**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CITY OF MESQUITE,

Petitioner,

vs.

THE EIGHT JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

DOUGLAS SMAELLIE,

Real Party in Interest



Case No.:

District Court
Case No: A-17-759770-C

**APPENDIX VOLUME II OF III**

REBECCA BRUCH, ESQ.
Nevada Bar No. 7289
CHARITY F. FELTS, ESQ.
Nevada Bar No. 10581
Erickson, Thorpe & Swainston, Ltd.
99 W. Arroyo Street
Reno, Nevada 89509
(775)786-3930
ATTORNEYS FOR PETITIONER
CITY OF MESQUITE

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# EXHIBIT “6”

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CLERK OF THE COURT

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Rebecca Bruch, Esq. (SBN 7289)
ERICKSON, THORPE & SWAINSTON, LTD.
99 W. Arroyo Street
Reno, Nevada 89509
(775) 786-3930
Attorneys Defendant City of Mesquite

DISTRICT COURT

CLARK COUNTY, NEVADA

DOUGLAS SMAELLIE,

Plaintiff,

vs

CITY OF MESQUITE,

Defendants.

Case No. A-14-696355-C
Dept. No.: XVI

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

This matter having come before the Court on November 3, 2015, on Defendant's Renewed Motion to Dismiss and Motion for Summary Judgment, with Plaintiff being represented by Adam Levine, Esq. of the Law Office of Daniel Marks; with Defendant being represented by Rebecca Bruch, Esq., of Erickson, Thorpe & Swainston, Ltd; the Court having reviewed the documents and pleadings on file herein, and having heard oral arguments of counsel, it is:

HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Renewed Motion to Dismiss is GRANTED with prejudice. Defendant's Motion for Summary Judgment is moot.

This matter concerns an employment dispute wherein Plaintiff alleges he was terminated in violation of the collective bargaining agreement governing his employment. Plaintiff worked as a police officer and was a member of the Mesquite Police Officers's Association ("MPOA") that executed the collective bargaining agreement with the City of Mesquite.

On February 19,2013, Plaintiff was terminated from employment. MPOA

declined to advance Plaintiff's grievance to arbitration, thus preventing Plaintiff from exhausting his contractual remedies. A unionized employee lacks standing to appeal the outcome of negotiated grievance procedures when a collective bargaining agreement expressly provides that the Union is the party responsible for filing a grievance and pursuing arbitration. *Ruiz v. City of N. Las Vegas*, 127 Nev.Adv.Op. 20, 255 P.3d 216, 219 & n. 3 (2011).

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In this case, Plaintiff lacks standing to enforce the collective bargaining agreement because he was not a party to the collective bargaining agreement. Further, Plaintiff has failed to allege that the Union breached its duty of fair representation or that he was a third-party beneficiary of the collective bargaining agreement and that reliance on the collective bargaining agreement was foreseeable. Thus, Plaintiff does not have proper standing to bring this action. IT IS SO ORDERED, this 4th day of January, 2016.

DISTRICT COURT JUDGE

NH

Respectfully submitted by:

DATED this 29 day of December, 2015.

ERICKSON, THORPE & SWAINSTON, LTD.

REBECCA BRUCH, ESQ. (# 7289)
99 W. Arroyo Street
Reno, NV 89509
Telephone: 775-786-3930
Attorneys for City of Mesquite

Approved as to content and form:

DATED this ____ day of December, 2015

DANIEL MARKS, ESQ. (# 2003)

ADAM LEVINE, ESQ. (#4673)
610 South Ninth Street
Las Vegas, NV 89101
Telephone: (702) 386-0536
Attorneys for Plaintiff

# EXHIBIT “7”

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FFCL
LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536: FAX (702) 386-6812
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MARK TANSEY,

Plaintiff,

v.

CLARK COUNTY,

Defendant.
_____/

Case No. A-10-619061-J
Dept. No. Senior Judge

Trial Date: 04/14/14 thru 04/16/14
Trial Time: 9:00 a.m

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

The trial of this matter having come before the court for bench trial on April 14, 2014 through April 16, 2014, and the Court having heard and considered the evidence hereby makes the following findings of fact, conclusions of law and judgment:

**FINDINGS OF FACT**

1. Plaintiff Mark Tansey was employed by Defendant Clark County as a Code Enforcement Specialist, sometimes known as a Code Enforcement Officer, with Clark County's Department of Administrative Services.

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2. As a Code Enforcement Specialist, Tansey's employment was governed by a collective bargaining agreement between Clark County and Service Employees International Union Local 1107 ("SEIU 1107").

3. Article 11, Section 1, (5) of the collective-bargaining agreement states "No employee who has satisfactorily completed probation may be demoted or terminated without just cause. Just cause may include, but not be limited to: inefficiency, incompetence, insubordination, moral turpitude, mental or physical disability as shown by competent medical evidence, habitual or excessive tardiness or absenteeism, abuse of sick leave or authorize leaves, withholding services as a result of a strike, in violation of established departmental work rules or procedures."

4. By 2006 Mark Tansey had satisfactorily completed probation.

5. On March 27, 2009 Tansey received a Final Written Warning as a result of an automobile accident for which Clark County blamed Tansey. Tansey did not agree with the discipline, and the Final Written Warning was eligible for removal from Tansey's file in 24 months.

6. Code Enforcement Officers dress like law enforcement officers and carry badges and other equipment similar to law enforcement officers. Code enforcement officers do not, however, carry firearms as part of their duties or authorized equipment.

7. County vehicles utilized by Code Enforcement Officers contain radios which allow the officers to listen to the radio traffic of, and if necessary communicate with, police officers of the Las Vegas Metropolitan Police Department.

8. The Las Vegas Metropolitan Police Department radio code for a "person with a gun" is "413".

9. Code Enforcement Officers carry digital cameras which they utilized to document violations of the Clark County Code. Some Code Enforcement Officers refer to their digital cameras as their "413" because they "point it" and "shoot it".

10. Tansey and other Code Enforcement Officers were taught to call their cameras a "413" by their supervisors and/or field training officer.

11. On August 24, 2009 Tansey was operating a County Ford ¾ ton pickup truck when he was involved in a motor vehicle accident. Tansey was not at fault for the accident.

12. The impact was so strong that it flipped the truck upside down. Tansey was knocked unconscious. It is unknown how long that Tansey was unconscious.

13. After regaining consciousness and being assisted out of the vehicle by civilians, Tansey placed multiple telephone calls to his supervisor David Pollox, and fellow Code Enforcement Officer Ruth Urrabazo.

14. Tansey also requested that Las Vegas Metropolitan Police Officer Timothy Mullins, who had responded to the scene, place a telephone call on Mullin's cell phone to LVMPD Officer Holman Lam who Tansey had worked with as a Code Enforcement Officer.

15. Officer Mullins described Tansey as "dazed". Officer Mullins made the phone call to Officer Lam at Tansey's request and handed his cell phone to Tansey.

16. During this telephone calls to Officer Lam, Tansey asked Lam if he could come to the scene of the accident and retrieve Tansey's personal belongings including his "413".

17. Tansey was in shock and/or suffering the effects of a concussion when he referred to a "413" in the telephone conversation.

18. Officer Lam did not respond to the accident scene after informing his Sergeant about the reference to the "413" in the County vehicle.

19. Officer Urrabazo was not informed in any telephone conversation with Tansey that he had been in an accident. Officer Urrabazo, who was off duty and driving to her brother's house, came upon the accident scene. After seeing that one of the vehicles was a Clark County Code Enforcement vehicle, she pulled her car over to the accident scene.

20. At the accident scene, Officer Urrabazo saw that it was Mark Tansey who had been involved in the accident. Urrabazo took possession of Tansey's personal effects including his binoculars, a satellite radio, and a personal laptop computer within a black soft sided case.

21. Officer Urrabazo did not feel anything large or unusual in the case in addition to the computer.

22. By the time Tansey's supervisor, Sergeant David Pollox arrived at the scene, Tansey had already been transported to University Medical Center.

23. Tansey was evaluated for several hours at UMC as a result of his head injury before being released.

24. On August 25, 2009 Clark County Code Enforcement Supervisor Cindy Lucas received a telephone call from the Las Vegas Metropolitan Police Department which informed her of the telephone conversation between Officer Tansey and Police Officer Lam wherein Tansey referenced having a "413" in the County vehicle.

25. On August 27, 2009 Officer Urrabazo was interviewed by Chief of Code Enforcement Joe Boteilho and Sergeant Pollox regarding her actions at the accident scene. Officer Urrabazo was represented at the interview by the SEIU Local 1107 shop steward Code Enforcement Officer Dale Murrell. During this meeting the Chief informed Urrabazo that they suspected there was a gun in the black computer case and that he needed to be surrendered to security. During the interview Officer Urrabazo informed both Boteihho and Pollox that there was no gun. She further informed the Chief that Some Code Enforcement Officers referred to their digital cameras as a "413".

26. Chief Boteilho asked Urrabazo for the location of the black case. Urrabazo informed the Chief that was either in her personal vehicle at the Clark County Government Center or at her home.

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27. Chief Boteilho instructed Officer Urrabazo and fellow Code Enforced in Officer Dale Murrell to go and search Urrabazo's vehicle to ascertain whether the black computer case was in it. Officer Murrell and Officer Urrabazo informed the Chief that it was not in the vehicle.

28. After learning that the computer case was not in the vehicle the Chief did not ask Officer Urrabazo to go to her house and retrieve it.

29. After getting off work, Officer Urrabazo went to her home and found the black computer case. She felt the case and was able to satisfy herself that there was no gun within it.

30. Officer Urrabazo subsequently returned Tansey's personal possessions to him.

31. Mark Tansey was not medically cleared to return to work for approximately three (3) weeks.

32. Upon return to work on September 15, 2009 Tansey was subject to an investigatory interview. Tansey was represented by SEIU Local 1107 shop steward Officer Dale Murrell.

33. Tansey denied having a firearm in his County vehicle and informed Chief Boteilho that he and other Code Enforcement Officers referred to their digital cameras as a "413".

