDSP somehow fell outside of the funding of NDOC. Moving prisoners costs money, and clearly NDOC had the money to do so. If NDOC has the funds to move prisoners, it certainly has funds available to ensure that the officers are properly trained, equipped, and staffed to move/guard those prisoners safely.

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[1] The time limits are slightly different for licensed teaching professionals under NRS 288.217.

Indeed, the fact that NDOC had such funds available is beyond dispute. One of the concerns which led to the demand by FOP Lodge 21 for such impact bargaining was the fact that the exercise cages outside of some of the units were in such a squalid state of disrepair that they could not be considered adequately secured. The demand to impact bargain letter from FOP Lodge 21 specifically pointed out the fact that "Exercise cages for units 1, 2, 4, 5 and 6 are insufficient and badly need repairs and reinforcement". (Exhibit "1" at p. 4).

Inmates who are not as dangerous as the maximum custody inmates from ESP have, in the past, been able to escape these cages in disrepair so as to attack fellow inmates. It goes without saying that if an inmate can escape the cage to attack fellow inmates, they may also do so to attack an officer. The demand to impact bargain specifically noted "the officers will inevitably be faced with inmates escaping the insufficient exercise cages and trying to kill each other or the officer." (Exhibit "1" at p. 4).

Following the transfer of the inmates, Lodge 21 was able to obtain the State Public Works Division's "Project Cost Estimate" to "*Replace recreational yard cages at housing units 1,2,4,5,6*". The "Project Justification" states "*The existing recreational cages can be compromised by inmates which causes safety and security issues*". (Exhibit "3"). This is exactly the sort of issue which Lodge 21 demanded to bargain over once management made the decision to move the more dangerous inmates from ESP to HDSP. Clearly State did have the monies to address this issue.

One of the safety concerns raised by FOP Lodge 21 was a lack of proper equipment in connection with the management of these inmates, including "protective body equipment". (Exhibit "1" at pp. 2-3). On October 17, 2024 the Warden of ESP sent a memo to all custody staff in possession of "State issued body armor" to turn in these stab vests to their supervisor as they were no longer needed with the lower threat level inmates moved from HDSP to ESP. (Exhibit "4"). This was another subject which the State should have been willing to meet with and discuss with FOP Lodge 21 prior to the

transfer of inmates, and an example of something which would not require Legislative appropriation. These are just isolated examples, and by no means *exhaustive*.[2]

Because the State has identified no statutory provision which creates a special carveout exempting the State from the requirement of impact bargaining that exists elsewhere in both the public and private sectors, and because the State identifies nothing in the legislative history to support such a claim, its arguments that it is not subject to impact bargaining should be rejected.

D. The Fact That Prisoners Have Already Been Transferred Is Not Grounds To Dismiss The Complaint, and a Cease and Desist Order May Be Used To Prevent Future Violations.

One of the arguments advanced by the State in support of its MTD is that the prisoners have already been transferred. The State claims that this renders the dispute "moot".

The fact that the State engaged in a bad faith *fait accompli* does not render the issue moot. Courts enforcing of the National Labor Relations Act have rejected the mootness defense where an employer's prescribed conduct is "capable of repetition". *C-B Buick, Inc. v. NLRB*, 506 F.2d 1086, 1092-1093 (3rd Cir. 1974) (rejecting mootness defense court stated, "we regard [the Respondent's] proscribed conduct as being capable of repetition in some relevant context with the Union"); see also *Westinghouse Electric Corporation*, 304 N.L.R.B. 703 (1991) ("In short, this is not a case where the issues presented are no longer live or where the parties lack a legally cognizable interest in the outcome"); *California School Employees Association v. Healdsburg Union High School District*, 1980 Cal. PERB LEXIS 96, PERB Decision No. 132 (finding it is well settled law that where the issues persist beyond the specific case the case is not rendered moot, and in "cases clarifying parties' rights and obligations under a new law, the public interest is served by deciding the underlying issue"). FOP

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[2] Simply redeploying existing assets, including but not limited to lethal weapons coverage, from those areas of HDSP where they are currently located, to the vacant gun rails of the units where the maximum custody inmate would be housed until such time as some of the safety issues can be ameliorated, is yet another example of bargaining over safety issues that does not incur any significant costs.

Lodge 21 has a legally cognizable interest in obtaining a finding of failure to bargain in good faith, and more importantly an order to prevent any repetition in the future. Dismissing the Complaint as moot would simply give the State *carte blanche* in the future to violate its bargaining obligations because NDOC can arrange for such inmate transfers faster than the Board may hear such matters.

It should further be pointed out that the threats to the officers resulting from the move are an ongoing issue. In FOP Lodge 21's September 3 letter laying out the safety issues which the to be negotiated, it pointed out:

> There are insufficient functional and secure Redcap boxes for the foods lives on the cell doors. These aid in preventing inmates from propelling bodily fluids on staff, including fluids containing infectious. There are simply not enough available, and some of those that are available are not currently installed.

