IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD,

Appellant,

vs.

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14 and CLARK COUNTY SCHOOL DISTRICT,

Respondents.
_____/

Supreme Court No. 70586
District Court Case No. A-15-715377-J

OPPOSITION TO STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD's MOTION FOR APPEAL TO BE EXPEDITED AND FOR *EN BANC* REVIEW IN THE FIRST INSTANCE

COMES NOW Respondent Education Support Employees Association ("ESEA"), by and through its attorneys and files its Opposition to State of Nevada, Local Government Employee-Management Relations Board's ("the Board's") Motion for Appeal to be Expedited and for *En Banc* Review in the First Instance ("Motion"). This Opposition is based on Nevada Rule of Appellate Procedure ("NRAP") 27(a)(3), the legal argument contained herein, and the pleadings on file in this matter.

INTRODUCTION

More than two months after filing this appeal, the Board now requests that this Court commit to an expedited, *en banc* consideration, arguing that such is necessary to "explain how the election process [to determine the exclusive bargaining agent for local government employees] is to be brought to a conclusion." Motion at 6. This

maneuver provides the Court with an insightful preview of the Board's misapprehension of the law of this case. In the fourteen (14) years that have elapsed since this case began, this Court has already issued two orders, to which the Board was a party, that set forth the way the election process is to be brought to a conclusion. In those orders, this Court ruled that the statute and administrative code which govern the election process are plain and unambiguous and require an affirmative vote from a majority of all of the members of the bargaining unit to displace an incumbent union. This Court also said that this unambiguous language must be followed regardless of result, and (in the first of such two orders) that it will defer to the Legislature to change the standard for bringing the results of representation elections held pursuant to NRS 288.160 to a conclusion. Necessity, therefore, does not compel expedition on the part of this Court. Indeed, it is difficult to understand the need for the Court's guidance at all at this point because the Board's options are already clear: it must accept this Court's previous orders; or, it must obtain a legislative change to NRS 288.160(4).

BACKGROUND

Although the limited space that NRAP allows for responding to a motion does not ordinarily allow for a recitation of the facts in a 14-year old case, the Board's misleading truncation of the facts in its Motion requires ESEA to set the record straight. The Board correctly states that in response to a petition by International Brotherhood of Teamsters, Local 14 ("Local 14") challenging ESEA's support from a majority of the bargaining unit of the support staff employees of the Clark County School District, the Board ordered that a representation election be held and that such election would be determined by the standard of an affirmative vote

of a majority of all the employees in the bargaining unit. However, in its Motion, the Board then jumps from that order for the election that was held in 2006 to the runoff election held in 2015 without mentioning that in between these two events, the matter came before this Court twice, and, on the subject of the appropriate standard for determining majority support, this Court stated:

> [T]he statute *and* administrative code plainly and unambiguously state that to win an election, the employee organization must have "a majority of the employees within the particular bargaining unit."

Education Support Employees Ass'n. v. Employee-Management Relations Board, Docket Nos. 42315/42338 (December 21, 2005) ("2005 Order of Affirmance") at 11 (emphasis added). Exhibit A. In fact, this Court ***specifically rejected*** the argument that NRS 288.160 or NAC 288.110 required a mere "majority of the employees who vote."[1] *Id.* This Court also stated that "in the case of an unambiguous statute, *the EMRB is required to follow the law 'regardless of result'*" and "[w]e defer to the Nevada Legislature as to whether the definition of a majority vote should be changed." *Id.* at 11-12 (emphasis added). Then, after the representation election was held and neither Local 14 nor ESEA received the affirmative vote of a majority of all the employees in the bargaining unit, this matter was again reviewed by this Court on the subject of whether a runoff election was required. In ordering that a runoff election was required, this Court also explicitly held that:

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[1] In the 2005 Order, this Court said "[c]ontrary to Local 14's contention, neither NRS 288.160 nor NAC 288.110 states that the employee organization seeking exclusive representation must have a majority of the employees who vote."

> [T]he language of NRS 288.160 *and* NAC 288.110 are plain and unambiguous and require an employee organization to obtain *support from a majority of all of the members of the bargaining unit and not just a majority of those who vote.*

International Brotherhood of Teamsters, Local 14 v. Education Support Employees Ass'n., Docket No. 51010 (December 21, 2009) ("2009 Order of Affirmance") at 2-3. Exhibit B. Additionally, the Court stated that such standard "is equally applicable to the runoff election." *Id.* at 3. Finally, this Court acknowledged that such election "may produce similar inconclusive results, however, the parties can agree to an alternative method in which to conduct the runoff election." *Id.* Thus, this Court has already explained, indeed, ordered, how the election process is to be brought to a conclusion.

