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-15-715577-J

REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW Respondent, the Education Support Employees Association ("ESEA") and files its Reply to the State of Nevada, Local Government Employee-Management Relations Board's (the "Board" or "EMRB") Response ("Board's Response" or "Response") to this Court's Order to Show Cause why this appeal should not be dismissed for lack of jurisdiction.

/ / /

/ / /

I. Introduction and Summary of Argument

This appeal by the Board seeks this Court's legal determination on the appropriate vote-count standard to be applied to a representation election(s) pursuant to NRS chapter 288. The instant dispute began more than fourteen (14) years ago when International Brotherhood of Teamsters, Local 14 ("Local 14") invoked the jurisdiction of the Board in EMRB Case No. A1-045735, Item No. 520, in an attempt to displace ESEA as the bargaining agent for the support staff employees of the Clark County School District ("the District"). Case No. A1-045735 has not yet been concluded by the Board.

Twenty-one (21) orders or decisions from the Board have resulted, with the most recent being Item No. 520T, in which the Board applied only a majority-of-the-votes-cast standard to a second runoff election to determine that Local 14 would become the bargaining agent. Item No. 520T was the subject of ESEA's petition to the district court in Case No. A-15-715577-J, which resulted in the district court May 16, 2016, Order, vacating Item No. 520T on the basis of this Court's 2005 and 2009 Orders of Affirmance in this matter, which held that NRS 288.160 and NAC 288.110 plainly and unambiguously require a showing of support from a majority of all the employees in the bargaining unit and not just a majority of those who vote.

///

In its order to show cause, this Court has identified the fact that, also in District Court Case No. A-15-715577-J, ESEA attempted to prevent the last runoff election, in which that lesser standard was applied, from occurring in the first place. ESEA sought this relief because the Board had already indicated its intent to apply the lesser vote-count standard. However, on June 8, 2015, the district court issued a dismissal *without prejudice* allowing the second, runoff election to go forward. This Court asks why that dismissal *without prejudice* does not prevent the May 16, 2016 district court order from being the "final decision" in this case. Put another way, this Court asks why the district court's June 8, 2015, order is not the "final decision."[1]

Rather than presenting any argument on that question, in its Response the Board jumps directly to a very convenient and optimistic argument that if this Court's concern is correct, then, although its appeal of the 2016 district court Order should be dismissed, that same order should nevertheless be declared void, and the Board's Item No. 520T be declared "resurrected." Stated differently, the Board argues that this Court should dismiss the Board's appeal, yet somehow simultaneously grant the Board the relief it seeks in that appeal. This would certainly

---

[1] Hereafter, the June 8, 2015, dismissal *without prejudice* will be referred to as the "2015 district court Order" and the May 16, 2016, order granting ESEA's petition for judicial review will be referred to as the "2016 district court Order."

be a fortuitous result of an order to show cause as to why a party's appeal should not be dismissed.

ESEA vigorously disagrees with this tortured argument because it fails to acknowledge the controlling effect of previous rulings by this Court in this matter. As explained in more detail below, in 2013, this Court held that an "election procedure" adopted by the Board in this matter is not subject to judicial review until the election process is complete. The district court relied on this order when it dismissed *without prejudice* ESEA's attempt to stop the second runoff election in 2015 stating that "[o]nly the Board's final order at the conclusion of the [election] process is subject to judicial review." Thus, the 2015 district court Order merely deferred adjudication until the conclusion of the election process.

Although failing to present any argument on the "final" or "non-final" nature of the 2015 district court Order, the Board does present argument on why the 2016 district court Order is the "final decision" notwithstanding the fact that the order remanded the matter to the Board, relying on this Court's 2008 Order Denying Motion to Dismiss, attached as Exhibit F to its Response.[2] Although it is tempting for ESEA to disagree and argue that the appeal should be dismissed on this remand-

[2] In that order, this Court held that because the district court's "remand" to the Board in 2008 was not for any further substantive action, but rather for a new election, it was appealable as a final order.

jurisdictional ground, ESEA acknowledges that this matter is governed by all of the earlier orders of this Court in this matter, even those that are not to its advantage. ESEA agrees that the Court's 2008 order, like the 2013 Grant of Writ Petition and the 2005 and 2009 Orders of Affirmance (discussed below), govern here as the "law of the case."

II. Statement of Pertinent Facts

To reply to the Court's concern as well as to rebut assertions in the Board's response, it is necessary to set out the following facts, emphasizing the procedural progression of this case in the district court over the years.

Local 14's effort to displace ESEA began in January, 2002 with an application to the Board to convene a hearing in EMRB Case No. A1-045735, Item No. 520. After the Board's hearing on whether there was a good faith doubt as to the employees' support for an employee organization, and the Board's subsequent order for a representation election, *see* I JA 003-11, ESEA filed a petition for judicial review in the First Judicial District Court which was later transferred to the Eighth Judicial District Court. I JA 015-17. In the Eighth Judicial District, this petition was assigned to Department 20 and assigned Case No. A-458182. After the Board issued an order establishing the terms of the election, including that the results must be determined by a vote of a majority of all the employees in the entire bargaining

unit ("outright majority"), *see* I JA 012-14, on February 24, 2003, Local 14 cross-petitioned to the district court to challenge the outright majority requirement. I JA 018-26. After the district court (Judge David Wall) ruled, both ESEA and Local 14 appealed to the Nevada Supreme Court. I JA 027-36. On December 21, 2005, this Court entered an Order of Affirmance rejecting both appeals, *see* I JA 037-49, declaring that the:

> [T]he statute [NRS 288.160] *and* administrative code [NAC 288.110] plainly and unambiguously state that to win an election, the employee organization must have "a majority of the employees within the particular bargaining unit."

I JA 047. This Court emphasized 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." I JA 047-48. (emphasis added).