(Exhibit "1" at p. 2). To this day, the maximum custody inmates from Ely continue to propel upon the corrections officers and Unit 3 at HDSP because proper precaution still not been taken.

In connection with its mootness claim, the State's MTD argues that this Board does not have injunctive powers, and therefore a cease-and-desist order regarding the transportation of maximum custody inmates will do no good. However, a cease-and-desist order prohibiting future transfers of maximum custody inmates until bargaining has taken place will be meaningful. Once it is established by this Board that NDOC cannot jeopardize the safety of its employees by rushing through such moves before meaningful impact bargaining to ameliorate the safety concerns has taken place, any future moves can be enjoined by the district court pursuant to NRS 288.110(3).

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E. Conclusion.

For all of the reasons set forth above, the State's Motion to Dismiss should be denied.

DATED this 12th day of November 2024.

LAW OFFICE OF DANIEL MARKS

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Nevada C. O. Lodge 21

1 **CERTIFICATE OF ELECTRONIC SERVICE**

2 I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on
3 the 12th day of November 2024, I served a true and correct copy of the foregoing OPPOSITION TO
4 RESPONDENT'S MOTION TO DIMISS COMPLAINT by emailing the same to the following
5 recipients. Service of the foregoing document by email is in place of service via the United State Postal
6 Service.

7 AARON FORD
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Special Counsel - Labor Relations
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14 *Attorneys for Respondent, Executive Department*
Of The State Of Nevada and its Department Of Corrections,

15

16

17 An employee of the
LAW OFFICE OF DANIEL MARKS

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EXHIBIT 1

EXHIBIT 1

FRATERNAL ORDER OF POLICE
NEVADA C.O. LODGE 21
PO Box 336254
North Las Vegas, NV 89033-6254
www.fopncol21.com

To: Bachera Washington, LRU
From: FOP Nevada C.O. Lodge 21
Date: September 3rd, 2024
Re: Safety negotiations

Bachera,

FOP has already made a demand to negotiate the impact on safety at HDSP before the maximum custody and close custody inmate population is transferred from Ely State Prison (ESP) to High Desert State Prison (HDSP). As of 6:30 p.m. on September 3rd, 2024, the following list of safety issues are being identified for negotiations in accordance with NRS 288.150 2.(r).

Training

Maximum custody training on proper restraint practices, proper restraint equipment (black boxes, etc.), searches, communication with an extremely violent inmate population, and escort techniques.

Some of these items are included in a two hour training, but not all of these elements. The training is not nearly comprehensive enough for dealing with maximum custody inmates.

There is a large amount of officers at HDSP that have not yet completed any of the training.

Pepperball Launcher certifications have been completed for less than half of the officers at HDSP. An officer that is not certified takes their livelihood into their own hands if they utilize the launcher in an effort to prevent one inmate from killing another and/or a member of HDSP Staff. Pepperball

Launchers are the most effective less lethal tool the NDOC currently offers for stopping violent incidents.

Training encompassing workplace violence prevention, stress management, recognition of the signs of potential violence and post-incident procedures and services to treat traumatized employees involved in a workplace violence incident are also needed.

New Maximum Custody policies and procedures for HDSP have been drafted, but are not signed or yet available for Officers to review. They are also not available for supervisors to review and train staff.

Equipment

Lethal force is what should be in place in the event that it becomes necessary to use in accordance with our training. There should be greater training on lethal force as well, but officers are already trained on the mini-14 Rifle and these should be available in every unit on a maximum custody yard.

There are not enough Pepperball Launchers to equip every unit at HDSP with one Launcher; and to equip two overwatch officers per quad to be posted during inmate exercise.

HDSP does not have enough functioning radios to assign one radio per officer that is on shift. There are civilian staff who are assigned radios while officers go without. Examples include: Caseworkers, Nurses, Culinary staff, Warehouse staff, and Maintenance staff. An officer should never be without a radio particularly when supervising maximum security inmates.

There are insufficient functional and secure Red Boxes for the food slots on the cell doors. These aid in preventing inmates from propelling bodily fluids on staff, including fluids containing infectious disease. There are simply not enough available, and some of those that are available are not currently installed.

There are currently not enough waist restraints, leashes, and leg shackles in every unit that will require them for escorts anytime an inmate is to leave their cell.

There are currently not enough shields, helmets, and protective body equipment for extractions in each unit.

Personal protective equipment, including personal alarm systems for staff and an appropriate system and way to contact security/correctional officers.

Gas masks are not available for staff. According to accounts of officers at HDSP, there are roughly seven gas masks in operations for responding officers. There are around 420 officers who work at HDSP, this is a vital piece of equipment for emergency response throughout the facility.

Tasers for officers working the units. They have only certified and assigned some tasers to some of the Sergeants and Lieutenants. The supervisors are a secondary response to the incidents that occur. Officers who are being attacked, responding to the emergency directly, or are located in the area where the incident occurs should be the ones carrying the tasers.