Since this Court's 2005 Order of Affirmance, the Board has conducted the representation election and the runoff election and correctly applied the standard quoted above. This was the "election process" which the Board has concluded, and the results have been "meaningful," *i.e.*, the challenger has failed to meet the standard for unseating the incumbent (who met the same standard when it originally became the exclusive bargaining agent) and thus, labor stability has been preserved. Nevertheless, after the runoff election, the Board ordered and held a second runoff election between the same parties and applied a different standard to determine the exclusive bargaining agent — the majority-of-the-votes-cast standard that this Court rejected in 2005 and 2009.

The fact that the Board now believes that the results of the first runoff were somehow not "meaningful" (Motion at 2) does not entitle it to change the law. As this Court has stated, the Board must follow the

law regardless of result, and it is within the sole jurisdiction of the Nevada legislature to change "the definition of a majority vote." 2005 Order of Affirmance at 12. The Board has had eleven (11) years since this Court's 2005 Order to obtain a legislative change. Neither the Board nor Local 14 have obtained such a legislative change, nor have they even attempted such a legislative change since 2007.[2] Rather, the Board ignored the statute and this Court's interpretation and held a second runoff election between the same parties for the express purpose of applying the standard of a mere majority-of-the-votes-cast. After the Board did so and declared Local 14 as the exclusive bargaining agent, ESEA filed a petition for judicial review of the Board's order. The Eighth Judicial District Court agreed with ESEA that this Court's orders declaring the majority of the entire bargaining unit standard controlled and that the Board had no authority to hold the second runoff election and determine the results by the wrong standard of a mere majority-of-the-votes-cast.

THE STANDARDS FOR *EN BANC* REVIEW IN THE FIRST INSTANCE ARE NOT PRESENT IN THIS CASE

The standard for *en banc* consideration is when a case "rais[es] substantial precedential, constitutional or public policy issues, or where *en banc* consideration is necessary to secure or maintain uniformity of the court's decisions." IOP 2(b)(2) and 13(a). The Board is charged with reviewing labor practices between local government employers and the bargaining agents for their employees. Therefore, every matter that the

[2] There were three unsuccessful attempts to seek a legislative change. *See* AB 545 (2003); AB 568 (2005) and AB 337 (2007).

Board considers is a matter of "public policy." The Board's lengthy description of its frustration with the Legislature's standard for determining the outcome of representation elections does not make this matter a more substantial matter of "public policy" than another. The Board does not assert that there are other matters pending before the Board, or even likely to appear before the Board in the near future, that involve the same issue.

Additionally, far from indicating a "need to secure or maintain uniformity of the court's decisions," the history in this case is a shining example of "uniformity." Going from a three-member panel decision in 2005 to an order of the full court in 2009, this Court maintained its interpretation of NRS 288.160(4) as requiring an affirmative vote of a majority of all the employees of the bargaining unit. Although in describing this Court's Orders, the Board latches on to the Court's 2009 statements that a runoff election may produce "similar inconclusive results," and that the parties "can agree to an alternative method in which to conduct the runoff election," those statements do not demonstrate a lack of uniformity or clarity, nor do they indicate that the Board may apply a different standard. This statement was made directly after the Court "conclude[d] that NRS 288.160(4)'s and NAC 288.110(10)(d)'s majority-vote requirement is equally applicable to the runoff election." Therefore, the mention of an "alternative *method* in which to conduct the runoff election" (emphasis added) clearly cannot have referred to the majority vote standard, and rather referred specifically to a *method*, such as in-person voting versus mail-in voting.

Similarly, the Board's characterization of the issue as being merely whether the Board has the option not to require "mathematical certainty"

in determining majority support does not cast this Court's prior orders into doubt. All along, the argument has been whether the standard should be an affirmative vote of a majority of all the employees in the bargaining unit or a mere majority-of-the-votes-cast. This Court has twice determined that the statute and the administrative code require the former — votes from a majority of all of the members of the bargaining unit.[3] It is a simple mathematical calculation to determine whether the number of affirmative votes for a challenger equals more than 50% of the number of employees in the bargaining unit; no extra calculations are required to get to any putative "certainty." The Legislature created this standard; this Court has interpreted it; it is the law. If the Board does not want to apply the law, it must seek a legislative change.