On April 20, 2006, the representation election was held and the Board determined that no organization received majority support; it certified the election results and, on September 7, 2006, ordered that it had "exhausted its jurisdiction." I JA 053-54. On September 18, 2006, Local 14 filed a petition for judicial review seeking to set aside the Board's September 7, 2006, order and to compel the Board

///

to issue a declaration that "no union" "won" or that Local 14 "won" the election. I JA 054-58. This petition was assigned to Department 1 of the Eighth Judicial District (Judge Kenneth Cory) and assigned case number A-528346. On April 4, 2007, the district court issued an order stating that the Board erred when it determined that it had exhausted its jurisdiction but making no determination as to how the Board was to proceed. I JA 059-64. After the Board then ordered that the previously certified election results stood and that the results preserved the status quo of ESEA as the recognized and exclusive bargaining agent, on June 11, 2007, Local 14 *returned to Department 1*, by filing what it entitled a "supplemental petition for judicial review" and on which it indicated Department 1 and the same case number as the one assigned in September, 2006 (A-528346). I JA 065-72. This "supplemental petition" requested the district court to order that "no union" or Local 14 be declared the winner, or, alternatively, that a runoff election be ordered pursuant to the Board's regulations. The court clerk apparently delivered it to Department 1 without using the random assignment process. On January 16, 2008, the district court granted this "supplemental petition" in part by ordering that a runoff election be held and denied it in part. I JA 073-78.

Local 14 appealed the denial of the "supplemental petition," which was the second order on a petition for judicial review in Case No. A-528346, to the Nevada

Supreme Court. I JA 079-80. ESEA filed a motion to dismiss that appeal on the basis that the remand to the Board to conduct the runoff election was not an appealable order. This Court denied that motion.[3] About two years later, this Court addressed the merits of the appeal and entered another Order of Affirmance, upholding the district court's conclusion that the regulations of the Board required a runoff election and reaffirming that the outright majority requirement would determine the results of the election. ("2009 Order of Affirmance") I JA 081-84.

Specifically, the supreme court stated:

> [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.*

I JA 082. This Court also stated that such standard applied to a runoff election and acknowledged that such election "may produce similar inconclusive results." I JA 083.

In the wake of this Court's 2009 Order of Affirmance, the Board announced its intention to move forward under the same procedure that had governed the original election in 2006. Thereafter, Local 14 *again returned to Department 1* of the Eighth Judicial District, on March 8, 2012, by filing what it entitled a "second

---

[3] *See* Board's Response, Ex. F.

supplemental petition and/or for writ of mandate" and on which it indicated Department 1 and the same case number as assigned in September, 2006 (A-528346), seeking review of the Board's decision to use the same procedures in the runoff election. I JA 089-96. On January 31, 2013, the district court granted Local 14's "second supplemental petition" and directed the Board to come up with an election plan that was "reasonably calculated to produce a definitive result." I JA 122-26. Thus, three district court orders on petitions for judicial review resulted under Case No. A-528346.

On March 1, 2013, the Board filed a Petition for a Writ of Mandamus or in the alternative for a Writ of Certiorari with this Court seeking an order that the district court be directed to dismiss and deny the "second supplemental petition" or for an order that said "second supplemental petition" was void on the basis that the district court lacked jurisdiction. I JA 127-54. On December 18, 2013, this Court granted the Board's petition, declaring that "[n]either NRS 288.160(4) nor NRS 233B.130 vested the district court with the authority to conduct a pre-election review of the EMRB's chosen election procedure" and explicitly stating that "*[o]nly the EMRB's determination of the election's results would constitute a final decision.*" A true and correct copy of the 2013 Order Granting Writ Petition is attached hereto as Exhibit ("Ex.") 1; I JA 155-61 (emphasis added).

The runoff election was finally held by mail between January 5, 2015 and February 3, 2015. As in 2006, the runoff election resulted in neither union receiving an affirmative vote from an outright majority of all employees in the bargaining unit. I JA 162. On February 17, 2015, the Board declared that the results did "not justify removing ESEA in favor of Local 14 under the majority vote requirement *imposed in the Supreme Court's 2009 order*." I JA 164 (emphasis added). Nevertheless, the Board then declared that it had discretionary or implied authority to order another runoff election, and that it would conduct such a runoff election "as soon as practicable and . . . [that] [t]he winner of the discretionary second runoff election shall be determined by the majority of votes cast." I JA 164-69.

On March 19, 2015, ESEA filed a petition for judicial review of this 2015 Board Order and a Motion for Stay in the Eighth Judicial District Court. I JA 173-78. ESEA filed these pleadings without indicating a department or a case number.[4] The case was again assigned to Department 1, and given the case number A-15-715577-J. The matter may have been assigned to Department 1 pursuant to the Eighth Judicial District Court's random case assignment system, *see* EDCR 1.60(a),

---

[4] The Board's facts in its Response could be interpreted as stating that ESEA's caption indicated Department 1. This is not correct. As can be seen, the Case number and Department number were typed in by the clerk on the file-stamped copy of the 2015 petition, which is attached to the Board's Response as Exhibit A.

or perhaps the chief judge or clerk reassigned the matter to Department 1 (Judge Cory) for efficiency and proper administration of justice as required by EDCR 1.10. (Rule 1.10: "These rules . . . must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice."). ESEA does not know why, but, without any request on its part, EMRB Case No. A1-045735, Item No. 520 remained in Department 1 of the district court.

Local 14 and the Board each filed an opposition to the Motion for Stay and the Board also filed a countermotion to dismiss the petition for judicial review, arguing that review of the 2015 Board Order would be a pre-election review of an election procedure and, therefore, would be in contravention of this Court's 2013 Grant of Writ Petition. ESEA argued that ordering a second, discretionary runoff election *for the purpose of* applying only a majority-of-the-votes-cast standard was not an "election procedure" but, rather, an exercise of substantive authority, the purpose of which was to avoid this Court's 2009 Order of Affirmance interpreting NRS 288.160(4) and NAC 288.110(10)(d) as requiring that the runoff election be determined by the outright majority standard.

On June 8, 2015, after indicating on the record at the hearing on the countermotion its doubt as to the Board's authority to determine the results of the

second, discretionary election by only a majority of votes cast, the district court nevertheless held that the issue was an "election procedure" that could not be reviewed until the end of the election process, and, so, granted the Board's motion to dismiss *without prejudice*. I JA 179-80. Specifically, this Court stated that it "lack[ed] jurisdiction over the petition at this juncture" and, citing this Court's 2013 Grant of Writ Petition, that "*[o]nly the Board's final order at the conclusion of the process is subject to judicial review.*" I JA 180 (emphasis added). The 2015 district court Order also explicitly stated that "[t]his order does not preclude ESEA from seeking judicial review at the conclusion of the election process." *Id.* Thus, the 2015 district court Order allowed the election to go forward but did not resolve the matter of whether the exclusive bargaining agent of the support staff employees could ultimately be determined by only a majority-of-the-votes-cast standard.