34. On September 16, 2009 Tansey was placed on administrative leave pending termination.

35. On September 22, 2009 a Step One meeting under the disciplinary provisions of the SEIU Local 1107 collective bargaining agreement was held before Department of Administrative Services Director Sabra Smith-Newby. Tansey was represented at the meeting by SEIU Local 1107 representative Craig McNair and Dale Murrell. Both Chief Boteilho and Sgt. Pollox were present on behalf of Clark County. At this meeting Director Smith-Newby was informed that Code Enforcement Officers referred to their Digital cameras as "413s". Neither Boteilho nor Pollox informed Smith-Newby that Officer Urrabazo had confirmed to them that there was no gun.

36. On September 24, 2009 Sabra Smith-Newby upheld the recommendation to terminate Tansey despite the fact that no witness had claimed to have either seen a gun in any County vehicle, or

identified such a gun in the computer case. Smith-Newby's written Step One Response informed Tansey that "the Union, on your behalf, may file an appeal to the Director of Human Resources within five (5) working days of this decision."

37. Tansey grieved his termination through SEIU Local 1107 union representative Craig McNair who timely requested a Step Two meeting with Clark County Director of Newman Resources Jesse Hoskins under Article 11 of the collective-bargaining agreement.

38. The Step Two meeting took place before Director Hoskins on October 20, 2009. Tansey was again represented by SEIU Local 1107 union representative Craig McNair and Dale Murrell. At this meeting Hoskins was informed that there was no gun in the vehicle and Code Enforcement Officers referred to their digital cameras as "413s". Despite the absence of any witness at the scene who could testify to the presence of a gun in the County vehicle, Hoskins upheld the termination.

39. Director Hoskins' written Step Two response to Mark Tansey dated October 27, 2009 stated "Pursuant to Article 11 of the Agreement between Clark County and SEIU Local #1107, the Union, on your behalf, may file an appeal to the Director of Human Resources within five (5) working days of this decision."

40. Under Step Three of the grievance procedure in the collective bargaining agreement between Clark County and SEIU Local 1107, the next step after a Step Two meeting is for the union to make a request for arbitration within five (5) working days of receipt of the Step Two decision.

41. Tansey requested that SEIU Local 1107 request arbitration on his behalf.

42. SEIU Local 1107 did not make a written request for arbitration on behalf of Tansey within five (5) working days.

43. Tansey first learned that SEIU Local 1107 did not make a timely request for arbitration when he received a letter dated November 6, 2009 from Clark County Senior Human Resources

Analyst Sharon W. Alvarez informing him that a timely request for arbitration had not been received by the required deadline of November 4, 2009. This letter enclosed another letter dated November 6, 2009 from Clark County Employee Relations Manager Barbara M. King to SEIU Local #1107 Executive Director Edward Burke stating that the grievance was deemed abandoned for failure to timely request arbitration.

44. The language of the collective bargaining agreement states that it is the union that has the right to request arbitration. Clark County would have accepted a request for arbitration directly from Tansey. However, Clark County did not inform Tansey that, notwithstanding the language of the collective bargaining agreement, he could request arbitration himself. Likewise, SEIU Local 1107 did not inform Tansey that he could request arbitration himself prior to allowing the five (5) day deadline to expire.

45. If any of these Findings of Fact are properly construed to be Conclusions of Law, they shall deemed to be so.

## CONCLUSIONS OF LAW

46. Clark County has the burden of proving "just cause" to terminate Mark Tansey's employment.

47. Clark County breached the collective bargaining agreements by terminating the employment of Plaintiff Mark Tansey without "just cause".

48. Clark County utilizes the "Seven Part Test" for "just cause" from *In re Enterprise Wire Company and Enterprise Independent Union*, 46 LA 359 (Daugherty 1966). The seven parts to this test are:

    1. Did the employer give to the employee forewarning or for knowledge of the possible or probable disciplinary consequences of the employee's conduct?

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2. Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the employer's business and (b) the performance that the employer might properly expect of the employee?
3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the employer?

49. Under *In re Enterprise Wire Company and Enterprise Independent Union* a "No" answer to one or more of the questions normally signifies that just and proper cause did not exist.

50. Clark County has failed to satisfy the requirements of Questions (3) and (5) as there was no evidence that Mark Tansey actually had a firearm in a County vehicle. Clark County simply chose to disbelieve Tansey that Code Enforcement Officers referred to their digital cameras as a "413" despite the fact that multiple Code Enforcement Officers confirmed that this was the case.

51. Both the written Step One and Step Two responses referenced credibility issues relating to Tansey's March 2009 discipline as grounds for supporting their belief that Tansey had a gun in the County vehicle. However, Note (2) under Question "7" within *In re: Enterprise Wire*

*Company* clearly states with regard to the just cause test "An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one."

52. Tansey's single reference to a "413" in a telephone conversation made when he was clearly in shock and/or suffering from the effects of a concussion is insufficient to establish the presence of a firearm in a County vehicle.

53. Under the federal approach for private sector employees from *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) an employee may seek judicial enforcement of his rights under a collective bargaining agreements by demonstrating that his union breached its duty of fair representation by the union's wrongful refusal to advance the grievance to arbitration.

54. Under the approach taken by states such as California and Alaska, an employee may seek judicial enforcement of his rights under a collective bargaining agreement without demonstrating a breach of the duty of fair representation by the union. *Anderson v. California Faculty Association*, 25 Cal. App. 4th 207, 31 Cal Rptr. 2nd 406 (1994); *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983). Under this approach all that is necessary is that the employee attempted to exhaust his administrative remedies under the collective bargaining agreement.

55. Under either test, Tansey has satisfied the requirements for seeking judicial enforcement of the collective bargaining agreement. The contractual language of Article 11 Step Three of the collective bargaining agreement gives the union, and not the employee, the sole power to request arbitration. Tansey requested that his representative, SEIU Local 1107 take his case to arbitration. SEIU Local 1107 refused to do so.

56. While Clark County would have accepted an arbitration request directly from Tansey, notwithstanding the language of the contract, neither Clark County nor SEIU Local 1107 informed Tansey of this fact prior to the expiration of the time to request arbitration.

Accordingly, Tansey exhausted his administrative remedies under the collective bargaining agreement.

57. A union breaches its duty of fair representation by failing to pursue a meritorious grievance. *Galindo v. Stoody Company,* 793 F.2d 1502, 1513 (9th Cir. 1986). SEIU Local 1107 acted arbitrarily and capriciously in refusing to take Tansey's grievance to arbitration where (1) there was no witness who could testify that there was in fact a firearm in Tansey's County vehicle, (2) Officer Urrabazo was available to testify there was no firearm, and (3) the union was informed by its own shop steward, Dale Murrell, that Code Enforcement Officers referred to their digital cameras as a "413".

58. A union breaches its duty of fair representation when it fails to adequately investigate a grievance before abandoning it. *Tenorio v. NLRB*, 680 F.2d 598, 602 (9th Cir. 1982); *Peters v. Burlington N.R.R.*, 931 F.2d 534, 540-41 (9th Cir. 1990). SEIU Local 1107 abandoned Tansey's grievance without even interviewing other Code Enforcement Officers to corroborate whether any of them referred to their digital cameras as a "413", and without interviewing Officer Ruth Urrabazo who would have informed SEIU Local 1107 that there was not a gun in the computer case which she retrieved from Tansey at the accident scene.

59. Prior to trial Plaintiff Mark Tansey elected the equitable remedy of reinstatement with retroactive back pay and benefits instead of a judgment for money damages.

60. If any of these Conclusions of Law are properly construed to be Findings of Fact, they shall deemed to be so.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Plaintiff Mark Tansey and against Defendant Clark County. Clark County is ordered to reinstate Plaintiffs Mark Tansey to his former position as a Code Enforcement Specialist with all retroactive back pay, seniority and benefits. Any moneys which Tansey has earned in

mitigation from unemployment insurance or other employment shall be deducted from the back pay award. The Court shall maintain jurisdiction to resolve any issues relating to the implementation of the remedy post-trial.

DATED this 25TH day of April, 2014

DISTRICT COURT JUDGE

Respectfully Submitted by:

THE LAW OFFICE OF DANIEL MARKS

DANIEL MARKS, ESQ.
Nevada State Bar No. 002003
ADAM LEVINE, ESQ.
Nevada State Bar No. 004673
610 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

# EXHIBIT “8”

IN THE SUPREME COURT OF THE STATE OF NEVADA



DOUGLAS SMAELLIE,

Appellant,

vs

CITY OF MESQUITE,

Respondent.

_____/

Case No. 69741

Appealed from
Case No. A-14-696355-C
Dept. No.: XVI

# RESPONDENT CITY OF MESQUITE'S ANSWERING BRIEF

REBECCA BRUCH, ESQ. (SBN 7289)
CHARITY F. FELTS, ESQ. (SBN 10581)
ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street
Reno, Nevada 89521
Tel: (775)786-3930
*Attorneys for Respondent City of Mesquite*

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## TABLE OF AUTHORITIES

Cases

Statutes

## I. STATEMENT OF THE ISSUES

A. Did the district court err when it applied existing Nevada law holding that a unionized employee lacks standing to appeal the outcome of negotiated grievance procedures when a collective bargaining agreement expressly provides that the Union is the party responsible for filing a grievance and pursuing arbitration?

B. Should Nevada adopt well-settled and majority-view federal labor law which allows a breach of contract action against an employer for an alleged breach of a collective bargaining agreement only when the employee also demonstrates that the union breached its duty of fair representation.

## II. STATEMENT OF THE CASE

On February 19, 2014, Mr. Smaellie filed an action in district court alleging a single cause of action against the City of Mesquite (the "City") for breach of the collective bargaining agreement ("CBA"). Mr. Smaellie claimed he was terminated without just cause in violation of the agreement. APP Vol. I, p. 3. He also claimed that he attempted to exhaust his administrative remedies as prescribed by the CBA but was prevented from doing so by the Union and/or the City. *Id.* Mr. Smaellie did not advance any claims or causes of action against the Mesquite Police Officer's Association (the "Union"). The Complaint contained no allegations of arbitrary or

discriminatory conduct on the part of the Union and did not include the Union as a defendant in the underlying case. *Id.* It also did not include a due process claim. The City initially responded to Mr. Smaellie's Complaint with a Motion to Dismiss that challenged Mr. Smaellie's single cause of action against the City of Mesquite because he did not plead facts necessary to advance the breach of contract action and therefore failed to state a claim. APP Vol 1, pp. 38-111. In its Motion to Dismiss, the City pointed out that the Employee-Management Relations Board ("EMRB") has exclusive jurisdiction over unfair labor practice claims. Additionally, the City pointed to the case of *Vaca v. Sipes*, 386 U.S. 171 (1967), which held that "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.*" *Vaca* at 186 (Emphasis added). Because Mr. Smaellie did not allege the Union breached its duty, the City argued his Complaint was subject to dismissal for failure to plead the related claim.