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[3] The interpretations by federal courts of the National Labor Relations Act ("NLRA") and the Railway Labor Act ("RLA") which the Board cites (*see* Motion at 7) were in existence when this Court issued its orders in 2005 and 2009, and their authority was briefed to this Court in those proceedings. These federal court decisions are distinguishable because although certain language of the federal acts are similar to language contained in NRS 288.160(4), the federal acts, read as a whole with their regulations (*see* 29 C.F.R. § 101.17-101.18 and 29 C.F.R. § 1206.2) are different because they require a specific, verifiable showing of employee support for the rival union before a representation election may even be ordered. In fact, the Board discussed this distinction between the federal acts and NRS chapter 288 when it argued to this Court in 2004 that NRS 288.160(4) did require an outright majority. Additionally, the congressional record supported the interpretation that the federal laws required only the votes-cast standard. *See N.L.R.B. v. Deutsch*, 265 F. 2d 473, 479 (9th Cir. 1959) (*citing Virginian Railway Co. v. Sys. Fed'n No. 40,* 300 U.S. 515, 559, 57 S. Ct. 592 (1937) and discussing Senate Committee's Report on 1934 amendment to the RLA and consideration of it in adopting NLRA). No such legislative history on the meaning of NRS 288.160 exists in Nevada.

In short, the criteria for full, *en banc* consideration set forth in IOP 2(b)(2) and 13(a) and are simply not present. There is no substantial public policy issue and there has been no lack of clarity or uniformity in the Court's decisions.

NO CRITERIA FOR EXPEDITION EXIST

The fact that the Board chose to act beyond its jurisdiction by holding a second runoff election between the same parties to apply a different standard for determining the results of that election rather than seek a legislative change does not create urgency on the part of this Court. As will be discussed at length when ESEA submits its responding brief, the Board does not have a duty to conduct representation elections nor does it have a duty to resolve all doubt as to whether a particular employee organization has the support of a majority of employees in a bargaining unit. Pursuant to NRS 288.160(4) the Board has the discretion to hold an election if it has a good faith doubt as to whether any employee organization enjoys such majority support.

Upon the petition of Local 14, the Board exercised such discretion to conduct such an election in this matter, and even held a runoff election, applying the correct standard for determining the results of both. It never should have conducted a second runoff election between the same parties for the purpose of applying an unlawful, lower election-determination standard. The fact that it did and now believes it has been prevented from bringing that illegal election to a "conclusion" does not create an emergency or need for expedition. The authority cited to by the Board for the proposition that delay in representation elections "cannot be adequately remedied" is completely inapposite. In *NLRB v. Carl Weissman & Sons, Inc.*, 849 F. 2d 449, 451 n.1 (9th Cir. 1988) an initial

representation election to determine if employees would be unionized was declared ineffective by the NLRB because the union representatives made anti-semitic remarks about the employer, and the issue was whether an appropriate amount of time had elapsed between that "tainted" election and a new representation election. The Ninth Circuit Court of Appeals held that the NLRB did not abuse its discretion when it conducted a rerun election approximately two (2) months later. This factual scenario and the court's comment that any further delay may have worked to the benefit of the employer do not support an assertion that when the Board acts extra-jurisdictionally by creating a new creature called a second, discretionary runoff election in order to apply a different, unlawful, lower election-determination standard, there must be an expedited review of its behavior by this Court.

ESEA has no interest in delaying the processing of the Board's appeal. However, it must oppose the Board's attempt to characterize this Court's two prior decisions as "unworkable" (Motion at 6) and its insistence that they be speedily overruled. ESEA has participated in two (legal) elections as a result of Local 14's challenge of its majority status, and one illegal election. Despite three elections, the legal standard established by the Nevada Legislature for removing ESEA and installing a new bargaining agent has simply not been satisfied. The Board did not have the authority, much less the duty, to further inject itself into this matter, apply a standard that is not the law, and seat a new bargaining agent. ESEA will continue to fully participate in this appeal but must object to the Board's efforts to elevate this case to a priority status which it does not warrant.