The second, discretionary runoff election was held by mail between November 2, 2015 and December 5, 2015. As in the first runoff election, neither union received an affirmative vote from an outright majority of all employees in the bargaining unit, but Local 14 received a majority of the votes cast. I JA 181-82. On January 20, 2016, the Board issued its 2016 Board order, labeled EMRB Item No. 520T, which ordered that because Local 14 had received a majority of the votes cast at the second runoff election, it would be certified as the recognized bargaining agent

thirty (30) days after the latter of: (1) the date of the order, Item 520T; or (2) Local 14's presentation to the District of certain documents required by NRS 288.160(1). I JA 191-93.

On January 20, 2016, ESEA filed its petition for judicial review and motion to stay the 2016 Board order, Item 520T. I JA 196-200. Additionally, on January 22, 2016, ESEA filed an application for temporary restraining order with the district court. On these pleadings, ESEA indicated Department 1 and the same case number assigned in March of 2015 because ESEA believed that, by indicating that his jurisdiction over the matter would be ripe at this juncture, Judge Cory had retained jurisdiction. Additionally, time was critical for ESEA and it seemed likely, based on past experience, that the matter would have been reassigned to Department 1, as was the case when ESEA filed its 2015 petition.

After staying the 2016 Board order, the district court ultimately granted ESEA's petition for judicial review, vacating the 2016 Board order that Local 14 would become the recognized exclusive bargaining agent based on only a majority-of-the-votes-cast standard. II JA 464-69. Thus, the district court's final decision was the determination that the application of the majority-of-the-votes-cast standard was in violation of NRS 288.160(4) as interpreted by this Court's 2005 and 2009 orders and, thus, unlawful. This appeal followed. II JA 470-72.

III. The 2015 district court Order Was Not the Final Decision in Case No. A-15-715577.

A. The 2015 district court Order Merely Declared the Matter to be Unripe for Review at that Juncture.

The finality of a district court's order "depends not so much on its label," but on what it "substantively accomplishes." *Lee v. GNLV Corp.*, 116 Nev. 424, 427, 996 P.2d 416, 417 (2000) (*citing Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959); *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994), *Hallicrafters Co. v. Moore*, 102 Nev. 526, 528-29, 728 P.2d 441, 443 (1986), *Bally's Grand Hotel v. Reeves*, 112 Nev.1487, 1488, 929 P. 2d 936, 937 (1996)). The district court's dismissal *without prejudice* had the effect of allowing the second, runoff election to go forward but it did not resolve the question of the appropriate election standard, and certainly did not determine who would be the appropriate bargaining agent for the support staff employees of the District–the ultimate issues in this case.

Specifically, the 2015 district court Order stated that the court would not have jurisdiction until "the conclusion of the [election] process." I JA 180. As support for this conclusion, the district court cited to this Court's 2013 Grant of Writ wherein this Court stated that "the EMRB's chosen election procedure does not constitute a

final decision." I JA 159. Citation to this makes clear that the district court merely declared the matter to be unripe because it was an issue of "election procedure" that could not be reviewed "until the conclusion of the [election] process."[5] I JA 180. This is all that the 2015 district court Order "substantively accomplished."

B. The 2015 district court Order Did Not Resolve all the Issues Presented in the Case.

A final judgment is "one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000); *see also Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994) (*quoting Alper v. Posin*, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961)). The 2015 district court Order left plenty for the future consideration of the court. It left consideration of the appropriate election standard for determining the results of the second, runoff election. It left consideration of the determination of who would be declared the recognized bargaining agent for the support staff employees of the District. It did not even

/ / /

---

[5] Another way of saying this is that the district court could not enter a final decision on a decision by an agency that was not final, and this Court, in its 2013 Grant of Writ Petition, clearly held that "the EMRB's chosen election procedure does not constitute a final decision."

determine, on the merits, that conducting a second, runoff election was proper; by declining to exercise jurisdiction, it merely allowed that election to go forward.

"[A] dismissal without prejudice is not a final adjudication on the merits." *Clark v. Columbia/NCA Info. Servs.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001) (a federal court's decision to dismiss *without prejudice* state law claims for wrongful termination did not preclude pursuit of those claims in state district court because "a dismissal without prejudice is not a final adjudication on the merits."); *Trustees, Hotel Empers. v. Royco, Inc.*, 101 Nev. 96, 98, 692 P.2d 1308, 1309 (1985) (after a dismissal *without prejudice* based on indication that parties would enter a settlement, doctrine of res judicata did not preclude refiling because "dismissal without prejudice is not a final adjudication on the merits."). An order that does not adjudicate issues on the merits cannot be said to have "disposed of all the issues presented in the case," *see Lee v. GNLV Corp.*, 116 Nev. at 426, 996 P.2d at 417 (2000), and, thus, cannot be a final judgment. Here, the 2015 district court Order did not make any adjudication of the case on the merits and, therefore, did not dispose of all the issues presented in the case.[6] The 2015 district court Order was not a final judgment.

---

[6] If the 2015 district court Order could be said to have made a final decision on anything, it could only be that the Board could conduct a second, runoff election, but even this was not truly adjudicated on its merits and was essentially "deferred."

Although this Court raised *Dredge Corp. v. Peccole,* 89 Nev. 26, 505 P.2d 290 (1973), in its order to show cause, as did the Board in its Response, ESEA respectfully submits that *Dredge Corp.* is not applicable, much less controlling, in this case. In *Dredge Corp.*, a dismissal *without prejudice* was entered in a quiet title action. *Id.* Subsequently, without appealing that dismissal or moving the court to reconsider or amend its determination, the defendants/respondents sought and obtained from a different district court judge a dismissal *with prejudice. Id.* at 27; 505 P.2d at 290. Additionally, the defendants/respondents did not serve the dismissal *with prejudice* nor the notice of its entry on the plaintiffs/appellants. *Id.* When the plaintiffs/appellants attempted to have the second dismissal voided, a third district court judge denied the request. This Court found that denial to have been in error, indicating that the district court (the second judge) "was without jurisdiction to alter the judgment dismissing appellant's action 'without prejudice.'" 89 Nev. at 27; 505 P.2d at 291. Thus, *Dredge Corp.* held that a dismissal *without prejudice* was a final judgment in a quiet title action for purposes of the "other party" to the matter who sought to convert the dismissal to one *with prejudice*; it did not hold that a dismissal *without prejudice* which explicitly allows the dismissed party to seek review at a later juncture is final as to that party.