At the same time, Mr. Smaellie filed a Motion to Stay the district court action pending a decision from this Court in *Dixson v. City of North Las Vegas*, Case No. 64016. APP Vol. I, p. 4-35. Mr. Smaellie was adamant that

the *Dixson* case would result in a decision that would be dispositive in the instant case and would permit Mr. Smaellie to proceed with his sole breach of contract claim and relieve him of any obligation to plead and demonstrate that the Union breached its duty of fair representation. APP Vol. I, p. 180. In support of that contention, Mr. Smaellie relied on two decisions representing a minority view on the issue. *See Casey v. City of Fairbanks*, 670 P.2d 1133 (1983), and *Anderson v. California Faculty Ass'n*, 25 Cal.App.4th 207 (1994). The district court considered the City's Motion to Dismiss and Mr. Smaellie's Motion to Stay on May 22, 2014. APP Vol. I, pp. 193-195, 197, ll. 8-15. At that hearing, the district court declined to grant the City's Motion to Dismiss during the pendency of the *Dixson* case. APP Vol. I, pp. 193-195. The court also denied the Motion to Stay and ordered that the parties proceed with discovery on the breach of contract claim only. APP Vol. I, p. 197, ll. 8-15.

The parties proceeded with discovery on the breach of contract claim. Following the close of discovery on that single issue, the City filed a Motion for Summary Judgment and renewed its Motion to Dismiss. APP Vol. II-IV, 221-923. Again, the City argued that Mr. Smaellie's Complaint failed to state a claim because he failed to plead or prove a breach of the Union's duty of fair representation. At the point the City renewed its Motion to Dismiss, this

Court had affirmed the district court's decision in *Dixson*, a case that Mr. Smaellie relied heavily upon for the hope that the Court might relieve a plaintiff from having to plead and prove a duty of fair representation claim by adopting the minority approach in *Casey* and *Anderson*. *See Dixson v. City of N. Las Vegas*, Case No. 64016, 2015 WL 3849160 (Nev. June 18, 2015). This Court did not decide that issue in *Dixson* and consequently Mr. Smaellie had no support for his contention that he could bring a breach of contract claim without bringing the related and necessary breach of the duty of fair representation claim. *Id.* Furthermore, this Court reiterated in *Dixson* that a union employee who attempts to enforce the terms of a CBA against his employer has no standing do to so under the holding in *Ruiz v. City of N. Las Vegas*, 127 Nev. 254, 255 P.3d 216 (2011). Relying on *Ruiz*, the district court granted the City's Motion to Dismiss. The district court did not reach a decision on the City's Motion for Summary Judgment. APP Vol. VII, pp. 1220-1222.

## III. STATEMENT OF THE FACTS

Mr. Smaellie was employed by the City as a police officer. His employment was terminated on February 19, 2013, after a series of events involving sexual harassment of fellow City employees as a well as a domestic disturbance between Mr. Smaellie and his estranged wife, Nicholle. APP

Vol. IV, 661-663. The domestic disturbance was instigated by Mr. Smaellie when he followed Nicholle into the parking garage and parked his vehicle behind hers, blocking her ability to leave the parking space. APP Vol. III, pp. 415-416. Mr. Smaellie attempted to gain access to the vehicle and Nicholle placed a 911 emergency call. *Id.*; pp. 447-452. Five police officers from the St. George, Utah police department responded to the call. APP Vol. III, pp. 412. Mr. Smaellie largely ignored the commands of the police officers while they tried to deescalate the situation. APP Vol. III, p. 416. As a result of the disturbance and the altercation that followed, Mr. Smaellie was placed under arrest and charged with Unlawful Detention and Disorderly Conduct. APP Vol. III, p. 412-413.

Following an investigation into these events, the City determined it had just cause to terminate Mr. Smaellie's employment. Mr. Smaellie filed a grievance over his termination. APP Vol. IV, 661-663. After receipt of the grievance, the Union's Grievance Board reviewed all of the investigative files and related information regarding Mr. Smaellie's termination. APP Vol. V, pp. 880, 882-83. The Grievance Board decided not to support Mr. Smaellie's grievance. APP Vol. V, p. 889. Mr. Smaellie appealed the Union's denial of his grievance to the full membership of the Union. APP Vol. V, p. 889. He presented his grievance to the Union's members at an emergency meeting on

April 2, 2013. APP Vol. IV, pp. 778-800; APP Vol. V, pp. 801-21. After presenting his arguments in favor of his grievance, the Union membership voted not to support Mr. Smaellie's grievance. APP Vol. V, p. 818, ll. 18-28. Mr. Smaellie was then informed by the Union that it would not advance his grievance to arbitration. APP Vol. V, p. 891.

The decision of whether to advance a grievance to arbitration was within the sole discretion of the Union pursuant to a Memorandum of Understanding ("MOU") entered into on May 20, 2009, which modified Article 29 of the CBA. APP Vol. I, pp. 98-99, 109-11. Despite the Union having the contractual right to determine whether to take a grievance to arbitration, Mr. Smaellie demanded that the City submit to arbitration with him individually. APP Vol. V, p. 895-96. The City declined his demand and referred Mr. Smaellie to the May 2009 MOU which gave that decision-making authority to the Union. APP Vol. V, pp. 898-99.

Despite his assertion that the Union failed to represent him, Mr. Smaellie did not advance a claim for breach of the duty of fair representation against the Union for its decisions regarding the grievance. In fact, Mr. Smaellie specifically and strategically resisted the duty of fair representation claim on numerous occasions; first, by filing a breach of contract claim against the City only and declining to name the Union or include a claim for

breach of the duty of fair representation. APP Vo. 1, p. 1-3. Second, once challenged by the City's original Motion to Dismiss, Mr. Smaellie denied that he was required to bring a duty of fair representation claim and heavily relied on his presumption that this Court would be deciding the issue of the proper forum for breach of contract and duty of fair representation claim via the *Dixson* case. APP Vol. I, pp. 180, 189-190. At the hearing on the original Motion to Dismiss, counsel for Mr. Smaellie admitted that he did not "want to be spending time having to do discovery on what – you know, the union's breach of duty of fair representation if the Supreme Court is going to come back and say we agree with the approach taken by *Arnold* and *Casey*," APP Vol.1, p. 189, ll. 18-22. Ultimately, the district court ordered the parties to proceed with discovery on the breach of contract claim only. APP Vol. I, p. 201, ll. 8-15. That is precisely what the parties did.

## IV. SUMMARY OF ARGUMENT

This case involves a single employee bringing a single cause of action against his employer for breach of the CBA. Mr. Smaellie was a member of the Union and covered by the CBA between the City and the Union. The district court correctly determined that Mr. Smaellie was therefore subject to dismissal because, as a unionized employee, he could not appeal the outcome of the grievance process when the CBA vested that authority solely in the

Union. *Ruiz v. City of N. Las Vegas*, 127 Nev. 254, 255 P.3d 216 (2011).

In addition to the standing issue, Mr. Smaellie's single claim was further subject to dismissal because he did not demonstrate a claim for breach of the duty of fair representation by the Union. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230,233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons"); *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505, 507 (1922) (appellate courts have a duty to affirm when the "judgment is right upon any theory").

Interestingly, Mr. Smaellie has described this case as a "hybrid action" but, in fact, the only cause of action he ever asserted was for breach of contract. The City was the sole defendant and Mr. Smaellie elected not to bring the related breach of the duty of fair representation claim against the Union. In fact, the parties were expressly limited to discovery on the breach of contract issue only. APP Vol. I, p. 201, ll. 8-15. Therefore, this is not a true hybrid action because Mr. Smaellie never advanced the second half of the hybrid action he describes in his Opening Brief.

When a true hybrid action is advanced, long-standing federal labor law cases have held that an employee may obtain judicial review of his breach of contract claim in situations where the union has the sole power to invoke the

higher stage of the grievance procedures, i.e., if the employee is prevented from exhausting his contractual remedies as is alleged here. But the employee must also prove the union, as his bargaining agent, breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). Because the two claims are interdependent, the breach of contract claim cannot succeed without proving the duty of fair representation claim.

Complicating this issue is the EMRB's refusal to address related breach of contract claims when an employee brings an unfair labor practice claim against the union for breach of the duty of fair representation. This Court and the EMRB have said that the EMRB has exclusive jurisdiction to hear unfair labor practice claims, which includes claims for breach of the duty of fair representation against the union. *Rosequist v. Int'l Ass'n of Firefighters*, 118 Nev. 444, 449, 49 P.3d 651 (2002) *see also Jerry Mann v. Clark County School District*, EMRB Case No. A1-045969, 2011 WL 282440 (Jan. 24, 2011).

Mr. Smaellie asserts that bringing the claim to the EMRB would have been futile and cites this court to another pending case, *Clark County v. Mark Tansey*, Case No. 68951. In *Tansey*, the employee actually brought a claim against his union. That is not the case here. Even with the EMRB's position

that it will not hear hybrid claims, there is no evidence that bringing a duty of fair representation claim with the EMRB would be futile. In fact, the EMRB has exclusive jurisdiction over such claims. In this case, Mr. Smaellie skipped the EMRB all together at great risk to his claims.

Whether the EMRB's refusal to hear hybrid claims should be permitted remains an open question and Mr. Smaellie's theory of futility is incorrect. Federal labor law permits employees to judicially enforce breach of contract claims, but also requires that employees at least plead and prove the related duty of fair representation claim, even if they elect not to sue their unions directly. Regardless of the forum, Mr. Smaellie is not excused from pleading and proving the duty of fair representation claim, and absent proof of that claim, his breach of contract claim against the City is subject to dismissal.