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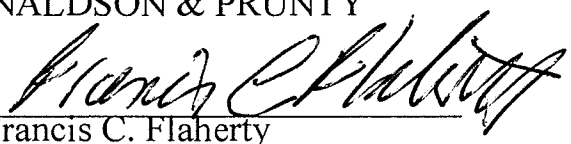
RESPECTFULLY, therefore, ESEA moves the Court to deny the Board's Motion.

DATED this 1st day of September, 2016

DYER, LAWRENCE, FLAHERTY, DONALDSON & PRUNTY

By: 

Francis C. Flaherty
Nevada Bar No. 5303
Sue S. Matuska
Nevada Bar No. 6051

2805 Mountain Street
Carson City, Nevada 89703
(775) 885-1896 telephone
(775) 885-8728 facsimile
fflaherty@dyerlawrence.com

Attorneys for ESEA

CERTIFICATE OF SERVICE

This is to certify that pursuant to NRAP 25(b) and (c) on the 2nd day of September, 2016, the undersigned, an employee of Dyer, Lawrence, Flaherty, Donaldson & Prunty, electronically filed the foregoing OPPOSITION TO STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD's MOTION FOR APPEAL TO BE EXPEDITED AND FOR *EN BANC* REVIEW IN THE FIRST INSTANCE with the Supreme Court of the State of Nevada, and a copy was served by the following method of service:

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_X_ BY E-MAIL

____ BY FACSIMILE

____ BY MESSENGER SERVICE

to the following:

EMRB
2501 East Sahara Avenue, Suite 203
Las Vegas, Nevada 89104

emrb@business.nevada.gov
Bsnyder@business.nevada.gov

Kristin L. Martin, Esq.
McCracken, Stemerman, Bowen & Holsberry
1630 Commerce Street, Suite A-1
Las Vegas, NV 89102

klm@dcbsf.com

S. Scott Greenberg, Esq.
Office of General Counsel
Clark County School District
5100 W. Sahara Ave.
Las Vegas, NV 89146

sgreenberg@interact.ccsd.net

Gregory L. Zunino, Esq.
Bureau Chief
Attorney General's Office
100 N. Carson Street
Carson City, Nevada 89701

gzunino@ag.nv.gov

Donald J. Bordelove
Deputy Attorney General
Attorney General's Office
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101-1068

dbordelove@ag.ng.gov

Debora McEachin

EXHIBIT “A"

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IN THE SUPREME COURT OF THE STATE OF NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, A NEVADA NONPROFIT CORPORATION,
Appellant,
vs.
STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF NEVADA; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, AN EMPLOYEE ORGANIZATION; AND CLARK COUNTY SCHOOL DISTRICT, A COUNTY SCHOOL DISTRICT,
Respondents.

No. 42315

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, AN EMPLOYEE ORGANIZATION,
Appellant,
vs.
EDUCATION SUPPORT EMPLOYEES ASSOCIATION, A NEVADA NONPROFIT CORPORATION; STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF NEVADA; AND CLARK COUNTY SCHOOL DISTRICT, A COUNTY SCHOOL DISTRICT,
Respondents.

No. 42338

FILED

DEC 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order denying a petition and a cross-petition for judicial review in a labor

05-24883

relations action. Eighth Judicial District Court, Clark County; David Wall, Judge.

In its appeal, Education Support Employees Association (ESEA) argues that (1) the State of Nevada, Local Government Employee-Management Relations Board (EMRB) lacked jurisdiction to hear the majority status challenge of International Brotherhood of Teamsters, Local 14 (Local 14), (2) EMRB erroneously interpreted the verified membership list requirement of NRS 288.160, (3) EMRB's good faith doubt determination was not supported by substantial evidence in the record, and (4) EMRB's September 24, 2002, order should be modified in light of a prospective future problem. In its appeal, Local 14 argues that the EMRB erred in interpreting NRS 288.160 and NAC 288.110 as stating that a majority status election is won by a majority of all members in the bargaining unit instead of a majority of members who vote. We disagree with both ESEA and Local 14.

Standard of review

"The function of this court in reviewing an administrative decision is identical to the district court's."[1] Typically, courts are free to decide pure legal questions without deference to the agency.[2] In reviewing questions of fact, however, we are prohibited from substituting our judgment for that of the agency.[3] We review questions of fact to determine whether the agency's decision was clearly erroneous or an arbitrary abuse

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[1]Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997).