Computers not functioning in a large portion of units. This prevents officers from accessing policy and procedures stored on the shared drives. Properly functioning computers assist officers in efficiently completing tasks such as reviewing emails, reports, and count.

Physical Structures

Engineering controls, including installing panic alarm systems and protective barriers, and configuring treatment areas to maximize an employee's ability to escape workplace violence.

Purge systems that are not currently functioning, are used clear units of OC spray and other chemical agents during emergency responses. This aids in the ability of officers to properly respond and decontaminate the unit when OC and other chemical agents are deployed.

Exercise cages for units 1, 2, 4, 5, and 6 are insufficient and badly need repairs and reinforcement. Exercise cages for units 7 and 8 are believed to be insufficient as well, but no confirmation at this time.

Cell doors for units 9, 10, 11, and 12 are easily manipulated and opened by inmates. They appear secure to the officers in the unit control room, but can be opened by the inmates at will.

Shower doors for units 9, 10, 11, and 12 are insufficient to secure inmates in the shower during a lockdown.

Shower doors for units 1-8 need reinforced as they have been kicked open by inmates allowing inmates to escape and cause violent situations to occur, like assault and battery on officers.

Staffing

All towers are not manned throughout the day. Towers 1 and 3 are manned 24/7. Towers 5 and 6 are manned on Graveyard shift. While towers 2 and 4 are routinely not manned on graveyard due to staffing. Towers 2, 4, 5, and 6 are not manned during day shift or swing shift. Just today there was an attempted escape in the area that tower 4 is responsible for and tower 4 was unmanned.

Currently, HDSP routinely falls below minimum staffing without attempting to maintain custody staffing ratios for maximum custody inmates. The proposed plan is to add officer positions throughout the facility to include, all towers, two overwatch posts for each quad (1/2 gun rail, 3/4 gun rail, 5/6 gun rail, and 7/8 gun rail) where currently there is only one officer assigned to each post, 5 floor officers in the maximum custody units (there are no more than 3 for any unit currently at HDSP), and officers to sit outside without the aforementioned tools and monitor the exercise cages from ground level.

The officers will inevitably be faced with inmates escaping the insufficient exercise cages and trying to kill each other or the officer. This is while not being given a radio to call for help and the responding officers may not have a radio to hear and respond to the call.

When an maximum custody inmate requires a hospital stay, they require two officers to be posted with them. Currently medium security inmates require only one and a rover officer. This increases the demand for staffing away from the facility, thus reducing the amount of staff available at HDSP for normal operations and emergency incidents.

Director Dzurenda said they were moving 60 Officer PCN's to HDSP from ESP. This only increases staffing on paper. Those positions will not be filled before the end of the year at the earliest. Most likely with turnover, sometime next year.

Currently, what happens when the officers are below the minimum staffing? They are told to run normal operations anyway. Those who are on probation or otherwise too intimidated to say "No" carry out those orders. This is exactly what will happen if maximum custody inmates are transferred to HDSP without adequate training, equipment, and staffing.

Additional Safety Concern
Heightened intake procedures to identify problematic incarcerated persons.

Respectfully,

Paul Lunkwitz
President
FOP
Nevada C.O. Lodge 21
lunkwitzfop21@yahoo.com

EXHIBIT 2

EXHIBIT 2

Joe Lombardo
Governor

Joy Grimmer
Director

Bob Ragar
Deputy Director

Bachera Washington
Administrator

STATE OF NEVADA
DEPARTMENT OF ADMINISTRATION
Division of Human Resource Management

515 E. Musser Street, Suite 101 | Carson City, Nevada 89701
Phone: (775) 684-0150 | http://hr.nv.gov | Fax: (775) 687-9085

September 8, 2024

Paul Lunkwitz
FRATERNAL ORDER OF POLICE NEVADA C.O. LODGE 21
PO Box 336254
North Las Vegas, NV 89033

Paul:

The purpose of this letter is to provide the Labor Relations Unit's ("LRU") response to the Fraternal Order of Police, Nevada C.O., Lodge 21, Unit I's ("FOP") August 21, 2024, "demand to immediately bargain over safety for Bargaining Unit I, in accordance with NRS 288.150 2(r)." I appreciate FOP's willingness to meet with us on September 3, 2024, and for subsequently providing the LRU with a list of FOP's specific safety concerns surrounding the transfer of max and close custody inmates from the Nevada Department of Correction's ("NDOC") Ely State Prison to High Desert State Prison ("HDSP"). Pursuant to NRS 288.565, Governor Lombardo has designated me as the Executive Department's representative for collective bargaining with Nevada's state employee unions, and this letter will only address the Executive Department's obligations under NRS Chapter 288 and the current Collective Bargaining Agreement between the FOP and the State of Nevada ("CBA"). Accordingly, this letter should not be considered as NDOC's comprehensive response to all of FOP's safety concerns included in its August 21st demand to bargain, or FOP's September 3, 2024, list of safety concerns provided to the LRU.