Mr. Smaellie also argues repeatedly that he has been denied due process. But he never brought a due process claim. There is nothing that prevented him from bringing a due process claim in his district court case. He specifically denied on the record at the hearing on November 3, 2015, that he was bringing a due process claim. APP Vol. VI, p. 1184 ("contrary to what's being suggested, I'm not arguing a due process case"). He cannot now claim he was denied due process when he did not plead such a cause of action, and categorically denied he was bringing such a claim.

Notwithstanding the intentional decision not to bring a due process claim, any concerns regarding due process would have been addressed had he advanced a claim for breach of the duty of fair representation. *Jones v. Omnitrans*, 125 Cal. App. 4th 273, 280, 22 Cal. Rptr. 3d 706 (2004) *citing Armstrong v. Meyers*, 964 F.2d 948, 950-51 (9th Cir. 1992). A union must act under a duty of fair representation and cannot make a determination whether to pursue a grievance arbitrarily, discriminatorily, or in bad faith. *Jones* at 281. It is therefore unnecessary for this Court to adopt the *Casey* or *Anderson* approach, each of which justify their departure from settled labor law based on due process concerns, when any due process concerns could have been addressed had Mr. Smaellie only brought a duty of fair representation claim. This is a situation solely of Mr. Smaellie's making and his Complaint was properly dismissed by the district court.

## V. LEGAL ARGUMENT

### A. The district court properly granted the City's renewed Motion to Dismiss on the basis on standing.

The district court's decision granting the City's Motion to Dismiss was neither based on a misreading of *Ruiz*, nor was it based solely on this Court's unpublished decision in *Dixson v. City of N. Las Vegas*, Case No. 64016, 2015 WL 3849160 (Nev. June 18, 2015). As a reminder, Mr. Smaellie

relied heavily on the fact that the *Dixson* case presented this court with a similar issue – the proper forum to advance a breach of contract claim against an employer and the extent to which a state court should address the duty of fair presentation claim. He relied on *Dixson* as the case that should prevent the district court from granting the City's original Motion to Dismiss and in support for his Motion to Stay. APP Vol. I, pp. 117-148. *Dixson* was described by counsel for Mr. Smaellie as the "perfect test case" and during oral arguments on the original Motion to Dismiss and Motion to Stay, Mr. Smaellie urged this Court to wait and consider the imminent *en banc* ruling in *Dixson* because the Nevada Supreme Court *might* choose to adopt the *Casey/Anderson* approach. APP Vol. I, p. 180, ll. 19-23.

As this Court is aware, it affirmed the district court's decision in *Dixson* that dismissal was warranted because the union employee lacked standing. *See Dixson v. City of N. Las Vegas*, Case No. 64016, 2015 WL 3849160, at *1 (Nev. June 18, 2015). This did not produce the result for which Mr. Smaellie undoubtedly hoping. Later, when the City renewed its Motion to Dismiss along with the filing of its Motion for Summary Judgment, Mr. Smaellie attempted to distance himself from the decision in *Dixson*, ignoring the fact that its promise to be "the perfect test case" did not turn out that way he had hoped. In fact, there was no decision on whether to adopt the

federal labor law precedent in *Vaca/Del Costello* or the minority view in *Casey/Anderson,* and instead, the Court decided the case on the issue of standing. Likewise, this case can also be decided on the issue of standing and the district court properly dismissed on that basis.

In *Ruiz*, the employee seeking review of the arbitrator's decision was not a party to the arbitration proceeding between his union and his employer. *Ruiz*, 255 P.3d at 219. Likewise, in this case, Mr. Smaellie would not have been a party to the arbitration proceeding had the Union elected to advance his grievance to arbitration. The express language of the CBA, which was modified by the MOU, is that the decision to take a matter to arbitration is left solely to the discretion of the Union. APP Vol. I, p. 110. In *Ruiz*, the CBA was made by and between the union and the City of North Las Vegas and did not include individual union members as parties. Here, the same is true – the CBA is between the City of Mesquite and the Mesquite Police Officers Association. APP Vol. I, pp. 49, 53. Because Mr. Ruiz was not a party to the underlying grievance and arbitration proceedings, this Court concluded that he lacked standing. *Ruiz*, 255 P.3d. At 221.

Additionally, this Court determined that Mr. Ruiz could not enlarge his rights by way of a purported assignment from the union. Such an act was not permitted under the CBA and would impose an additional burden on the City

beyond that which was contemplated by the City and the union's agreed-upon terms. *Id.* at 221-22. This Court also noted that NRS 288.140(2) "does not permit a union member to seek judicial relief in the event that he or she is unsatisfied with the outcome of CBA–negotiated grievance procedures." *Ruiz*, 127 Nev. at 258, n. 3. In reaching its decision in *Ruiz*, this Court noted that even though an employee is not considered a party to the underlying grievance or arbitration proceedings, he is not without recourse. "If the employee can demonstrate that the union has violated its duty of fair representation in handling the employee's grievance, the employee may have a cause of action against his or her union." *Ruiz*, 127 Nev. at 261, n. 6. *citing Rosequist v. Int'l Ass'n of Firefighters*, 118 Nev. 444, 448–49, 49 P.3d 651, 653–54 (2002) (holding that a union member seeking to challenge whether his union fulfilled its duty of fair representation must file a claim with the EMRB), *abrogated on other grounds by Allstate Ins. Co v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007). Clearly this Court has recognized the duty of fair representation is a necessary cause of action for an employee seeking this type of relief.

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**1. Regardless of the proper forum for advancing a claim for breach of the duty of fair representation, such a claim was never brought and subjects Mr. Smaellie's single cause of action to dismissal.**

Importantly, the EMRB is the proper forum for bringing a duty of fair representation claim. According to *Rosequist*, the EMRB has exclusive jurisdiction over these claims. *Rosequist*, 118 Nev. at 449 *see also Jerry Mann v. Clark County School District*, EMRB Case No. A1-045969, 2011 WL 282440 (Jan. 24, 2011) (A duty of fair representation claim is one that belongs in the exclusive jurisdiction of the EMRB). There is no evidence in this case that any person, entity, or any other force prevented Mr. Smaellie from bringing a duty of fair representation claim against the Union in any forum. He simply elected not to bring the claim. Mr. Smaellie never filed a complaint with the EMRB and, if he were going to advance a duty of fair representation claim with the EMRB, he must have done so within six months of the alleged unfair labor practice. NRS 288.110(4).

Likewise, he did not advance a duty of fair representation claim in the district court. Mr. Smaellie claims he is immune from having to bring such a claim because: (1) the EMRB refuses to hear hybrid actions that include a duty of fair representation claim against the union and a breach of the collective bargaining agreement claim against the employer, and/or (2) two

non-Nevada courts have adopted a minority approach that goes against settled federal labor law and excuses the employee from demonstrating the duty of fair representation claim.

Thus we are left with a single cause of action against only the City that was filed after the EMRB's limitations period set by NRS 288.110(4). Without a claim against the union, and with discovery in this matter having been limited to the breach of contract claim only, there has been no determination on whether the union breached its duty of fair representation. Because of the manner in which this Complaint was brought, there never will be a determination on that issue. Regardless of which forum is appropriate – the EMRB or the district court – Mr. Smaellie's single cause of action was properly dismissed for failure to state a claim.

**2. The District court did not rely solely on the unpublished decision in *Dixson*.**

A review of the district court's minute order after oral argument on the Motion to Dismiss and a review of the district court's order which dismissed Mr. Smaellie's Complaint demonstrates that the district court correctly relied on the published case precedent in *Ruiz v. City of North Las Vegas*. APP Vol. VII, p. 1218-1222. While the parties referred to *Dixson* at the hearing on the renewed Motion to Dismiss, the district court's order actually

demonstrates that it relied upon *Ruiz* for the position that "[a] unionized employee lacks standing to appeal the outcome of negotiated grievance procedures when a collective bargaining agreement expressly provides that the Union is the party responsible for filing a grievance and pursuing arbitration." APP Vol. VII, p. 1221. Although the *Ruiz* case had a different procedural posture because the union employee was contesting an arbitration result, this Court's determination regarding standing is nonetheless applicable in this case, just as it was in *Dixson.* The *Dixson* case also dealt with a breach of contract claim brought against the city employer only and without any claim against the union for breach of the duty of fair representation. The plaintiffs/appellants in *Dixson* were subject to dismissal under *Ruiz* much like Mr. Smaellie is subject to dismissal in this matter. In each case the plaintiffs selected their forum and created their procedural predicaments from which there is now no turning back.

Further, because Mr. Dixson failed to allege that he was a third-party beneficiary or that the MOU or CBA was intended to benefit him or that he would foreseeably rely upon those agreements, he again could not be afforded the relief he sought *Id.* Likewise, Mr. Smaellie has not alleged he was a third-party beneficiary to the CBA in the Complaint he filed this case. As *Dixson* pointed out, Mr. Smaellie lacks standing to bring a breach of the collective

bargaining agreement against the City.

**B. Mr. Smaellie's breach of contract claim is further subject to dismissal because it cannot survive absent a duty of fair representation claim which was never advanced by Mr. Smaellie.**

With the Union having sole discretion of whether to advance a grievance to arbitration, its actions and conduct are necessarily implicated in Mr. Smaellie's breach of contract action. In *Vaca v. Sipes*, 386 U.S. 171, 186 (1967), the Court stated that "the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." Mr. Smaellie claimed in his Complaint that he was prevented from exhausting his administrative remedies as provided by the CBA, thus placing *Vaca* and its progeny, *Del Costello*, squarely at issue. Those cases hold that an employee must prove that an unfair labor practice by the union occurred, as part and parcel of the breach of contract action. *Id.* Courts will be compelled to pass upon whether there has been a breach of the duty of fair representation in context of a breach of contract action. *Id.* at 187.

In *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983),

which expanded upon the holding in *Smith v. Evening News Ass'n*, 371 U.S. 195, the United States Supreme Court again acknowledged that any breach of contract action against the employer must be advanced concurrently with a breach of the duty of fair representation against the union. Such a suit comprises two causes of action which are "inextricably interdependent." *Id.* "To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." *Id.* at 164-65. Regardless of who the employee chooses to sue, he must prove his breach of contract claim and his breach of the duty of fair representation claim. *Id.* at 165; *see also Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 988 (9th Cir. 2007) (employee did not include fair representation claim in complaint and cannot recover under a breach of contract action) *citing Brown v. Witco Corp.*, 340 F.3d 209, 213 n. 5 (5th Cir.2003) ("The employee must allege and prove both that the employer has breached the collective bargaining agreement and that the union has breached its duty of fair representation").