[2]Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

[3]NRS 233B.135(3).

of discretion.[4] Accordingly, an agency's conclusions of law, which are closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence.[5]

Additionally, we defer "to an agency's interpretation of a statute that the agency is charged with enforcing."[6] Substantial evidence exists if a reasonable person could find adequate evidence to support the agency's conclusion.[7] In making this determination, the reviewing court is confined to the record before the agency.[8] Therefore, this court's review is limited to determining whether there was "substantial evidence in the record to support the agency determination" or statutory interpretation.[9]

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[4]NRS 233B.135(3)(e) – (f); Local Gov't Emp. v. General Sales, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982).

[5]Schepcoff, 109 Nev. at 325, 849 P.2d at 273; see also Elliot v. Resnick, 114 Nev. 25, 32 n.1, 952 P.2d 961, 966 n.1 (1998) (stating that an agency's interpretation of a statute, which it has the duty to administer, is entitled to deference).

[6]State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

[7]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

[8]SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990).

[9]Id. at 787 P.2d at 409; see State Farm, 116 Nev. at 293, 995 P.2d at 485.

ESEA appeal

"Contract bar" doctrine

Typically, the "contract bar" doctrine prohibits a rival employee organization[10] from challenging the recognition of an incumbent employee organization where a collective bargaining agreement exists between the local government employer[11] and the incumbent employee organization.[12] The "contract bar" doctrine, however, is temporarily lifted during "window periods" as provided by NAC 288.146(2). At the time the EMRB initially heard this case, NAC 288.146(2) stated:

> An employee organization may challenge recognition of another employee organization or request a hearing to determine whether a recognized employee organization has ceased to be supported by a majority of the local government employees in a bargaining unit only during the period:
>
> (a) Beginning upon the filing of notice by the recognized employee organization pursuant to NRS 288.180 of its desire to negotiate a successor agreement and ending upon the commencement of negotiations for such an agreement; or

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[10]An employee organization is "an organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees." NRS 288.040. This is also referred to as a union.

[11]A local government employer means "any political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts." NRS 288.060.

[12]NAC 288.146(2).

> (b) Beginning 242 days before the expiration date of the existing labor agreement and ending 212 days before the expiration of the labor agreement.

NAC 288.146(2) plainly and unambiguously states that for the EMRB to have jurisdiction to consider a majority status dispute, an employee organization, within the "window period," must either make a challenge or request a hearing.[13] All the parties agree that Local 14 requested a hearing within the "window period." Consequently, the issue at stake is whether Local 14's November 15, 2001, letter constituted a challenge pursuant to NAC 288.146(2).

In determining whether the letter constituted a challenge, the EMRB turned to the plain meaning of the word "challenge." As defined, "challenge" means a formal questioning of "legal qualifications of a person, action, or thing."[14] Using this definition as a guide, the EMRB determined that by requesting recognition, Local 14 was questioning ESEA's legal qualifications or status. As a result, the EMRB concluded that the letter constituted a challenge. Since NAC 288.146(2) is plain and unambiguous, no further review is necessary.[15] Further, the EMRB's interpretation that Local 14's letter represented a challenge is entitled to great deference since it is charged with enforcing this regulation.[16] It is also not necessary to review the EMRB's interpretation in light of recent amendments to

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[13]Id.

[14]Black's Law Dictionary 223 (7th ed. 1999).

[15]State Farm, 116 Nev. at 293, 995 P.2d at 485.

[16]Id.

NAC 288.146(2).[17] Therefore, we conclude that the EMRB had jurisdiction to hear Local 14's request since the letter constituted a sufficient challenge within the "window period."

NRS 288.160

Typically, a local government employer's bargaining unit[18] is represented by only one employee organization.[19] To become the exclusive bargaining unit representative, the employee organization must gain recognition[20] from the local government employer.[21] Difficulties may arise, however, when two or more employee organizations desire recognition. To resolve this dilemma, the State of Nevada enacted NRS 288.160, which establishes the requirements that an employee organization must meet before a local government employer will recognize it.

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[17]Town of Eureka v. State Engineer, 108 Nev. 163, 167, 826 P.2d 948, 951 (1992) (stating that "absent clear legislative intent to make a statute retroactive, this court will interpret it as having only a prospective effect").

[18]A bargaining unit means "a group of local government employees recognized by the local government employer as having sufficient community of interest appropriate for representation by an employee organization for the purpose of collective bargaining." NRS 288.028.