///

Unlike *Dredge Corp.*, this case does not present a situation where one party has undercut another party by obtaining a different order from a different district judge on the same case. Here, there is just ESEA who attempted to stop the second runoff election and obtain review of the appropriate election standard in 2015, and who, upon being told by the district court that such review would not be available until after the application of such election standard at the conclusion of the election process, returned in 2016 at the conclusion of such election to obtain that review.

Additionally, ESEA's 2016 petition for judicial review did not attempt to alter the 2015 district court Order, such as changing its prejudicial value. The second runoff election had already occurred when ESEA filed its 2016 petition, but the question of the appropriate election standard was still unresolved and that is what the 2016 petition challenged. Specifically, it challenged the Board's 2016 order, Item No. 520T, in which the Board applied just a majority-of-the-votes-cast standard, and declared that "use of the majority of the votes cast standard is warranted for the reasons stated in Item No. 520Q." Thus, the Board adopted the reasoning that had been set out in its 2015 order (520Q) but it is the 2016 order (520T) that actually applied this lesser election standard and declared that Local 14 would become the recognized bargaining agent. ESEA's 2016 petition for judicial review challenged

///

this application, and the 2016 district court Order which resulted from that petition is the final decision on that issue.

As the 2015 district court Order was not a final judgment, two final decisions have not been obtained in Case No. A-15-715577-J.[7] The final decision is the 2016 district court Order that adjudicated the issues on their merits. That order granted ESEA's petition for judicial review, wherein ESEA argued that the "Board had no authority to hold the second runoff election to be determined by just a majority of the

---

[7] For this reason, the cases cited by the Board in its Response for the proposition that the district court did not have jurisdiction to grant the relief requested in the 2016 petition are inapplicable. In several of the cases, the finality of the decision was more than clear due to prior settlements by the parties. *See SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P. 3d 715, 717 (2007) (after settlement and dismissal *with prejudice*, court lacked jurisdiction to consider pleading concerning costs); *Smith v. West Las Vegas Surgery Ctr., LLC,* No. 68383, 2016 WL 423367; 2016 Nev. App. Unpub. LEXIS 26 (Nev. App. filed August 1 2016) (after settlement and execution of release of claims, court lacked jurisdiction to allow respondent to file complaint in intervention). In *Smith v. Emery*, 109 Nev. 737, 741, 856 P.2d 1386, 1389 (1993) the pleading that divested the district court of jurisdiction was a notice of appeal, which is not a factor in this case. Finally, several of the cases had nothing to do with any purported second decision in the same case: *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (issue with jurisdiction was whether family court judges had general district court jurisdiction); *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) (issue with jurisdiction was failure to exhaust administrative remedies); *Alper v. Posin*, 77 Nev. 328, 331, 363 P.2d 502, 503 (1961) (court only held that order confirming sale of assets in receivorship was not final judgment that could be appealed because court would still have to liquidate debts, wind up affairs and distribute proceeds; comment that there can only be one final judgment was only made to support holding re: nonappealability).

votes cast because of two prior Nevada Supreme Court Orders in [the] case," and vacated the 2016 Board order. The 2016 decision resolved the issue as to the appropriate election standard and left nothing else for future consideration by the district court. There is, thus, no jurisdictional defect caused by the existence of the 2015 district court Order.

IV. The Filing of the 2016 Petition for Judicial Review was Proper.

A. The Filing in Department 1 was Consistent with the District Court's 2015 Order.

The 2015 district court Order stated that "the court finds that it lacks jurisdiction over the petition *at this juncture*" but that ESEA is "not preclude[d] from seeking judicial review at the conclusion of the election process." I JA 180; Board's Response, Ex. B (emphasis added). In its Response, the Board states, definitively, that the district court did not retain jurisdiction over this matter. ESEA disputes that this fact is at all clear.

It is true that the 2015 district court Order did not explicitly "express an intention to supervise the conduct of the election process at issue." *See* Board's Response at 2. However, given its conclusion that it did not have jurisdiction over "the election process," that would have been a ridiculous intention to have stated. So, the omission of such a statement is meaningless. During the hearing on the

countermotion to dismiss on May 19, 2015, the district court expressed several times its inclination to conclude that determining the election results by only a majority-of-the-votes-cast standard would be unlawful, even referring to how it might rule (presumably when the matter came back) and referencing that it does not "have the whole picture *yet*." A true and correct copy of the May 19, 2015, Transcript is attached hereto as Exhibit 2; *see* Ex. 2 at 11: 13-17, 13:3-7 (emphasis added). As the Board itself admits, the district court "disposed of the First Petition on the ground that the stated allegations *were not ripe for review*." Board's Response at 2 (emphasis added). Therefore, it was reasonable for ESEA to believe that the district court either retained jurisdiction or, at least, made clear its willingness to consider the matter again at the conclusion of the election process. Thus, it was reasonable, logical and in furtherance of judicial efficiency for ESEA to file the 2016 petition in Department 1.

B. The Filing Did Not Circumvent the Eighth Judicial District Court Rules.

Further, ESEA's indication of Department 1 on the 2016 petition was consistent with the past procedure for the handling of this matter by the parties and by the Eighth Judicial District Court. As stated above, even after a three (3) year break following Local 14's 2012 "second supplemental petition," ESEA's 2015

petition ended up being assigned to Department 1. It was, thus, precedent in this case for the matter to be *re*assigned to Judge Cory in Department 1.[8] There certainly was not any sort of attempt by ESEA to circumvent the random assignment process.[9] Indeed, it is accurate to state that disposition of this matter by Judge Cory in Department 1 "secure[d] the proper and efficient administration of the business and affairs of the court and . . . promote[d] and facilitate[d] the administration of justice." *See* EDCR 1.10.