Although *Vaca* and *Del Costello* addressed breach of contract claims arising under the Labor Management Relations Act, these cases are still instructive on the issue of how to address an action brought by a local

government union employee against his employer for breach of the CBA. Nevada courts have looked to federal precedent for guidance on issues concerning labor relations. *Weiner v. Beatty*, 121 Nev. 243, 248, 116 P.3d 829, 832 (2005) (state labor law should be interpreted consistently with federal labor law such that precedent interpreting federal labor statutes is persuasive). A consistent interpretation requires that the duty of fair representation claim be proven.

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Vaca* at 190. Mr. Smaellie's conclusory and speculative theory about the Union buying a low-cost insurance plan satisfies none of these criteria. His Complaint stated that the City of Mesquite and/or the Union prevented him from exhausting his administrative remedies, but does not include any allegations that the Union wrongfully refused to process his grievance or otherwise breached its duty of fair representation. APP Vol. I, p. 3. There are no allegations of conduct on the part of the Union that it acted in a manner that is arbitrary, discriminatory, or motivated by bad faith. *Truesdell v. S. California Permanente Med. Grp.*, 151 F. Supp. 2d 1161, 1170 (C.D. Cal. 2001) aff'd, 37 F. App'x 945 (9th Cir. 2002) (Plaintiff must plead facts from which the Court can infer "hostility,

arbitrariness, or bad faith in the union's representation of him"). Because the breach of contract and breach of duty of fair representation claims are inextricably intertwined, Mr. Smaellie's Complaint failed to state a claim upon which relief can be granted. *See Smith v. Pac. Bell Tel. Co.*, 649 F. Supp. 2d 1073, 1099 (E.D. Cal. 2009) (Plaintiff can only maintain his cause of action for breach of contract against employer if he can maintain the corresponding breach of duty of fair representation claim against the union) *citing Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1447 (9th Cir.1994) (individual employee cannot sue employer for breach of CBA containing mandatory arbitration clause absent a breach of duty of fair representation by employee's union).

**1. Bringing a breach of contract claim without the related duty of fair representation claim also creates standing issues.**

In addition to the standing issues addressed in *Ruiz*, other courts have held that an employee has no standing to file an action against his employer without also bringing a claim against the union for breach of the duty of fair representation. Failure to allege that the union breached its duty of fair representation should result in dismissal of the contract claim because the claim against the union is a prerequisite. *Larkins v. Chicago Transit Auth.*

*Basel*, 12-CV-08214, 2013 WL 5878441 (N.D. Ill. Oct. 31, 2013).

Like Mr. Smaellie, Larkins, who was not a party to the CBA, brought a state law breach of contract claim and asserted that the employer breached the CBA. *Id.* at *4. The employer-defendant moved to dismiss Larkins' claim for lack of standing and failure to state a claim. *Id.* at *1. In dismissing the breach of contract claim for lack of standing, the court in *Larkins* cited to a Seventh Circuit decision which explained:

> Unless the union violated its duty of fair representation, [the plaintiff] cannot litigate his claim of breach of contract, because the union's responsibilities as the exclusive representative of the members of the bargaining unit include responsibility for the decision whether to prosecute a grievance on the employee's behalf. *Id.* at *4.

The "indispensable predicate" for a breach of contract action is to demonstrate that the union breached its duty of fair representation. *Duerr v. Minnesota Min. and Mfg. Co.,* 101 F.Supp.2d 1057, 1064 (N.D.Ill.2000) ("the employee lacks standing to sue upon the contract unless he asserts both breach of contract by the employer and breach of the duty of fair representation by the union"); *Smith v. Pac. Bell Tel. Co., Inc.*, 649 F. Supp. 2d 1073 (E.D. Cal. 2009) (employee could not maintain cause of action for breach of CBA against employer without maintaining corresponding fair representation claim against union). Mr. Smaellie's failure to even allege a breach of the duty of fair representation by the Union is fatal to this action.

**2. Mr. Smaellie's single breach of contract claim is missing a very important component and does not actually advance a hybrid action.**

Mr. Smaellie's Opening Brief describes the "hybrid action" to the Court and the various approaches taken by states and courts in adjudicating these claims. But what is curious is that Mr. Smaellie never sought to bring a hybrid claim. In order for it to be hybrid, it must be comprised of two different components – a breach of contract claim and a duty of fair representation claim. Mr. Smaellie has been adamant that he is not required to plead and prove a duty of fair representation claim. The claim that Mr. Smaellie asserts is not actually a hybrid claim at all. It is simply a breach of contract claim and the only way his claim is saved is if this Court actually excuses proof of the second component of a hybrid claim, thus failing to satisfy Mr. Smaellie's own definition of a hybrid caution of action.

For those plaintiffs who do bring a true hybrid cause of action, a majority of states have adopted the federal *Vaca* standard which ties a claim for breach of a collective bargaining agreement by an employer to a duty of fair representation claim against the union. Mr. Smaellie himself describes a hybrid action as one involving the breach of contract claim and the duty of fair presentation claim. Yet, in the underlying proceedings, Mr. Smaellie consistently attempted to distance himself from the requirements to either

plead or prove a duty of fair representation claim. It was not until the City filed its Motion for Summary Judgment and renewed its Motion to Dismiss, after the close of discovery, that Mr. Smaellie claimed that the duty of fair presentation claim had been proven.

Even in *Anderson*, a case Mr. Smaellie relies on to justify his decision not to advance a breach of the duty of fair representation claim, the plaintiff actually brought a duty of fair representation claim along with his breach of contract claim. *Anderson*, 25 Cal. App. 4th 207. As for *Casey*, it simply gives an employee who claims that the CBA was breached a complete pass on the issue of whether the Union acted wrongfully in refusing to process his grievance. This is despite the fact that, by contract, the employee had an obligation to exhaust his administrative remedies. If the Union allegedly prevented Mr. Smaellie' from exhausting those remedies, then the Union's conduct is naturally at issue and bears directly on the issue brought by a breach of contract claim. The exhaustion of contractual or administrative remedies and the duty of fair representation claim are predicate to the breach of contract claim. Thus, the acts of more than one party are at issue, but *Casey*, citing to concerns about due process would give the employee a pass on the claim against the Union. This naturally creates a forum selection incentive in the event it is more convenient or strategically advantageous to

bring a single cause of action in the district court for breach of contract, rather than a claim in front of the EMRB or an true hybrid action to the district court. There is nothing that prevented Mr. Smaellie from bringing a duty of fair representation claim with the EMRB. *Casey* departs drastically from settled labor law and it should not be adopted by this Court.

Moreover, the concerns regarding due process expressed by *Casey* and *Anderson* have been sufficiently addressed in subsequent case law, as will be demonstrated below.

### C. Mr. Smaellie has not advanced a due process claim and any assertion that his due process rights were violated does not save this case from dismissal.

Mr. Smaellie's single cause of action is one for breach of contract. He admitted that he was not advancing a due process claim. APP Vol. VI, p. 1184, ll. 1-3. Yet he devotes a substantial part of his brief to due process concerns despite the absence of any such claim. His due process allegations were levied in response to the City's renewed Motion to Dismiss, and long after the expiration of the time in which to amend the Complaint. Mr. Smaellie is using unpleaded due process allegations as a mechanism to convince the Court to adopt the minority approach in *Casey* and *Anderson*. Such an approach is not necessary. Mr. Smaellie's concerns regarding due process would have been addressed had he brought a duty of fair

representation claim against the union or at least proven such a claim even if he elected not to name the Union as a defendant.

In *Jones v. Omnitrans*, a case far more recent than Mr. Smaellie's suggested approach in *Anderson*, the court held that any due process concerns are allayed by the fact that a union employee can bring a breach of the duty of fair representation claim against his union. *Jones v. Omnitrans, 125 Cal. App. 4th 273, 281, 22 Cal. Rptr. 3d 706, 712 (2004) citing Armstrong v. Meyers*, 964 F.2d 948, 950-51 (9th Cir. 1992). Unions are obligated to make decisions that are not arbitrary or discriminatory and must always act in good faith in representing the interests of its members. *Jones*, 125 Cal. App. 4th at 283. This is the case even if the CBA or the MOU gives the Union sole discretion in deciding whether to pursue a grievance to arbitration. *Id.* at 281.

Mr. Smaellie claims in his Opening Brief that a reasonable jury could conclude that the Union breached its duty of fair representation but Mr. Smaellie has consistently distanced himself from the need to plead or prove this claim. Conveniently, when opposing the City's renewed Motion to Dismiss and Motion for Summary Judgment, Mr. Smaellie claimed that the Union's selection of cheap insurance is proof of the breach of its duty of fair representation. However, there is no proof that the Union breached its duty

because there was no discovery on that issue. The district court specifically narrowed discovery to the breach of contract claim only, which was consistent with what Mr. Smaellie sought in opposition to the City's original Motion to Dismiss. Simply saying that the Union acted in an arbitrary and capricious manner after the fact does not make it so and certainly does not demonstrate a breach of the duty of fair representation.

Mr. Smaellie further claims that he could not exhaust his administrative remedies because the Union failed to represent him and then the City refused to arbitrate with him. Simply put, the City had no obligation to arbitrate Mr. Smaellie's grievance. The Union decided not to advance the grievance. If Mr. Smaellie was dissatisfied with that decision and felt that the Union had breached its duty of fair representation, he could have brought a claim against the Union. He did not. Instead, he filed this breach of contract action and insists that the City should have ignored the MOU and the sole authority of the exclusive bargaining agent to compel arbitration. APP Vol. I, pp. 109-11.

Vesting the decision of whether to take a grievance to arbitration solely with the Union is not a due process violation. *Vaca* clearly states that an employee does not enjoy an absolute right to have a grievance taken to arbitration. *Vaca*, 386 U.S. at 191. This was even reiterated in *Anderson*

when that court quoted *Vaca* for the proposition that employees have no absolute right to compel arbitration and that there is no substantial danger to the employees' rights even if the union is given the contractual authority to decide whether to arbitrate because it must do so honestly and in good faith. *Anderson*, 25 Cal.App.4th at 219. Furthermore, this Court held in *Ruiz* that a party's obligation under a collective bargaining agreement should not be increased beyond the provisions of that agreement. *Ruiz*, 127 Nev. at 262.