The duties of the correctional officers that FOP represents are complex and demanding, and I appreciate the professionalism, dedication and courage exhibited daily by FOP members throughout the performance of their duties. The important work of correctional officers is not publicly visible, and the brave men and women that work in our correctional facilities often do not receive the recognition that they deserve. To be effective, any safety and health program needs the meaningful participation of workers and their representatives. Correctional officers often know the most about potential hazards associated with their jobs, and successful safety programs should tap into this knowledge base.

The employment relationship between the Executive Department and FOP is governed by the framework developed by the Nevada Legislature in NRS Chapter 288, our CBA, and Government Employee-Management Relations Board ("EMRB") precedent. Pursuant to NRS 288.565, every two years the Executive Department is required to meet with and negotiate in good faith a new CBA with each Bargaining Unit. The State and the FOP have already started this process for the next biennium. The Nevada Legislature proscribed the mandatory subjects for collective bargaining in NRS 288.500. While NRS Chapter 288 does not define "working conditions," this list of mandatory subjects, combined with the list of subjects outside the scope of collective bargaining, constitutes what the Nevada Legislature believes are

the working conditions that must be collectively bargained between the Executive Department and each Bargaining Unit. In addition, NRS 288.505(1)(a) requires that each CBA include:

"[a] procedure to resolve grievances which applies to all employees in the bargaining unit and culminates in final and binding arbitration. ***The procedure must be used to resolve all grievances relating to employment, including, without limitation, the administration and interpretation of the collective bargaining agreement, the applicability of any law, rule or regulation relating to the employment*** *and appeal of discipline and other adverse human resources actions."* (emphasis added)

Pursuant to NRS 288.505(2), this grievance procedure negotiated in a CBA is meant to be "the exclusive means available for resolving all grievances" under the CBA.

Pursuant to NRS Chapter 288.500(3), certain matters relating to employment conditions are reserved for the Executive Department and are commonly referred to as "management rights." These management rights include the right to determine:

1. Appropriate staffing levels and work performance standards, except for safety considerations;
2. The content of the workday, including without limitation workload factors, except for safety considerations;
3. The quality and quantity of services to be offered to the public;
4. The means and methods of offering those services, and;
5. Public safety.

In addition, the relationship between the Executive Department and FOP does not exist in a vacuum, and there are other statutory provisions where the Nevada Legislature has granted certain public officials and or agencies with the discretion to make important decisions relating to corrections. This includes the provisions of NRS Chapter 209, which gives the NDOC Director decision making authority with respect to the transfer of inmates between NDOC facilities.

The Nevada Legislature has mandated in NRS 288.550 that term of all CBAs "must begin on July 1 of an odd-numbered year and must end on June 30 of the next odd-numbered year." Pursuant to NRS 288.150(2)(w), once a CBA has been negotiated and approved by the State Board of Examiners, subject to any required appropriation by the Nevada Legislature, NRS Chapter 288 limits a Bargaining Unit's ability to re-open a CBA to conduct "supplemental bargaining." Pursuant to NRS 288.585(1), the Executive Department may engage is supplemental bargaining "concerning any terms and conditions of employment which are peculiar to or which uniquely affect fewer than all the employees within the bargaining unit." While the procedure for supplemental bargaining outside of the context of a fiscal emergency is not a mandatory subject of bargaining, Article 27 of the current CBA between the Executive Department and FOP addresses how and when supplemental bargaining can take place.

Employee safety is a mandatory subject of bargaining pursuant to NRS 288.500 and NRS 288.150(2)(r). Accordingly, the Executive Department negotiated Article 10 of the FOP CBA to address employee safety. The current FOP CBA addresses safety standards, personal protective equipment, safety committees, addressing employee safety concerns and workplace violence. While employee training is not a mandatory subject of bargaining, the Executive Department and FOP negotiated Article 15, "Training & Professional Development," in the current FOP CBA. Accordingly, the mandatory subjects of collective bargaining addressed in FOP's August 21st demand to bargain, were collectively bargaining for in the current FOP CBA.

Based on the procedures outlined in NRS Chapter 288, the FOP CBA, and EMRB precedent, the LRU does not believe that supplemental bargaining is the appropriate vehicle to address the issues in FOP's August 21st demand. FOP's demand fails to articulate a change in employment conditions that would require supplemental bargaining. The decision to transfer inmates between correctional institutions is clearly a management right in NDOC's discretion, and nothing provided by FOP since its August 21st demand suggests otherwise. If FOP believes that NDOC is violating the provisions of its current CBA, as required by NRS 288.505(1)(a), Article 21 of the FOP CBA contains a grievance procedure the ends in final and binding arbitration.

As I mentioned previously, FOP's input on employee safety is important and I look forward to further collaborative discussions on this topic.

Sincerely,

Bachera Washington

Bachera L. Washington
DHRM Administrator

EXHIBIT 3

EXHIBIT 3

State Public Works Division — Project Cost Estimate — September 17, 2024

C11 **Title:** Recreational Yard Enclosure Replacement (High Desert State Prison)

Description: Replace recreation yard cages at housing units 1,2,4,5,6.