/ / /

---

[8] In any case, if ESEA's indication of Department 1 on the pleadings was incorrect, this would have only been a procedural error of little consequence and not a factor that would have divested the Eighth Judicial District Court of jurisdiction. *See Ex Parte Ohl*, 59 Nev. 309, 317; 92 P.2d 976, 978 (1939) ("mere error of procedure . . . does not go to the jurisdiction of the court"). Further parties, "having appeared in the proceeding and not having made any objection at the time to said proceeding or urged any alleged irregularities . . . have waived [procedural irregularities]." *Chiatovich v. Young*, 61 Nev. 286, 289-90, 127 P.2d 218, 219 (1942).

[9] The Board's citation to *Margold v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 109 Nev. 804, 806-07, 858 P.2d 33, 35 (1993) misses the mark as that case dealt with criminal case assignments and did not deal with the actions or pleadings of any party to the criminal matters. It, thus, is not authority for any impropriety about Department 1's retention of this matter or ESEA's preparations of its pleadings. Indeed, the Court in *Margold* distinguished the assignment of criminal case under EDCR 1.64 from the "semi-random basis" for assigning civil cases under EDCR 1.62, which is to consider the caseloads of the district court judges.

V. The 2016 district court Order is an Appealable Final Decision.

As stated in the Introduction, it is tempting for ESEA to argue that because the district court remanded the matter to the Board, the 2016 district court Order is not a final, appealable decision. ESEA declines to so argue. As argued throughout this pleading, this matter is governed by all the orders of this Court as the "law of the case" in this matter.

The Board directs this Court's attention to its 2008 order in this matter wherein this Court held that, as long as a remand does not require an agency to conduct further substantive proceedings, a district court order that apparently resolved all of the substantive issues before the court, is an appealable final order. *See* Board's Response, Ex. F. ESEA has directed this Court's attention to the 2013 Grant of Writ Petition, which stated that "only the EMRB's determination of the election results would constitute a final decision," as well as to the 2005 and 2009 Orders of Affirmance, which held that representation elections and runoff elections must be determined by the vote of a majority of all the employees in a bargaining unit, not just a majority of votes cast.

This Court's 2008 order and its 2013 Grant of Writ Petition are the "law of the case" in this matter, as are all of this Court's orders in this matter. Therefore, ESEA does not argue against the Board's assertion that the 2016 district court Order is the

final decision, subject to appeal. All this Court's prior orders apply equally, and the 2005 and 2009 Orders of Affirmance will ultimately control the outcome of this appeal, as they state unequivocally that representation elections must be determined by a majority of all the employees of the bargaining unit and not just a majority of those who vote, and that only the Legislature has the authority to change that standard.

VI. Conclusion.

The 2015 district court Order did not adjudicate this case on the merits and certainly did not resolve all issues between the parties. It merely declared the matter to be unripe and, as such, it was not a final decision in district court Case No. A-15-715577-J. Therefore the 2016 district court Order is the only final decision in the underlying case that is the subject of this appeal. No jurisdictional defect exists therefore, and for all the foregoing reasons, ESEA acknowledges that this Court should retain jurisdiction in this appeal.

Additionally, even if this Court were to dismiss this appeal, there is no basis for declaring the 2016 district court Order void. The 2015 district court Order was not a final decision and no other event occurred (*e.g.*, settlement, notice of appeal) that divested the district court of jurisdiction before the 2016 district court Order. Indeed, the basis for dismissing this appeal would be for the reason that this Court

has twice stated that, until the Nevada Legislature amends the statute, representation elections must be determined by the vote of a majority of the bargaining unit, and not just of those who vote, which is entirely consistent with the 2016 district court Order.

RESPECTFULLY SUBMITTED this 12th day of December 2016.

DYER, LAWRENCE, FLAHERTY,
DONALDSON & PRUNTY
2805 Mountain Street
Carson City, Nevada 89703
Telephone: (775) 885-1896
Fax: (775) 885-8728

By _____
Francis C. Flaherty NV #5303
Sue S. Matuska NV #6051

Attorneys for Respondent
Education Support Employees Association

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, the undersigned hereby certifies that I am an employee of the Dyer Lawrence Law Firm and that on the 12th day of December, 2016, I served a true and correct copy of the Reply to State of Nevada, Local Government Employee-Management Relations Board's Response to Order to Show Cause by electronic mail to each of the following:

EMRB
2501 East Sahara Avenue, Suite 203
Las Vegas, Nevada 89104
emrb@business.nv.gov; Bsnyder@business.nv.gov

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

Debora McEachin

EXHIBIT “1"

EXHIBIT “1"

EXHIBIT “1"

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE, DISTRICT JUDGE,
Respondents,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14; EDUCATION SUPPORT EMPLOYEES ASSOCIATION; AND CLARK COUNTY SCHOOL DISTRICT,
Real Parties in Interest.

No. 62719

ORDER GRANTING PETITION

This is a petition for a writ of mandamus, or in the alternative, for a writ of certiorari to vacate a district court's order. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

A district court reviewed an administrative agency's chosen election procedure prior to the election's commencement. Dissatisfied with the agency's choice, the court instructed the agency to adopt a procedure that was reasonably calculated to produce a definitive result. We conclude

that the district court lacked jurisdiction to conduct a pre-election review of the agency's chosen election procedure.

FACTS

The Local Government-Employee Management Board (EMRB) held a representative election to determine whether the International Brotherhood of Teamsters, Local 14 (Local 14), or the Education Support Employees Association would be recognized as the bargaining agent for the Clark County School District's non-certified employees' bargaining unit. The EMRB determined that the election's results were inconclusive and planned to hold a runoff election.

Local 14 objected to the EMRB's chosen procedure for the runoff election, and proposed a different method; but, the EMRB denied it. Local 14 then filed a petition for judicial review of the EMRB's chosen election procedure. The district court granted the petition and remanded the case to the EMRB to develop an election procedure that was reasonably calculated to produce a definitive result.

The EMRB claims that the district court lacked jurisdiction to consider a pre-election petition for judicial review and now seeks a writ of mandamus, or in the alternative, of certiorari to vacate the district court's order.