The Union has an independent obligation under the duty of fair representation to act in good faith toward the employee bringing a grievance against his employer. *Jones*, 125 Cal. App. 4th 273, 282. It is the duty of fair representation and the availability of recourse for a breach of that duty that addresses any concerns that may otherwise exist from limiting an employee's individual right to seek an arbitration hearing. *Id.* Absent a request from the Union to arbitrate, the employer has no obligation to do so. *See Jones* at 713; *Vaca* at 191-92. If the employee is dissatisfied with the Union's decision and feels it was not made in good faith, he can seek recourse through a claim for breach of the duty of fair representation. *Armstrong*, 964 F.2d at 851. This course of action would also preserve the employee's due process rights.

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## VI. CONCLUSION

Mr. Smaellie elected to bring one cause of action for breach of the CBA against the City only. He did not bring a claim against the Union for breach of the duty of fair representation. He hoped that *Dixson* would be decided in his favor so the duty of fair representation claim wold not be an issue. That did not happen. As a result Mr. Smaellie's single claim was subject to dismissal for lack of standing. Even without the standing issue, Mr. Smaellie's single claim must still fail because it does not advance the interdependent claim for duty of fair representation, whether that claim was required to be brought to the EMRB or the district court.

The minority approach in *Casey* and *Anderson* that excuses the employee from providing proof of a duty of fair representation claim should not be adopted by this Court. Those cases drastically depart from settled labor law and unnecessarily expand the mechanism by which an employees can seek redress. The CBA governs the actions of the employer and the union. There are obligations under the CBA that extend to the employer and the union. The failing of the Union, if any, should not be imputed on the City, and, further, Mr. Smaellie should not be absolved from proving the entirety of his claim because, for whatever reason, he would rather advance his single cause of action in district court.

For the reasons stated above, the City respectfully requests that the Court affirm the dismissal of Mr. Smaellie's Complaint. Should the Court decide not to affirm the dismissal, the City alternatively requests that it remand this matter back to the district court for a determination on the City's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 23rd day of September, 2016.

/s/ Rebecca Bruch

REBECCA BRUCH, ESQ. (SBN 7289)
CHARITY F. FELTS, ESQ. (SBN 10581)
ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street
Reno, Nevada 89521
Tel: (775)786-3930
*Attorneys for Respondent City of Mesquite*

## CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 28 AND 32

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in proportionally spaced typeface using WordPerfect in font 14 Times New Roman.

2. I further certify that this brief complies with the page or type value limitations of NRAP 32(a)(7) because:

It is properly spaced, has typeface of 14 points or more, and contains 6971 words, and does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedures, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of September, 2016.

/s/ Rebecca Bruch
REBECCA BRUCH, ESQ. (SBN 7289)
CHARITY F. FELTS, ESQ. (SBN 10581)
ERICKSON, THORPE & SWAINSTON, LTD.
99 West Arroyo Street, Reno, Nevada 89521
*Attorney for Respondent City of Mesquite*

**CERTIFICATE OF SERVICE BY ELECTRONIC MEANS**

I certify that I am an employee of ERICKSON, THORPE & SWAINSTON, LTD., 99 West Arroyo Street, Reno, Nevada 89509; over the age of 18 years, and not a party to the within action; that I served a copy of RESPONDENT CITY OF MESQUITE'S ANSWERING BRIEF through the court mandated E-Flex filing service, upon Appellant's counsel as follows:

Daniel Marks, Esq.
Adam Levine, Esq.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101

DATED this 23rd day of September, 2016.

/s/ Jennifer Jacobsen
Jennifer Jacobsen

# EXHIBIT “9”

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY,
Appellant,
vs.
MARK TANSEY,
Respondent.

No. 68951

FILED

MAR 01 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court judgment after bench trial and an order awarding back pay in a wrongful termination action. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Respondent Mark Tansey was employed as a code enforcement officer with appellant Clark County. Tansey was also a member of the collective bargaining agreement between Clark County and Service Employees International Union Local No. 1107 (the Union). According to the collective bargaining agreement, the Union is the sole and exclusive bargaining representative for various Clark County positions, including code enforcement officers. Tansey filed a grievance with the Union when Clark County terminated his employment. Ultimately, the Union did not request arbitration on Tansey's behalf. As a result, Clark County deemed Tansey's grievance as abandoned and finalized his termination. Tansey then filed a complaint with the Local Government Employee-Management Relations Board (the Board), asserting a hybrid action for breach of contract against Clark County and breach of the duty of fair representation against the Union. The Board dismissed his complaint on jurisdictional grounds, and the district court denied judicial review of the

Board's decision. However, the district court ultimately determined it had jurisdiction over Tansey's hybrid action. After a bench trial, the district court found that the Union breached its duty of fair representation, and that Clark County breached its contract with Tansey by terminating him without just cause.

On appeal, Clark County argues that the district court lacked subject matter jurisdiction to hear Tansey's hybrid action because the Board has exclusive jurisdiction to determine whether the Union breached its duty of fair representation.[1] We disagree.

Subject matter jurisdiction is a question of law, which this court reviews de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Further, we review a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105-06, 294 P.3d 427, 432 (2013).

Generally, this court has recognized that a union is subject to the duty of fair representation and the Board has exclusive jurisdiction to hear an employee's complaints against a union's breach of duty of fair representation. *See Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118

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[1]We have considered Clark County's other arguments on appeal, including those concerning standing, and conclude that they lack merit. In particular, we note that Clark County's reliance on *Ruiz v. City of North Las Vegas*, 127 Nev. 254, 255 P.3d 216 (2011) is unpersuasive because it is distinguishable from this case. For instance, *Ruiz* did not concern a hybrid action, which involves a different legal analysis. Further, Tansey is not merely seeking judicial relief because he is unsatisfied with an arbitration decision or the outcome of negotiated grievance procedures. Instead, Tansey attempted to follow the available grievance procedure but was not sufficiently afforded the opportunity to pursue arbitration.

Nev. 444, 447-49, 49 P.3d 651, 653-54 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007). The duty of fair representation arises under the Nevada Employee-Management Relations Act (EMRA). *Id.* at 449, 49 P.3d at 654. Conversely, the Board does not have jurisdiction for actions outside of the EMRA. *See* NRS 288.110(2); NAC 288.200(1)(c). Here, Tansey's complaint involved a hybrid action claiming a breach of the duty of fair representation against the Union and a breach of contract against Clark County. The EMRA is silent with regard to where a hybrid action should be filed. Thus, this case presents an issue of conflicting forums.[2]

While this court has not yet addressed the issue of where a hybrid action should be filed in Nevada, there is federal precedent that addresses this matter. In *Vaca v. Sipes*, 386 U.S. 171, 173 (1967), a discharged employee sued both his employer for wrongful discharge and his union for breach of its duty of fair representation in refusing to pursue a grievance to the final arbitration level. The Supreme Court of the United States granted the employee a right of action, determining that there was no basis for limiting the employee's available remedies. *Id.* at 196. In particular, the Court analyzed when an employee can be excused from using the contractual grievance process and resort to judicial enforcement. *Id.* at 184-86. The Court recognized that exceptions exist to provide an employee with this judicial remedy, such as when the union breaches its duty of fair representation. *Id.* at 185.

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[2]We note that Tansey exhausted the available grievance procedure under the collective bargaining agreement, as the Union declined to bring his claim to arbitration and the Board dismissed his complaint. Thus, it was proper for the district court to entertain Tansey's claims.

Further, in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 165 (1983), the Supreme Court examined a hybrid action, specifically an action for breach of a collective bargaining agreement accompanied by a union's breach of its duty of fair representation. The Court reiterated that a rule prohibiting direct judicial enforcement of the collective bargaining agreement "works an unacceptable injustice" when the union breaches its duty of fair representation in connection with the grievance process. *Id.* at 164. "In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." *Id.* Notably, the Court recognized that "the two claims are inextricably interdependent." *Id.* at 164-65 (internal quotation omitted). As a result, the employee "must not only show that [his] discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *Id.* at 165 (internal quotation omitted). "The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *Id.* Thus, the Court determined that it is unreasonable to only allow an employee to bring a breach of duty of fair representation claim against a union when the union's breach is related to an employer's breach of the collective bargaining agreement. *Id.*

Here, the federal approach applies, as delineated by *Vaca* and *DelCostello*. Thus, we conclude that the district court had subject matter jurisdiction to hear Tansey's hybrid action. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

Cherry, C.J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

cc: Chief Judge, The Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Clark County District Attorney
Clark County District Attorney/Civil Division
Law Office of Daniel Marks
Eighth District Court Clerk

# EXHIBIT “10”

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS SMAELLIE,
Appellant,
vs.
CITY OF MESQUITE,
Respondent.

No. 69741

FILED

APR 17 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER AFFIRMING IN PART AND VACATING IN PART*

This is an appeal from a district court order dismissing an employment contract action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Having considered the parties' arguments and the appendix, we conclude that the district court properly dismissed appellant's complaint. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (reviewing de novo a district court NRCP 12(b)(5) dismissal). Appellant did not allege in the complaint that he was a third-party beneficiary of the collective bargaining agreement. *Hartford Fire Ins. Co. v. Trs. of Constr. Indus. and Laborers Health & Welfare Tr.*, 125 Nev. 149, 156, 208 P.3d 884, 899 (2009). Appellant also did not allege that the Mesquite Police Officer's Association breached its duty of fair representation, which is required to state a hybrid action. *Vaca v. Sipes*, 386 U.S. 171, 173 (1967). Although appellant was not required to join the Mesquite Police Officer's Association or state a cause of action against it, he was required to allege that the Association breached its duty. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983) ("The employee may, if he chooses, sue one defendant and not the other; but the

case he must prove is the same whether he sues one, the other, or both."). Although appellant argues that by alleging that the Association prevented him from exhausting his administrative remedies he sufficiently alleged a breach of the Association's duty of fair representation, we disagree. The inability to exhaust remedies and breach of the duty of fair representation are different legal theories. Therefore, we affirm the district court's dismissal of appellant's complaint.