[19]NRS 288.027; NRS 288.160(2).

[20]Recognition requires "the formal acknowledgement by the local government employer that a particular employee organization has the right to represent the local government employees within a particular bargaining unit." NRS 288.067.

[21]NRS 288.160(2).

NRS 288.160(2) pertains to situations where only one employee organization requests recognition. Without any competitors, the employee organization may become the exclusive bargaining representative without the involvement of the EMRB. To become the exclusive bargaining representative, the employee organization must merely (1) present "a verified membership list showing that it represents a majority of the employees" and (2) gain recognition from the local government employer.[22] The presentation of the verified membership list, however, may be made at or after the submission of the application for recognition.[23]

When more than one employee organization requests recognition, NRS 288.160(4) establishes a method of determining which organization is supported by a majority of the bargaining unit. NRS 288.160(4) also allows a competing employee organization to appeal to the EMRB. If, in assessing the parties' interests, the EMRB determines that there is a "good faith doubt[ ] whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot upon the question."[24]

Verified membership lists

The requirement of NRS 288.160(2) for a verified membership list pertains only to an unchallenged employee organization gaining recognition. There is no mention in NRS 288.160(2) or (4) that an

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[22]NRS 288.160(2).

[23]Id.

[24]NRS 288.160(4).

employee organization must provide a verified membership list prior to an election. In fact, as stated in the EMRB's order, "NRS 288.160(4) is silent as to the issue of a verified membership list." Rather, when the majority status of an incumbent employee organization is challenged, NRS 288.160(4) requires only that the EMRB find a good faith doubt prior to ordering an election. Notably, if submitting a verified membership list were a prerequisite, there would be no need to hold an election since majority status would be evident.

On September 19, 2002, Gary Mauger, Local 14's Secretary/Treasurer, testified that CCSD never requested a verified membership list. Taking NRS 288.160 and Mauger's testimony into consideration, the EMRB concluded that Local 14 was not required to submit a verified membership list prior to holding an election. The EMRB's interpretation of NRS 288.160 is entitled to great deference. Thus, we conclude that the EMRB appropriately determined that the submission of a verified membership list is not a prerequisite for an election.

Good faith doubt

There is substantial evidence to support the EMRB's determination that a good faith doubt existed as to whether ESEA or Local 14 was supported by a majority of CCSD's bargaining unit employees. Contrary to ESEA's contentions, NRS 288.160(4) does not require a challenging employee organization to provide substantial evidence that it is supported by the majority of the bargaining unit. Rather, NRS 288.160(4) merely states that the EMRB may order an election if there are "good faith doubts whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit." (Emphasis added.) Consequently, the

requirement is whether substantial evidence exists to support the EMRB's good faith doubt that either ESEA or Local 14 had majority status.

Here, the bargaining unit employees' statements of dissatisfaction with ESEA are admissible to support the EMRB's determination that a good faith doubt existed. Further, the collective testimonies of Mauger, Lamar Leavitt, and Joseph Furtado suggest that there was sufficient uncertainty as to whether ESEA or Local 14 had majority status. Considering this testimony, the EMRB determined that a good faith doubt existed as to whether Local 14 or ESEA had majority status. There is no evidence that the EMRB's decision was clearly erroneous or an arbitrary abuse of discretion.[25] Substantial evidence supports the EMRB's decision that a good faith doubt existed and an election was justified.

Order modification

"'Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.'"[26] Accordingly, "the issue involved in the controversy must be ripe for judicial determination"[27] and

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[25]NRS 233B.135(3)(e) – (f); Local Gov't Emp. v. General Sales, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982).

[26]Resnick v. Nevada Gaming Commission, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988) (quoting Doe v. Bryan, 102 Nev. 523, 525, 729 P.2d 443, 444 (1986)).

[27]Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948), quoted in Resnick, 104 Nev. at 66, 752 P.2d at 233.

"'not merely the prospect of a future problem.'"[28] To prove ripeness, the "party must show that it is probable [that] future harm will occur."[29]

Here, ESEA claims that if an election occurs, it may have to undergo a recertification by the EMRB. Yet, the EMRB's order does not address the decertification process. The EMRB's order of January 23, 2003, merely sets forth the guidelines for an election. Further, the order states that the EMRB will require either ESEA or Local 14 to obtain a majority of the bargaining unit employee votes before it will recognize it as CCSD's exclusive bargaining unit representative. ESEA has not carried its burden of proving that "it is probable [that] future harm will occur."[30] Accordingly, we hold that ESEA's objections concerning the EMRB's January 23, 2003, order are not ripe for review.