Department: NDOC **Division:** Correctional **Dept. Rank:** 2

Agency: HDSP **Project Mgr:** MML

Funding Summary	
State:	6,148,299
Agency:	-
Federal:	-
Other:	-
Total:	**6,148,299**

Project Group:	Armory, Military or Prisons	**Building Area:**	0 gsf
Project Type:	Remodel	**Months to Construction:**	24
Project Site:	Remote	**Const. Annual Escalation Rate:**	6.40%
Location:	Indian Springs	**Total Escalation:**	13.21%

	2024	2026
Professional Services		
A/E Design & Supervision	540,470	611,864
Surveys	60,000	63,840
Soils Analysis	50,000	53,200
Materials Testing Services	-	-
Structural Plan Check	3,194	3,398
Mechanical Plan Check	-	-
Electrical Plan Check	-	-
Civil Plan Check	2,729	2,904
ADA Plan Check	-	-
Fire Marshal Plan Check	-	-
Code Compliance Plan Check	-	-
Constructability Plan Check	-	-
CMAR Pre-Construction Services	-	-
PWD Project Mgmt & Inspection	222,690	222,690
3rd Party Commissioning	-	-
FF&E Design Fee	-	-
Subtotal	**879,083**	**957,896**
Construction Costs		
Construction	3,984,000	4,510,270
Construction Contingency	597,600	676,541
Build America Buy America	-	-
Green Building Equivalence	-	-
Utility/Off-Site Costs	-	-
Utility Connection Fees	-	-
Data/Telecom Wiring	-	-
Furnishings and Equipment	-	-
Roof Maint. Agreement	-	-
Local Government Requirements	-	-
Hazardous Material Abatement	-	-
Subtotal	**4,581,600**	**5,186,811**
Miscellaneous		
Advertising	2,359	2,671
Printing	814	921
Temporary Facilities	-	-
Agency Moving Costs	-	-
Land Purchase	-	-
Subtotal	**3,173**	**3,592**
Total Project Cost	**5,463,856**	**6,148,299**

Remarks

All costs are estimated based upon 2024 information. During project implementation, funds will be shifted between categories as necessitated by actual costs. The total budget will not be exceeded.

Construction Cost Detail:

1	Recreation Yard Enclosures (40 @ $77,000/ea)	3,080,000
2	Demolish Enclosures (40 @ $6,000/ea)	240,000
	Total	**3,320,000**

Allowances:

1	Remote Site (10%)	332,000
2	Secure Facility Allowance (10%)	332,000
	Total	**664,000**
	Total	**3,984,000**

Detail Description:

This project will design and construct the demolition of the existing 40 chain-link recreation yard cages, and replace them with 40 expanded metal recreation yard cages.If this project requires custody escort services, then this expense will need to be included in the Nevada Department of Corrections' operating budget.

Project Justification:

The existing recreational cages can be compromised by inmates which causes safety and security issues.

Background Information:

The High Desert State Prison is located 40 miles north of Las Vegas on the west side of Highway 95. It is the largest correctional facility within the Department of Corrections. The complex buildings total approximately 900,000 square feet of space. The institution opened September 1, 2000 and is the reception unit for Southern Nevada.

EXHIBIT 4

EXHIBIT 4

Joe Lombardo
Governor

James E. Dzurenda
Director

Terry Royal
Warden

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 977-5500

Ely State Prison
P.O. Box 1989
Ely, NV 89301
(775) 977-5348

MEMORANDUM

Date: October 17, 2024

To: ESP Custody Staff

Subject: State Issued Stab Vests

All custody staff who are currently in possession of State issued body armor aka stab vests are to turn them into their shift supervisor by Thursday, October 24, 2024, at the conclusion of your shift.

Terry Royal, Warden
Nevada Department of Corrections

AARON D. FORD
Attorney General
JOSH REID (Bar No. 7497)
Special Counsel – Labor Relations
STEVEN SORENSEN (Bar No. 15472)
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Attorneys for Respondents

FILED
December 2, 2024
State of Nevada
E.M.R.B.
10:52 a.m.

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

FRATERNAL ORDER OF POLICE NEVADA C.O. LODGE 21, Complainant, vs. EXECUTIVE DEPARTMENT OF THE STATE OF NEVADA, Respondents.	Case No.: 2024-031 **REPLY TO COMPLAINANT'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS COMPLAINT**

COMES NOW, Respondent, EXECUTIVE DEPARTMENT OF THE STATE OF NEVADA ("the State") by and through undersigned counsel, Attorney General Aaron D. Ford, Special Counsel – Labor Relations Josh Reid, and Deputy Attorney General Steven Sorensen and files its Reply to Complainant Fraternal Order of Police Nevada C.O. Lodge 21's Opposition to the State's Motion to Dismiss Complainant's Complaint ("FOP") as follows:

A. FOP'S COMPLAINT LACKS PROBABLE CAUSE.

(i) Department of Correction's Statutory Authority

While FOP makes several arguments as to why it does have probable cause for the complaint, which will be addressed below, FOP completely fails to address the argument made by the State with regards to the Government Employee Relations Board ("EMRB") lacking the authority to review a decision to transfer prisoners made by the Director of the Nevada Department of Corrections ("NDOC") under his statutory authority granted to him pursuant to NRS 209.291[1]. This could be taken by the EMRB as a confession that the argument is meritorious. see *Ozawa v. Vision Airlines, Inc,.* 125 Nev. 556, 563, 216 P.3d 788, 793 (2009)

NRS 288.505(5) makes it clear that "if there is a conflict between any provision of an agreement between the Executive Department and an exclusive representative and….(a)n existing statute…the provisions of the agreement may not be given effect unless the Legislature amends the existing statute in such a way as to eliminate the conflict." NRS 209 has not been amended to require that it be subject to collective bargaining. Granting a cease and desist order or forcing the State to bargain over prisoner transfers would conflict with the authority granted to the Director of NDOC under NRS 209. Without any argument by FOP as to how this would be permissible under the statute or how the EMRB could interpret NRS 209 to be limited by NRS 288 without being amended by the Legislature, the EMRB should find, on this basis alone, that the FOP Complaint lacks probable cause.

(ii) Impact Bargaining

The first argument that FOP does address is that the Complaint is silent with regard to essential elements of a unilateral change claim. FOP asserts that it is making a "refusal to engage in impact/effects bargaining claim". **see Opposition at 2:14** However, if an impact bargaining theory is applicable to the Executive Department under NRS 288, which the State

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[1] NRS 209.291(1) – "The Director may transfer an offender: (a) From one institution or facility to another within the Department; or (b) To other government agencies in accordance with classification evaluations and the requirements of treatment, training, security and custody of the offender."

argued it does not in paragraph C below, FOP failed to meet the elements under an impact bargaining theory.

To prevail on an impact bargaining theory FOP would need to establish: "(1) the government employer lawfully exercised its managerial prerogative; (2) as a result of the managerial decision, there must be a demonstrable impact that is 'significantly related' to a mandatory subject of bargaining and is severable from the managerial decision; (3) the employee organization must have demanded, in writing to negotiate the impact; and (4) the government employer must have refused the employee organization's demand." see *Service Employees International Union, Local 1107 v. Clark County*, EMRB Case No. 2021-019, Item No. 881 5:13 (October 4, 2022), citing *County of Washoe v. Washoe County Employees Association*, EMRB Case No. A1-045365 (March 9, 1984)

While FOP can show that the first and third elements, those of management exercising a managerial prerogative and that the employee organization demanding bargaining have been met, FOP cannot show that the second and fourth elements have been met.

For the second element of the managerial decision having a demonstrable impact that is significantly related and severable from the management decision, FOP fails to allege facts to meet this element. FOP has not argued a demonstrable impact. FOP alleged in their demand letter (See Exhibit A of Opposition to Motion to Dismiss) that training and equipment were inadequate at High Desert State Prison ("HDSP") to accommodate maximum security inmates. However, as stated in the State's Motion to Dismiss (see 10:7), FOP's Complaint does not allege that HDSP was not built to house maximum security inmates, or that it never housed maximum security inmates because these claims would be untrue. HDSP already housed maximum security inmates prior to the transfer, which gave rise to this complaint. Job titles and class specifications for FOP Unit I employees assigned to Ely State Prison ("ESP") and HDSP do not contain limitations on the type of offenders that they may be assigned to and employees in these job titles may be assigned to any NDOC institution. There are no distinctions made with regard to the type of prisoner they supervise.

Therefore, because HDSP already housed maximum security inmates and the job classes within the FOP bargaining unit could be assigned to supervise anyone within the prison or could transfer to another prison, there is no impact to the FOP bargaining in transferring prisoners from one prison to another.

As to the fourth element, the employer refusing to bargain, FOP Unit I and the State are currently in negotiations as required under NRS 288.565. FOP may present any proposals on safety that it wishes to on safety.

B. A GRIEVANCE WOULD NOT HAVE BEEN FUTILE

FOP claims that they are not required to exhaust contractual remedies because to do so would have been futile. To support this argument, FOP claims that because the CBA requires the State to provide safe and healthy working conditions (Article 10.1.4.1), appropriate safety training (Article 10.1.4.3), and to provide personal protective equipment and to facilitate prisoner transfers (Article 10.2) all within the standards of Nevada Occupational Standards ("NOSHA"), Peace Officer Standards & Training ("POST"), and Federal Occupational Safety and Health Administration ("OSHA") and that none of those entities have regulations for the transport maximum security prisoners that a grievance would be futile. **See Opposition to Motion to Dismiss 5 at 7-17**. This argument is clearly absurd. FOP knew that the transport and supervision of maximum security prisoners was a duty that their members would have to engage in when they negotiated this agreement. Maximum security prisoners have been housed and transported across the facilities of NDOC long before the collective bargaining agreement existed. The fact that FOP and the State mutually agreed that the transfer and housing of prisoners would be subject to the requirements of OSHA, POST, and NOSHA and no further requirements were bargained, does not mean that FOP lacked the opportunity to bargain over the safety of their members when transporting or supervising maximum security prisoners.