Nevertheless, because the dismissal was for lack of standing, the action should have been dismissed without prejudice. *See Clark Cty. v. Tansey*, Docket No. 68951 (Order of Affirmance, March 1, 2017) (concluding that the district court had subject matter jurisdiction to hear an employee's hybrid action against his employer for breach of the collective bargaining agreement and his union for breach of the duty of fair representation); *see also Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) (observing that "standing is a jurisdictional mandate" and concluding that a dismissal for lack of standing should be without prejudice because it is not an adjudication of the merits); *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 463-65 (8th Cir. 2004) (same). Therefore, we vacate this portion of the district court's order, and we

ORDER the judgment of the district court AFFIRMED IN PART as to the dismissal of the complaint AND VACATED IN PART as to the dismissal being with prejudice.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

cc: Hon. Timothy C. Williams, District Judge
Lansford W. Levitt, Settlement Judge
Law Office of Daniel Marks
Erickson Thorpe & Swainston, Ltd.
Eighth District Court Clerk

# EXHIBIT “11”

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

| | |
|---|---|
| MARK TANSEY,<br>Complainant,<br>vs.<br>CLARK COUNTY; and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1107<br>Respondent. | ITEM NO. 726<br>CASE NO. A1-045973<br>**ORDER** |

For Complainant: Adam Levine, Esq.

For Respondents: Yolanda T. Givens, Esq.
Deputy District Attorney

Michael A. Urban, Esq.
Douglas V. Ritchie, Esq.
The Urban Law Firm

On the 27th day of May, 2010, this matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board"), for consideration and decision pursuant to the provisions of the NRS and NAC chapters 288, NRS chapter 233B, and was properly noticed pursuant to Nevada's open meeting laws.

Respondent Clark County filed a Motion to Dismiss, asserting that Complainant Mark Tansey has not alleged any prohibited labor practice against the County. The Complaint asserts that the County terminated Tansey's employment without just cause, contrary to the provisions of the collective bargaining agreement which governed his employment. The Complaint also asserts that Tansey, through Respondent Service Employees International Union Local 1107 ("SEIU"), had been proceeding through the bargained-for grievance process with the County.

After the County denied Tansey's grievance at the Step Two level, SEIU then allegedly failed to submit a written request to the County demanding that Tansey's grievance be taken to arbitration, which is the next step in the grievance process. Because there was no Step Three request submitted to the County, the County has apparently deemed Tansey's grievance as abandoned. The County's argument is that the question of whether or not there was just cause to terminate Tansey is a question reserved to the grievance process, not this Board, and because there are no other allegations against the County, that the allegations in the Complaint do not amount to a claim for a prohibited labor practice against the County.

Tansey filed an Opposition to the motion to dismiss, asserting that his claim constitutes a "hybrid claim" over which the Board should assume jurisdiction, citing to Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) and Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983). Respondent SEIU did not file any Opposition or Joinder to the motion to dismiss.

The Local Government Employee-Management Relations Act ("the Act") authorizes this Board to "hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of [Chapter 288]," and to hear "any controversy concerning prohibited practices." NRS 288.110(2); NRS 288.280. A complainant before this Board must allege "a justiciable controversy under chapter 288 of NRS..." NAC 288.200.

Tansey's allegations against the County assert only a breach of the collective bargaining agreement, and do not assert a violation of any section of the Act itself. Thus, Tansey fails to allege any conduct by the County that falls within the statutory jurisdiction of the Board. The County is therefore entitled to be dismissed from this matter.

Having considered the above, the Board unanimously finds as follows:

1. Pursuant to NRS 288.110(2) and NRS 288.280, the Board has jurisdiction over violations of NRS Chapter 288.

2. Tansey's Complaint does not assert a violation of NRS Chapter 288 against Clark County.

3. Tansey has not alleged any conduct by the County that falls within the statutory jurisdiction of the Board.

Based upon the foregoing, and good cause appearing therefore:

IT IS HEREBY ORDERED that Respondent Clark County's Motion to Dismiss is Granted.

IT IS FURTHER ORDERED that this action is dismissed as to Clark County only.

DATED this _2nd__ day of June, 2010

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
SEATON J. CURRAN, ESQ., Chairman

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 2nd day of June, 2010, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

Adam Levine, Esq.
Law Offices of Daniel Marks
530 S. Las Vegas Blvd, #300
Las Vegas, NV 89101

Jonathan Cohen, Esq.
Rothner, Segall & Greenstone
510 So. Marengo Ave.
Pasadena, CA 91101

Yolanda Givens, Esq.
Deputy District Attorney
PO Box 552215
Las Vegas, NV 89155-2215

Douglas V. Ritchie, Esq.
The Urban Law Firm
4270 S. Decatur Blvd. #A-9
Las Vegas, NV 89103

ANDY ANDERSON, Commissioner

# EXHIBIT “12”

ORIGINAL

**ORDR**
DAVID ROGER
District Attorney
**CIVIL DIVISION**
State Bar No. 002781
By: **Yolanda T. Givens**
Deputy District Attorney
State Bar No. 4434
500 South Grand Central Pkwy.
P. O. Box 552215
Las Vegas, Nevada 89155-2215
(702) 455-4761
Fax (702) 382-5178
E-Mail: Yolanda.Givens@ccdanv.com
Attorneys for Respondent/Defendant
**Clark County**

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04/22/2011 11:26:17 AM

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

MARK TANSEY,

Petitioner/Plaintiff,

vs.

CLARK COUNTY and STATE OF NEVADA LOCAL GOVERNMENT EMPLOYEE MANAGEMENT RELATIONS BOARD,

Respondent/Defendants.

Case No: A-10-619061-J
Dept No: I

Date of Hearing: 2/5/11
Time of Hearing: 1:30 p.m.

**ORDER DENYING PETITION FOR JUDICIAL REVIEW**

Petitioner/Plaintiff Mark Tansey's Petition for Judicial Review of the Decision of the State of Nevada Local Government Employee Management Relations Board (hereafter "EMRB") to dismiss Respondent/Defendant Clark County from the administrative proceedings pending before the EMRB having come before the Court for a hearing on February 15, 2011 at 1:30 p.m., and Petitioner/Plaintiff Mark Tansey being represented by his attorney Adam Levine, Esq., of the Law Office of Daniel Marks, Respondent/Defendant Service Employees International Union Local 1107 being represented by its counsel Jonathan M. Cohen, Esq., Rothner, Segall, Greenstone & Leheny, and Respondent/Defendant Clark County being represented by its counsel Yolanda T. Givens,

Deputy District Attorney, and the EMRB being represented by its counsel Scott R. Davis, Deputy Attorney General, and the Court having read and considered the record of the EMRB filed with the Court and the briefs of the parties, and have heard oral arguments of counsel;

**IT IS HEREBY ORDERED, ADJUDGED and DECREED** that Petitioner/Plaintiff Mark Tansey's Petition for Judicial Review of the EMRB's decision to dismiss Respondent/Defendant Clark County from the administrative proceedings pending before the EMRB is **DENIED**.

**IT IS FURTHER ORDERED, ADJUDGED and DECREED** that Petitioner/Plaintiff Mark Tansey may proceed with a breach of contract action against Respondent/Defendant Clark County. Petitioner/Plaintiff Mark Tansey shall file an amended complaint for his breach of contract action with this Court within 30 days of Notice of Entry of this Order.

DATED this 26th day of April, 2011.

DISTRICT COURT JUDGE

Respectfully Submitted By:

DAVID ROGER
DISTRICT ATTORNEY

By: _____
YOLANDA T. GIVENS
Deputy District Attorney
State Bar No. 4434
500 South Grand Central Pkwy. 5th Floor
P. O. Box 552215
Las Vegas, Nevada 89155-2215
Attorney for Respondent/Defendant
Clark County

# EXHIBIT “13”

CASE NO. A696355

DOCKET U

DEPT. 16

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

DOUGLAS SMAELLIE,

Plaintiff,

vs.

CITY OF MESQUITE,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTIONS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED THURSDAY, MAY 22, 2014

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

APPEARANCES:

For the Plaintiff:

MARKS LAW GROUP, LLP
BY: ADAM LEVINE, ESQ.
1120 TOWN CENTER DRIVE
SUITE 200
LAS VEGAS, NV 89144
(702) 341-7870
(702) 341-8049 Fax
OFFICE@DANIELMARKS.NET

For the Defendant:

ERICKSON, THORPE & SWAINSTON, LTD.
BY: CHARITY FELTS, ESQ.
BY: REBECCA BRUCH, ESQ.
99 WEST ARROYO STREET
RENO, NV 89509
(775) 786-3930
CFELTS@ETSRENO.COM

* * * * *

LAS VEGAS, NEVADA; THURSDAY, MAY 22, 2014

9:24 A.M.

P R O C E E D I N G S

* * * * * * *

09:24:36 THE COURT: Smaellie versus City of Mesquite.

Apparently Mr. Levine called. He's running late, unless he's coming in the door right now. So -- well, there you go. He is coming in the door right now.

09:24:53 Mr. Levine.

MR. LEVINE: I apologize for being late.

THE COURT: Actually you got here right on time. We just called it 10 seconds ago, sir.

MR. LEVINE: All right.

09:25:05 THE COURT: Okay. Let's go ahead and note our appearances for the record.

Do we want this reported?

All right. Let's go ahead and note our appearances for the record.

09:25:12 MR. LEVINE: Adam Levine, Bar 4673 for the plaintiff.

MS. FELTS: Charity Felts, Bar 10581 for the City of Mesquite.

MS. BRUCH: Rebecca Bruch, 7289, City of

09:25:23 Mesquite.

09:25:24 THE COURT: All right. Good morning.

MS. BRUCH: Good morning, your Honor.

THE COURT: All right. I guess we have two motions, the defendant's motion to dismiss and also
09:25:32 plaintiff's motion to stay pending decision by the Supreme Court.

MR. LEVINE: Correct.

THE COURT: All right. Let's deal with the motion to dismiss first.

09:25:41 MS. FELTS: Yes, your Honor.

The City of Mesquite has filed its motion to dismiss based on failure to state a claim. If you take a look at the complaint in this matter, it's relatively civil. It advances one cause of action against the
09:25:53 employer, the City of Mesquite. There is no claim against the union. There is no -- there is only a claim of breach of the collective bargaining agreement as against the City of Mesquite. And there is no related allegation regarding a breach of the duty of
09:26:08 fair representation by the union.