DISCUSSION

A writ of mandamus is available only when the petitioner does not have a plain, speedy and adequate remedy at law. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court,* 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

Here, writ relief is appropriate because the EMRB cannot appeal the district court's remand order. The district court's order did not

constitute a final judgment because the remand did not dispose of the case's underlying issue. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Consequently, the district court's order is not appealable. *See State, Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1025, 862 P.2d 423, 424 (1993). Thus, the EMRB does not have an adequate remedy at law and mandamus relief is appropriate. *See Haley v. Eighth Judicial Dist. Court*, 128 Nev. __, __, 273 P.3d 855, 858 (2012).

District courts can review an administrative agency's decision only when a statutory provision expressly allows it. *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) (citing *Lakeview Vill., Inc. v. Bd. of Cnty. Comm'rs*, 659 P.2d 187, 192 (Kan. 1983)). Local 14 asserts that NRS 288.160(4) and NRS 233B.130 allowed the district court to review the EMRB's decision. Thus, we must review these statutes to determine if either one expressly authorizes a district court to conduct a pre-election review of an administrative agency's election procedure.

Under NRS 288.160(4),

> [i]f the Board in good faith doubts 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. Subject to judicial review, the decision of the Board is binding upon the local government employer and all employee organizations involved.

NRS 288.160(4) did not give the district court the authority to review the EMRB's election plan. The statute authorizes the district court to determine whether the EMRB had a good faith doubt as to whether a majority of the bargaining unit's members supported a particular employee organization. However, the statute does not expressly provide the district court the power to conduct a pre-election review of the EMRB's

election procedure. Thus, the district court could not have reviewed the EMRB's election procedure under NRS 288.160(4).

Under NRS 233B.130,

> 1. Any party who is:
>
> (a) Identified as a party of record by an agency in an administrative proceeding; and
>
> (b) Aggrieved by a final decision in a contested case,
>
> is entitled to judicial review of the decision. Where appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute. Any preliminary, procedural or intermediate act or ruling by an agency in a contested case is reviewable if review of the final decision of the agency would not provide an adequate remedy.

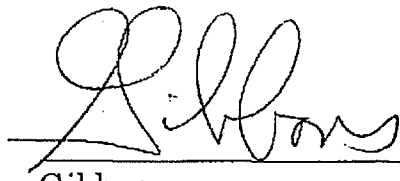
Local 14 is an aggrieved party, but the EMRB's chosen election procedure does not constitute a final decision. Choosing the election's procedure is an intermediate step in the election process. Only the EMRB's determination of the election's results would constitute a final decision. Thus, under NRS 233B.130, the district court could have conducted a pre-election review of the EMRB's election procedure only if this matter qualified as a contested case and a judicial review of the EMRB's determination of the election's results would not have provided Local 14 with an adequate remedy.

NRS 233B.130 did not provide the district court the power to review the EMRB's election procedure. This matter is not a contested case because the controlling regulations do not require notice and an opportunity for a hearing at which the parties can present evidence supporting their respective arguments. *See* NRS 233B.032 (defining a

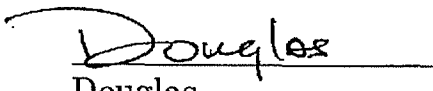
"contested case"); *see also Citizens for Honest & Responsible Gov't v. Sec'y of State*, 116 Nev. 939, 951-52, 11 P.3d 121, 129 (2000). Specifically, NAC 288.110 governs runoff elections, and it does not require a district court to hold a hearing to address a party's pre-election challenges. Rather, the regulation provides an opportunity for a hearing only after the election has concluded. Additionally, judicial review of the EMRB's decision concerning the election's results would provide Local 14 with an adequate remedy. Thus, judicial review of the EMRB's chosen election method under NRS 233B.130 is improper.

Neither NRS 288.160(4) nor NRS 233B.130 vested the district court with the authority to conduct a pre-election review of the EMRB's chosen election procedure. Accordingly, we

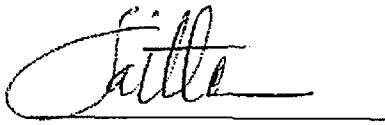
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting Local 14's petition for judicial review.



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Saitta

cc: Hon. Kenneth C. Cory, District Judge
Attorney General/Las Vegas
Clark County School District Legal Department
Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty
McCracken, Stemerman & Holsberry
Eighth District Court Clerk

EXHIBIT "2"

EXHIBIT "2"

EXHIBIT "2"

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, Petitioner, vs. NEVADA LOCAL GOVERNMENT EMPLOYEE MANAGEMENT RELATIONS BOARD, ET AL., Respondents.	)	CASE NO. A-15-715577-J DEPT. NO. 1

BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE

TUESDAY, MAY 19, 2015 AT 10:32 A.M.

RECORDER'S TRANSCRIPT RE:
PETITIONER'S NOTICE OF MOTION AND MOTION FOR STAY OF A FINAL DECISION OF A STATE AGENCY PENDING PETITION FOR JUDICIAL REVIEW
RESPONDENT'S OPPOSITION TO MOTION FOR STAY AND COUNTERMOTION TO DISMISS

Recorded by: LISA A. LIZOTTE, COURT RECORDER

APPEARANCES:

FOR THE PETITIONER:	FRANCIS C. FLAHERTY, ESQ.
FOR THE RESPONDENT NEVADA LOCAL GOVERNMENT EMPLOYEE MANAGEMENT RELATIONS BOARD:	SCOTT R. DAVIS Deputy Attorney General
FOR THE RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 14	KRISTIN L. MARTIN, ESQ.

(TUESDAY, MAY 19, 2015 AT 10:32 A.M.)

THE CLERK: Page 8, Education Support Employees versus Nevada Local Government Employee, Case Number A715577.

THE COURT: Good morning.

MR. FLAHERTY: Good morning, Your Honor. My name is Frank Flaherty. I'm here on behalf of the Education Support Employees Association. With me in the galleria are Doug McCain, ESEA's President, Dick Terry from the Nevada State Education Association, that's the ESEA state affiliate, and Guillermo Vazquez from the National Education Association. NEA is ESEA's national affiliate.

THE COURT: Okay.

MR. DAVIS: Good morning, Your Honor. Scott Davis from the Attorney General's Office on behalf of the EMRB.

MS. MARTIN: And Kristen Martin of McCracken, Stemerman and Holsberry for Teamsters Local 14.

THE COURT: Good morning. Well, so where do we want to go with this?