Local 14's appeal

Plain and unambiguous language

NRS 288.160(4) sets forth the criteria of resolving a majority status dispute between two employee organizations contending to become a local government employer's exclusive bargaining unit agent. NRS 288.160(4) states that an election shall be held if there is a good faith doubt as to "whether any employee organization is supported by a majority of the local government employees in a particular bargaining

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[28]Resnick, 104 Nev. at 66, 752 P.2d at 233 (quoting Doe, 102 Nev. at 525, 729 P.2d at 444).

[29]Id., at 66, 752 P.2d at 233.

[30]Id.

unit." (Emphasis added.) In applicable part, former NAC 288.110(9)(d) stated:[31]

> An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if:
>
> . . . .
>
> (d) The election demonstrates that the employee organization is supported by a majority of the employees within the particular bargaining unit.

(Emphasis added.)

Contrary to Local 14's contention, neither NRS 288.160 nor NAC 288.110 states that the employee organization seeking exclusive representation must have a majority of the employees who vote. Rather, the statute and administrative code plainly and unambiguously state that to win an election, the employee organization must have "a majority of the employees within the particular bargaining unit."[32] As a result of this clear language, the EMRB held that NRS 288.160(4) and NAC 288.110(9)(d) required a majority of all members within the bargaining unit, not just those who vote. In fact, in the case of an unambiguous statute, the EMRB is required to follow the law "regardless of result."[33] As such, the EMRB appropriately held that the election would be resolved by obtaining a majority vote. In light of this plain and unambiguous

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[31]On October 30, 2003, NAC 288.110(9) was amended. This unchanged provision is now NAC 288.110(10)(d).

[32]Id.; see NRS 288.160(4).

[33]Randono v. CUNA Mutual Ins. Group, 106 Nev. 371, 374, 793 P.2d 1324, 1326 (1990).

language, we will not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110.[34] We defer to the Nevada Legislature as to whether the definition of a majority vote should be changed.

Election laws

Local 14 also argues that the EMRB's decision conflicts with election laws contained within the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA). To support this contention, Local 14 turns to 29 U.S.C. § 159(a) and 45 U.S.C. § 152(4). When interpreting statutes, however, administrative agencies are not bound by stare decisis or dissimilar statutes.[35] Nor are agencies compelled to accept any policy arguments "in the face of an unambiguous, controlling statute."[36]

Here, the election provisions contained within NRS 288.160 and NAC 288.110 are different from those contained within the NLRA and the RLA. Thus, the NLRA is not binding on the EMRB.[37]

CONCLUSION

We conclude that the EMRB had jurisdiction to hear Local 14's request since Local 14's November 15, 2001, letter constituted a

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[34]State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000); State v. Jepsen, 46 Nev. 193, 196, 209 P. 501, 502 (1922).

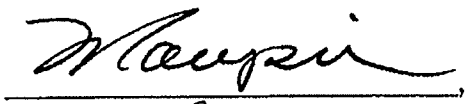
[35]State, Bus. & Indus. v. Granite Constr., 118 Nev. 83, 88, 40 P.3d 423, 426 (2002) (noting that it is presumed that the state legislature intended to adopt the interpretation of federal acts "'only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.'" (quoting Sharifi v. Young Bros., Inc., 835 S.W.2d 221, 223 (Tex. App. 1992)); Gray Line Tours v. Public Serv. Comm'n, 97 Nev. 200, 203, 626 P.2d 263, 265 (1981).

[36]Randono, 106 Nev. at 375, 793 P.2d at 1327.