FOP further claims that an arbitrator is limited to enforcement of the collective bargaining agreement as it exists. **See Opposition to Motion to Dismiss page 5 at 18** As already discussed there is language in the CBA regarding the training, transport, and

supervision of prisoners as well as standards of personal protective equipment that the State is required to provide. It is therefore unclear why an arbitrator could not render a decision as to whether the State met those requirements. Additionally, Article 27 – Mid-Contract Bargaining or Impact Bargaining details conditions under which the parties are required to impact bargain. Even if an arbitrator could not determine whether the safety conditions required by the CBA had been complied with, an arbitrator definitely could determine whether the State met the requirements of the CBA with respect to impact bargaining. Because FOP has stated that their claim is a "refusal to engage in impact/effects bargaining claim" **(see Opposition to Motion to Dismiss page 2 at 14)** this claim falls squarely within Article 27 of the CBA and an arbitrator would have the authority to render a decision as to whether the State followed the impact bargaining requirements of the CBA.

Because both safety and impact bargaining are contained within the CBA and because the Board does not have jurisdiction over a complaint, which alleges only contractual violations (see *Adonis Valentin v. Clark County Public Works*, EMRB Case No. A1-046010; *Stacey D. Madden v. Regional Transportation Commission of Southern Nevada*, EMRB Case No. A1-045959), the Board should dismiss FOP's complaint for failing to exhaust their contractual remedies.

C. A PLAIN READING OF NRS 288 EXCLUDES THE EXECUTIVE DEPARTMENT OF THE STATE OF NEVADA FROM THE OBLIGATION TO ENGAGE IN IMPACT BARGAINING.

FOP argues that the State fails to cite anything from the legislative history of Senate Bill 135 to show that the State is excluded from impact bargaining. However, the EMRB need not look to the legislative history. The Nevada Supreme Court has found that "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. See *State, Div of Ins v. State Farm Mut. Auto Ins Co.,* 116 Nev. 290, 293, 995 P.2d 482, 485 (2000) Here a simple reading of NRS 288 clearly distinguishes the obligations of the State from local governments with respect to bargaining and it is clearly

distinguished from the National Labor Relations Act ("NLRA") language, which is the basis for the National Labor Relations Board finding a duty of private sector employers to impact bargain.

The EMRB has found that failure to impact bargain for local government employers is a prohibited practice citing the language contained in NRS 288.270(e). see *Nye County Support Staff Organization v. Nye County School District*, EMRB Case No. A1-045754, Item No. 559, page 8 at 20 (2003) NRS 288.270(e) states that it is a prohibited practice for a local government employer to "Refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. Bargaining includes the entire bargaining process, including mediation and fact-finding, provided for in this chapter." NRS 288.150(1) states that "every local government employer shall negotiate in good faith through one or more representatives of its own choosing concerning the mandatory subjects of bargaining…."

Similarly, the NLRA makes it a prohibited practice to "refuse to bargain collectively with the representatives of his employees" with respect to "rates of pay, wages, hours of employment, or other conditions of employment." See NLRA section 8(a)(5) and section 9(a)

Both the NLRA and NRS 288.270(e) tie the prohibited practice to a general duty to bargain. Contrast this with 288.620(1)(b), which governs Executive Department employers. 288.620(1)(b) states that it is a prohibited practice for the State to "(r)efuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.565." NRS 288.565 is the obligation of the State to negotiate collective bargaining agreements not a general duty to bargain. NRS 288.565 does not contain any language giving rise to a general duty to bargain outside of the context of a collective bargaining agreement.

Further complicating the arguments raised by FOP, there is no dispute resolution contained within NRS 288 for the Executive Department and the exclusive representative outside of disputes concerning the negotiation of a collective bargaining agreement. While NRS 288.200 through NRS 288.217 permits local government employer or the employee organizations to submit any dispute to a fact finder or arbitrator after a failure to reach

agreement, NRS 288.565 through NRS 288.580 is specific to resolving disputes regarding the negotiation of a collective bargaining agreement ("Either party may request a mediator….if the parties do not reach a ***collective bargaining agreement***" (emphasis added) NRS 288.570(1)) If the EMRB were to find that the Executive Department is required to impact bargain and that bargaining were to go to impasse, there is no dispute resolution process available for the parties to resolve the impasse.

Had the Legislature intended to obligate the State to bargain outside of a collective bargaining agreement it would have simply mirrored the language of NRS 288 as it is applied to local government employers. Instead, the legislature in NRS 288.620(1) makes a point of stating that NRS 288.270(e) is not a prohibited practice for the Executive Department. If the intention had been to hold the Executive Department to the same standards as the local government employers there is no reason for this exemption to exist or for the statute to specifically tie the duty to bargain to the bargaining of a collective bargaining agreement.