MR. DAVIS: Your Honor, if I may, I think it may be prudent to first address the countermotion to dismiss since that raises the threshold issue of jurisdiction.

THE COURT: Okay. That makes sense. Go ahead

MR. DAVIS: The countermotion is very simple, and that is that the petition that's been filed by ESEA as a petition for judicial review is not within this Court's jurisdiction because what they're actually challenging is not a final decision by the EMRB. It's a decision to hold another election, it's a decision

about how they're going to go about doing it, how they're going to count the votes in that election, but the Supreme Court has already determined that that type of a petition is beyond the District Court's jurisdiction until it's all said and done before the EMRB.

THE COURT: Okay.

MR. FLAHERTY: Your Honor, that's simply not the case. Contrary to the Board's position, ESEA isn't asking the Court to conduct a pre-election judicial review of a non-final election order here. ESEA is asking the Court to put a stop to an unlawful election and ad hoc rule making. The 2013 writ order relied upon by the EMRB for its countermotion directed this Court to vacate its grant of a petition for judicial review of the Board's 2012 order.

The 2012 order denied Local 14's motion to approve an election plan for the run-off election –

THE COURT: Are you saying – are you saying that the Supreme Court's order, therefore, conferred jurisdiction upon the Court to act before a final order is issued?

MR. FLAHERTY: Well, the Supreme Court's order in 2013 divested this Court of jurisdiction to act on a pre-election issue, but that's not the case here, and, in fact, in that 2013 writ order the Supreme Court said that the order that ESEA is here appealing would be a final order because that was going to be the certification of the election results, but the Board went beyond mere certification of the election results and has now ordered what it calls a second discretionary runoff election, and perhaps most importantly the Board feels that it has the authority to deviate from the majority of the bargaining unit requirement specified by the Nevada Supreme Court in both 2005 and 2009.

So there's nothing procedural about what's happening here, Your Honor. The Board has kind of boldly and arbitrarily and substantively deviated from the statute and ordered this unlawful election.

THE COURT: Well, let me -- along the lines of giving you guys the lay of the land, let me say that I tend to be somewhat swayed by your argument in your petition – well, I'm sorry, in your motion for stay. In other words, I'm having a hard time agreeing that the Board is free to order an election and have that election, regardless of how many vote, get around the Supreme Court's order twice given that it requires a vote of all of the members.

But before we get to that that doesn't – we don't get to that unless the Court has jurisdiction, and I am troubled by the argument that the Court doesn't have jurisdiction because there is no final order. Along those lines let me ask you a question. How much would it cost you to put on this election?

MR. DAVIS: Your Honor, between 15 and $20,000 would be the total cost of the election, at least that's about what it was for the last runoff election in January. We anticipate it be about the same.

THE COURT: Given that it is known what you want to do and how you intend to use the election – well, you could say, no, it's not because we haven't made a final decision, but you've pretty well argued that you're free to make an election – to hold an election, and then because of the use of the cases that you've cited to the Court, that you're able to infer that those that didn't vote would have voted the same as those that did vote essentially, and, therefore, whatever the results are you can – you're free to certify it and you will have complied with the statute.

So if – I mean if you're wrong with that then you will have expended all that money to do an election, and I don't know what the answer will be ultimately but it will be, again, for naught. Wouldn't it be better to resolve the question of whether or not they're right that the statute precludes the Board from simply – from doing anything other than getting a majority of all the members I mean because it begs – that question is begged by the fact that the Supreme Court does seem to have said that once or twice in this case, has it not, so why are we going down this road?

MR. DAVIS: Well, Your Honor, first of all, anytime the EMRB does hold an election there's an opportunity to object, it is subject to judicial review after the election is over, so the possibility that it all could be for naught is a possibility that arises in any election, and that in and of itself isn't unique to this case, so that doesn't provide a reason not to move forward with the election.

As far as the merits of ESEA's arguments and what the Supreme Court has said, EMRB doesn't agree with them. We do have the authority to administer our own affairs to decide how we're going to conduct the election. The EMRB has already decided that, and so there's no point in just waiting to see if we got it wrong. If the EMRB thought they got it wrong, they wouldn't have decided that to begin with.

THE COURT: Okay. Let me ask you this, then. You mentioned it will cost about 20,000 to hold this election?

MR. DAVIS: That's a ballpark figure, Your Honor, yes.

THE COURT: Okay. Who's going to pay the 20,000?

MR. DAVIS: The cost is borne by the EMRB.

THE COURT: The EMRB?

MR. DAVIS: Yes, Your Honor.

THE COURT: And so who pays that?

MR. DAVIS: That's – well, the –

THE COURT: Is that taxpayer money? That's what I'm trying to get down to.

MR. DAVIS: Well, it comes from the EMRB's funding. I mean there's a process that the EMRB goes through to get budget approval to use the funds in its budget for the election. EMRB's funding mechanism is actually an annual assessment that's charged on local government employers to fund the operations of the EMRB.

THE COURT: Okay. So it doesn't come from the taxpayers, per say?

MR. DAVIS: Not directly.

THE COURT: It comes from the employers?

MR. DAVIS: From local government employers, yes.

THE COURT: All right. What do you say to what his argument is?

MR. FLAHERTY: Well, Your Honor, of course it's taxpayer money. That's where local government employers get their money, they get it from taxpayers, and beyond that, Your Honor, there's cost to the parties. Typically it's a voluntary arrangement, but as a practical matter both ESEA and Local 14 wind up expending significant funds to conduct one of these elections, not only the election itself and the counting but the run-up to the election and the campaign.

And as indicated, Your Honor, there is jurisdiction here. The Supreme Court said that this was a final order, but beyond that we also have ad hoc rule making here because –

THE COURT: The Supreme Court said that their order to hold the election is a final order?

MR. FLAHERTY: All right. You got me there, Your Honor. They said that the order certifying the election results would be a final order, however, Your Honor, they've gone beyond that and it's not procedural. As I've already stated, they're ordering this new election. They're effectively – it's ad hoc rule making. They have now said that in the future when we have a situation where a majority of the bargaining unit doesn't vote for either the incumbent or the challenger in the initial election, and then when the same thing happens in the runoff election, now we're going to have a second discretionary runoff election, the outcome of which is going to be determined by a mere majority of the votes cast despite what 288.160(4) of NRS says, a statute that the Nevada Supreme Court has said is clear and unambiguous.