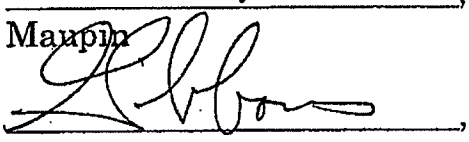
[37]Weiner v. Beatty, 121 Nev. ___, ___, 116 P.3d 829, 832 (2005).

sufficient challenge within the "window period." Further, the EMRB appropriately determined that the submission of a verified membership list is not a prerequisite for an election. The testimony before the EMRB suggests that there was sufficient uncertainty as to whether either ESEA or Local 14 had majority status. Therefore, we further conclude that the EMRB's good faith doubt decision was supported by substantial evidence in the record. In addition, ESEA's objections concerning the EMRB's January 23, 2003, order are not ripe for review. Lastly, since NRS 288.160 and NAC 288.110 are plain and unambiguous, the EMRB properly determined that an employee bargaining organization must have a majority of the total bargaining unit membership's support before it will be considered the exclusive bargaining unit. Accordingly, we

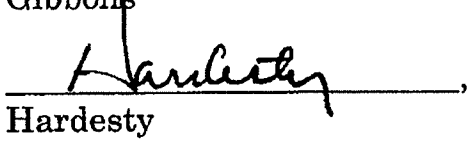
ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. David Wall, District Judge
Dyer, Lawrence, Penrose, Flaherty & Donaldson
Attorney General George Chanos/Las Vegas
C. W. Hoffman Jr.
McCracken Stemerman Bowen & Holsberry
Thomas F. Pitaro
Clark County Clerk

EXHIBIT “B"

EXHIBIT “B"

EXHIBIT “B"

IN THE SUPREME COURT OF THE STATE OF NEVADA

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AN EMPLOYEE ORGANIZATION,
Appellant,
vs.
EDUCATION SUPPORT EMPLOYEES ASSOCIATION, A NEVADA NONPROFIT CORPORATION; THE STATE OF NEVADA LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF NEVADA; AND CLARK COUNTY SCHOOL DISTRICT, A COUNTY SCHOOL DISTRICT,
Respondents.

No. 51010

FILED

DEC 21 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from order granting in part and denying in part a petition for judicial review. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

This action arises out of an election to determine which employee organization would represent the employees of the Clark County School District. Because the primary election was inconclusive, the district court concluded that the Local Government Employee-Management Relations Board (EMRB) is required to conduct a runoff election in accordance with NAC 288.110. We agree.

When a competing employee organization seeks recognition, NRS 288.160(4) permits the EMRB to conduct an election to determine which "employee organization is supported by a majority of the local government employees in a particular bargaining unit." To win an

election and thus be considered the exclusive representative employee organization, the election must "demonstrate[] that the employee organization is supported by a majority of the employees within the particular bargaining unit." NAC 288.110(10)(d). In a previous order resolving consolidated appeals involving these same parties, we determined that the language of NRS 288.160 and NAC 288.110 are plain and unambiguous and require an employee organization to obtain support from a majority of all of the members of the bargaining unit and not just a majority of those who vote. See Education Support v. Employee-Management Relations Board, Docket Nos. 42315/42338 (Order of Affirmance, December 21, 2005).

At issue in this appeal is whether a runoff election must be conducted when neither employee organization secured a majority vote from all of the members of the bargaining unit.[1] Since we have determined that an employee organization must obtain support from a majority of all of the members of the bargaining unit and not just a majority of those who vote, it was impossible for either Local 14, Education Support Employees Association (ESEA), or the "no union" option to obtain sufficient votes to win the election. Therefore, the election results are inconclusive. NAC 288.110(7) states that "[i]f the results are inconclusive, the Board will conduct a runoff election." (Emphasis added.) We conclude that based on the plain and unambiguous language of NAC

[1]At the time the election was held, there were 10,386 employees in the bargaining unit but only 4,797 ballots were cast. Of the ballots cast, 2,711 employees voted for Local 14, 1,932 employees voted for ESEA, and 93 employees voted for "no union."

288.110(7), the EMRB must conduct a runoff election. We further conclude that NRS 288.160(4)'s and NAC 288.110(10)(d)'s majority-vote requirement is equally applicable to the runoff election.

Accordingly, we affirm that portion of the district court's order requiring the EMRB to conduct a runoff election in accordance with NAC 288.110. We recognize that a runoff election may produce similar inconclusive results; however, the parties can agree to an alternative method in which to conduct the runoff election.[2]

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

[2]NRS 288.160(5) provides in pertinent part that "[t]he parties may agree in writing, without appealing to the Board, to hold a representative election to determine whether an employee organization represents the majority of the local government employees in a bargaining unit."

cc: Hon. Kenneth C. Cory, District Judge
Ara H. Shirinian, Settlement Judge
McCracken, Stemerman & Holsberry
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Clark County School District Legal Department
Dyer, Lawrence, Penrose, Flaherty & Donaldson
Eighth District Court Clerk