FOP's arguments regarding timelines are also unpersuasive. As acknowledged by FOP and contained within the statute, an employee organization and a local government employer may negotiate a contract at any time with the simple restriction being that notice must be given on or before February 1 if the negotiation requires the budgeting of money. See NRS 288.180(1) What was not mentioned by FOP, but what is relevant, is that a local government employer may negotiated a collective bargaining agreement of any length. See NRS 288.155 Contrast this with the State who must negotiate a two-year agreement every two years. See NRS 288.550

This two-year requirement was not random or an accident. The requirement is meant to coincide with the realities of State government. Unlike local governments where the ruling body meets regularly, the State legislature only meets every two years. This makes approval for anything requiring an appropriation possible only every two years. A local government has the ability to reappropriate money at any time. The State lacks that flexibility. If the State were subject to an impact bargaining requirement it would paralyze State functions for the

biennium as a department of the State cannot simply reappropriate money without legislative approval.[2]

FOP goes on to state that the appropriations requirement would not limit the State's ability to impact bargain by stating "it doesn't cost the State anything to collectively bargain" (See Opposition to Motion to Dismiss page 7 at 15), but then goes on to show the price of one of their proposals. (see Opposition to Motion to Dismiss Exhibit 3) FOP claims that this Exhibit demonstrates that NDOC has the money. However, this document proves the opposite. Exhibit 1 is a cost estimate, not budgeted funds and the project described continues into 2026, which would mean that a legislative appropriation would be necessary in 2025 to complete the project. Nothing in this document shows that NDOC has the money currently to complete this project or to complete it on a timeline that would meet with the operational need to transfer the prisoners.

D. A CEASE AND DESIST ORDER IN THIS MATTER WOULD EXCEED THE BOARD'S AUTHORITY AND THE COMMENCING OF NEGOTIATIONS BETWEEN THE PARTIES RENDERED THE ISSUES IN THE COMPLAINT MOOT.

FOP claims that its prayer for relief is not a preliminary injunction request, but a request that the EMRB order NDOC to refrain from transporting additional maximum security prisoners to HDSP. See Opposition to Motion to Dismiss Page 9, 11 through page 10, 4) As stated earlier in this Reply, the authority of NDOC to transfer prisoners is found in NRS 209.291. The EMRB only has the authority to interpret and enforce NRS 288. *See Clark County Education Association, et. al. v. Clark County School District*, Case No. 2020-008, Item No. 869 (2020); *City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474-75, 653 P.2d 156, 158 (1982); *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); *City of Henderson v. Kilgore*, 122 Nev. 331, 333, 131 P.3d 11, 12 (2006); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case

[2] NRS 353(1) The sums appropriated for the various branches of expenditure in the public service of the State shall be applied solely to the objects for which they are respectively made, and for no others.

No. Al-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. Al-04611, Item No. 796 (2014); see e.g., *Flores v. Clark Cty*., Case No. Al-045990, Item No. 737 (2010); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), aff'd *Bonner v. City of North Las Vegas*, Docket No. 76408, 2020 WL 3571914, at 3 filed June 30, 2020, unpublished deposition (Nev. 2020); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018).

If FOP's prayer for relief is not a preliminary injunction request and instead a demand that the EMRB limit the authority of NDOC to transfer prisoners between institutions, the EMRB would still lack this authority. As argued above, the legislature would have to limit the Director of NDOC's authority under NRS 209.291 and to date it has not done so.

With the EMRB lacking the authority to force NDOC to refrain from transferring prisoners, the only available remedy available would be an order that the State bargain the effects of the impact of the prisoner transfer. Because the State and FOP are currently in negotiations there would be no purpose in such an order. FOP may present any safety proposal it wishes to and the State can negotiate over them. With no further justiciable controversy, the matters contained within the complaint are rendered moot.

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E. CONCLUSION

WHEREFORE, for the reasons set out above, Respondent hereby requests an Order dismissing the Complaint with prejudice, an award of attorney's fees and costs incurred by Respondent, and for such other relief as is appropriate.

DATED this 2nd day of December 2024.

AARON D. FORD
Attorney General

By: */s/ Steven Sorensen*
STEVEN SORENSEN
Deputy Attorney General
JOSH REID (Bar No. 7497)
Special Counsel – Labor Relations
State of Nevada
Office of the Attorney General
1 State of Nevada Way, Suite 100
Las Vegas, Nevada 89119
ssorensen@ag.nv.org

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December 2024, a true and correct copy of the JOINT STATUS REPORT was served in ELECTRONIC MAIL to the below:

Government Employee-Management Relations Board, emrb@business.nv.gov
Bruce Snyder, Commissioner, bsnyder@business.nv.gov
Daniel Marks, Esq., office@danielmarks.net
Adam Levine, Esq., alevine@danielmarks.net
Paul Lunkwitz, lunkwitzfop21@yahoo.com

/s/ Steven Sorensen
An employee of the Office of the Attorney General