They've done all that without notice, without a workshop, without public hearings. They completely violated NRS 233(b), Your Honor, and we've cited you cases where the Nevada Supreme Court has upheld a District Court's grant for preliminary injunction when administrative agencies have engaged in that kind of bad behavior.

MR. DAVIS: Your Honor, none of those cases arose –

THE COURT: You're not asking for a preliminary injunction –

MR. DAVIS: -- in a petition for judicial --

THE COURT: -- you're asking for a stay?

MR. FLAHERTY: That's true, Your Honor.

THE COURT: It's the same – same – essentially the same –

MR. FLAHERTY: Same net effect.

THE COURT: Well, and the same test more or less, right?

MR. FLAHERTY: Yes. Yes, Your Honor.

THE COURT: I would have to determine that – I forgot the precise magic words, but that it appears to me that your side would prevail on the issue ultimately as I would in a preliminary injunction.

MR. FLAHERTY: That's correct, Your Honor.

THE COURT: All right. What were you going to say?

MR. DAVIS: That still doesn't get around the threshold issue of this Court's jurisdiction. The fact that they're alleging ad hoc rule making, there's no merit to that argument, but the fact that they're alleging that in a petition for judicial review still invokes that finality requirement, still invokes the Supreme Court's 2013 decision in the same case that ruled that the District Court does not have jurisdiction over this type of case. The fact that the – that they're alleging ad hoc rule making has nothing to do with it. They have to get over the jurisdictional hurdle first before looking at ad hoc –

THE COURT: I'm sorry, the 2013 decision?

MR. DAVIS: Yes. It came in December of 2013.

THE COURT: And, I'm sorry, which – oh, that's in this case you're talking about?

MR. DAVIS: Yes, in this case. It's attached as Exhibit A to our opposition and countermotion.

THE COURT: Okay. Do we have the exhibits there? I don't know that I have – yes, I do. Okay. I got Exhibit 1. Is that the one you're talking about? Is it Exhibit 1 that – you have an Exhibit A?

MR. DAVIS: No, Your Honor. It wasn't attached as an exhibit by anything that was filed by ESEA. When we filed our opposition to the motion for stay and countermotion to dismiss, we attached that as an exhibit. It's also attached in the declarations filed by Ms. Martin.

MS. MARTIN: And that's Exhibit J if that's easier to find.

THE COURT: I have – on your opposition and countermotion to dismiss I've got an Exhibit 1 attached, order granting –

MR. DAVIS: My apologies. That was mislabeled. It should have been identified as Exhibit A. If it's identified as Exhibit 1, my apologies.

THE COURT: Okay. But that is the one, December 18th, 2013?

MR. DAVIS: Yes, Your Honor.

THE COURT: Yeah. Okay. That's – how do you get around that? Look what it says.

MR. FLAHERTY: Well, Your Honor, it's – I'm looking at the text in it, Your Honor.

THE COURT: We conclude that the District Court lacked jurisdiction to conduct a pre-election review of the agency's chosen election procedure.

MR. FLAHERTY: And that's the point, Your Honor. This isn't about the agency's chosen election procedure. This particular writ order dealt with the how and when. Okay. Are we going to do paper ballots. Are we going to do electronic voting. How long is the voting period going to be for. This all dealt with the how and when of conducting election.

Here ESEA is challenging the order for the election itself. The election itself is illegal and it's unauthorized, and the Board's chosen method for

determining the outcome on their majority of the votes cast is illegal and unauthorized.

THE COURT: Well, granted that you may be right, and I've already said I find your argument – I mean I'm not saying that I definitely would rule that way but I find it pretty persuasive so far, but I often change my mind in the middle of a hearing due to the eloquent nature of your arguments. But I've got – I've got a previous Supreme Court order in this case that says that I was incorrect to order a definitive procedure – well, a procedure that was reasonably calculated to produce a definitive result. I mean that's still what we're talking about. We're talking about – it's not about where and how and all of that but it's about how many people do you have to get there, and I think it comes down to this. As you know – you guys know this area of the law better than I do.

We're in an area where in its infinite wisdom a legislature has chosen to allow an agency action, administrative action and have the Court simply sort of back-stop it or allow a review after they do it but its put limitations in place as to when a Court has jurisdiction to do that, and we've already been up and down the pike on this one and it looks to me like – you know, to interpret the previous Supreme Court order here is that I would be doing the same thing.

You know, nobody likes to be reversed. Nobody likes to be reversed twice in the same case for doing the same thing.

MR. FLAHERTY: It's not the same thing, Your Honor.

THE COURT: Well, I understand your argument and you – and you're free to make that argument, I guess I would have to say, just not in this court. I think they're right. I'm not about to – I mean it seems frankly -- I don't

understand why – well, it doesn't matter. It may be a vain act to hold this election, I don't know, but –

MR. FLAHERTY: Well, certainly it is, Your Honor. The Supreme Court has said they can't hold this election this way and they're determined to do it.

THE COURT: But they haven't given me the power and jurisdiction to stop them. It's a matter of procedure and remedies, what is your remedy for them doing it the, quote, wrong way. Well, we have to wait until they do it and get a final order when you come in. I would be happy to be proven wrong in yet another appeal or writ to the Supreme Court that says, Cory, no, you should have acted, fine, but I think it would be – I just think that the Supreme Court in this – because of its previous order has pretty well tied my hands. It's not up to me to make that determination prior to the election and finalizing a final order. I just don't think I can do it. I would love to but I don't think I can.

So the motion to dismiss the petition must be granted. I don't know how your final order, if you follow the plans you've stated, could stand the test of the Supreme Court but I don't have the whole picture yet, so we'll wait – we'll wait and see what happens.

MR. DAVIS: I assume you'd like us to prepare the order and run it by counsel?

THE COURT: Yeah.

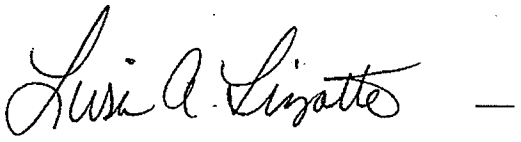
MR. DAVIS: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Whereupon, the proceedings concluded.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.



LISA A. LIZOTTE
Court Recorder