We submit, and it was part of our briefing in this matter, that that is an unnecessary component of a breach of contract or breach of the collective bargaining agreement claim. And we relate that back
09:26:22 and rely on the case, Supreme Court case of *Vaca versus*

09:26:25 *Sipes* and some of the cases.

THE COURT: Tell me, why would the evidence support the decision to even control this matter? Because I understand the distinction between federal
09:26:37 law and state law, and it's my recollection the employees involved in this case, the employee in this case was an employee of the City of Mesquite.

MS. FELTS: Correct.

THE COURT: As a result, they wouldn't come
09:26:48 under the jurisdiction of the federal act.

MS. FELTS: They don't, and that's correct. And *Vaca* did deal with the Federal Labor Management Relation Act. Would it fall under the Employment Labor Act, Chapter 288?

09:27:04 THE COURT: Right. However, there's a long line of Nevada cases that have said that the Nevada Supreme Court has looked to federal guidance on those issues, and this is the analogous federal issue that has come into the LMRA.

09:27:17 I did read the *Rosequist versus International Association of Firefighters Local 1908*, and it does stand for that proposition. But what I found interesting about that case was essentially this: When I read it yesterday, when I was going through it, and I
09:27:32 was really looking at how our Supreme Court handled

09:27:36 this case, and more specifically at the allegations that were claimed in the complaint.

And so -- and I'm looking -- I guess this would have been under Headnote 2 through 5 from what I 09:27:48 can see. Let me see what page of the decision this would be, if I can kind of find it. 448 of the decision. And they stated their *Rosequist* complaint contained numerous allegations. These include breach of the collective bargaining agreement, breach of the 09:28:07 duty of fair representation, improper submission of grievance, breach of the duty of good faith and fair dealings, wrongful termination of employment, and conspiracy to violate the collective bargaining agreement.

09:28:21 So when the Nevada Supreme Court looked at this, and it -- it's really kind of interesting. I think how this all is developing and evolving in the state. They were trying to make a determination as to specifically where this claim should originate. And 09:28:39 one of the things they really just focused on as far as that was concerned, specifically involved the breach of the duty of fair representation. And that's all they really focused on, as far as the case was concerned, to make a determination that, you know, what the EMRB is, 09:28:59 the appropriate place for this from a jurisdictional

09:29:05 standpoint. That's my recollection as to what they did.

And but I felt it kind of interesting because they really didn't address the breach of the collective
09:29:14 bargaining agreement issue at all. So when I look at this, I'm wondering -- it seems like to me, as far as the application of a breach of collective bargaining agreement, the law of the State of Nevada would be unsettled as to whether or not that comes under the
09:29:33 original jurisdiction of the EMRB or whether or not you can go straight to the district court.

MS. FELTS: Agreed. I think there is some issue on that. We haven't taken a particular issue on that. Mr. Levine has pointed out that there's a
09:29:50 related case in the Supreme Court. However, in looking at this *Rosequist* case, it definitely did stand for the fact that these unfair labor practice claims, which a duty of fair representation claim belongs in the sole jurisdiction of the EMRB.

09:30:05 THE COURT: I think that's undisputed.

MS. FELTS: Based on the *Rosequist* case. It seems to me originally also any sort of related breach of contract claim would also fall within that, perhaps EMRB taking a different position, but it's part and
09:30:20 parcel.

09:30:21 THE COURT: The reason I ask that, but if that was true, it appears to me under ***Rosequist***, they would have said that because it was teed up for them in this case, it was teed up right there, that claim was part
09:30:30 of the complaint, and for, along with others, good faith and fair dealing, and for whatever reason they declined to address that.

MS. FELTS: They did, your Honor. They did state, as I mentioned earlier, that they looked to the
09:30:43 federal precedent on these issues and federal guidance, which I think is actually helpful in this case. And that's why we look to the ***Vaca*** and ***Del Costello*** case that said the DFR claim, the duty of fair representation claim, is part and parcel of the breach
09:30:58 of contract claim. And you can't succeed on one without the other, and there is no claim for that. There's no allegations related to that in this complaint.

And the -- and for that it appears based on
09:31:11 this federal guidance, which, like I said, there is several cases within Nevada that look to the federal guidance. In fact, there was one case that actually came I believe to this case -- I mean, and I believe Mr. Levine represented the complainant in that case,
09:31:25 where that also instructed that, you know, you look to

09:31:28 federal guidance on these issues, so ...

THE COURT: But I would -- I would assume we looked at federal guidance, but I'm not convinced the federal statutory scheme is the same, state of Nevada
09:31:37 scheme, are they identical? Are they different? Because, I mean, you know, at the end of the day, I have to look at it from that perspective, because, yeah, we looked lack to the federal court many times, like, say when you came to the rules of civil
09:31:50 procedure, but in many respects Nevada's rule of civil procedure have distinct differences than the federal rules.

MS. FELTS: Sure.

THE COURT: For example, we have 16.1; they
09:31:59 don't. You know, they have their own version under Rule 26, but it's not quite the same.

MS. FELTS: Agreed. The statutory scheme is not identical. In evaluating a breach of contract claim, the case law has indicated that those two goes
09:32:12 hand in hand with the duty of fair representation claim. And in the case of duty of fair representation, it is part and parcel of this. And one of the orders there has been in order to be successful on collective bargaining agreement claim. The *Del Costello* case also
09:32:34 points out the statutory time period in which to bring

09:32:36 that six-month period of time, which we do have an analogous statutory limitation period within Chapter 288 that also includes that six-month limitations period.

09:32:46 THE COURT: I understand. And then we have a little conflict because we have a six-year statute of limitations for written contracts in the state of Nevada. I get that too.

MS. FELTS: Correct. And the *Del Costella* 09:32:57 states and other DUERR, looking at that other and decline to apply that six -- that statute of limitations period for written contracts, and it said, apply the six-month period. And in this case of the LMRA, but the related one in Chapter 288 is 288.110, 09:33:14 subsection 4, apply that and decline to apply the state limitations period and also decline.

THE COURT: But I think I can even -- I didn't read that case, why that would be -- that would be because of federal preemption.

09:33:30 MS. FELTS: I don't know that that was the determining factor.

THE COURT: I would read that, would federal preemption.

MR. LEVINE: Versus Garmin.

09:33:43 THE COURT: I would -- I haven't read the

09:33:44 case, but I would anticipate from a legal logic that would be the reason for it, because Congress has spoken in this area when it comes to collective bargaining outside of the state, local government, federal
09:33:58 employee. I mean state and federal. I'm sorry, state and local government employees. I get that.

MS. FELTS: And also the state has spoken in this area, State of Nevada with Chapter 288 and said that unfair labor practices are separate to the EMRB.
09:34:11 And the thing is this question of whether or not this collective, a breach of the collective bargaining agreement can be advanced without also bringing along the related duty of fair representation claim, which is unfair labor practice, which as you pointed out is
09:34:24 something that belongs with the EMRB.

THE COURT: Here's my next question. What do we do when the EMRB declines to even consider?

MS. FELTS: Well, they have declined to consider because it's beyond the statutory period in
09:34:36 which to bring the claim to the EMRB.

THE COURT: But I'm talking about -- I think that is specifically the position plaintiff is taking. They're saying, "Look, Judge. When it comes to cases specifically involving breach of the collective
09:34:48 bargaining agreement, they will not even entertain

09:34:50 those cases. Is that --

MR. LEVINE: That is correct. I attempted, and been told no. I'll address -- I don't want to interrupt her argument, but you are correct.

09:34:59 THE COURT: I mean, so --

MR. LEVINE: In fact, you saw the amicus brief they filed.

THE COURT: Because I'm going to tell everybody, I read all. I wasn't a labor lawyer. I

09:35:06 didn't practice in employment law, but I just find these areas that come in kind of interesting.

MS. FELTS: Right.

THE COURT: So when -- after Karlie briefed it, and she tees it up and she gives me copies of all

09:35:16 of the cases, I go back and I read everything. Because it's kind of -- I mean, because when I first started, I can't say I knew much about this area. But I like to learn about other areas of the law because I was a tort lawyer.

09:35:28 So because -- I mean, we actually went back and also read the *Allstate versus Thorpe* case and the impact, and it's kind of interesting of how the footnote developed in that case. We spent a little time on this yesterday.

09:35:51 MS. FELTS: Well, to conclude, your Honor, I

09:35:53 still believe that the *Vaca* case is instructive here. And the case cited by the plaintiff in this case just takes an about-face in that position and disregards the required for the DFR, duty of fair representation claim
09:36:08 being advanced at the same time. And, again, I think that steps away from what the Nevada Supreme Court has addressed on these issues, which is to look to guidance from the -- from the federal -- the federal guidance on these issues.

09:36:20 THE COURT: I understand. I just wish they would have taken a more comprehensive look at this when -- in that *Rosequist* case.

MS. FELTS: Agreed.

THE COURT: Because that was their opportunity
09:36:30 to do so. I mean, because there's a lot of different claims here.

All right. Thank you, ma'am.

MS. FELTS: Thank you.

MR. LEVINE: I am actually bringing our
09:36:39 Supreme Court now so they are going to have to decide. I've been trying for a number of years to get the perfect test case in front of them. Now, it is already there. Let me address a couple key points.

Your Honor is correct. The National Labor
09:36:48 Relation Act and the Labor Management Relation Act do

09:36:53 not actually apply because state and political subdivisions employees of such are excluded from the coverage of the act.

There are two approaches that are taken by
09:37:04 court, and I cited them. One is the federal *Vaca* approach. The other is settlement. Both in cases for public employees such as Arnold out of California and Casey. We don't know which standard is going to apply, but what we do know is the courts have always taken the
09:37:25 position, starting with *Vaca*, that when Congress gave employers and employees I think -- I quote that portion -- gave employees of the employers the right to bargain over grievance and arbitration provisions. They did not defend it. No, the intent of -- correct
09:37:41 me if I'm wrong -- to deprive an employee of their right to seek redress in the event that the union prevents the grievance from going forward.

I would analogize likewise when the Nevada legislature passed the Employee Management Relation
09:37:55 Act, Chapter 288, and gave those same sort of bargaining rights to local government employees, it was not the intent of the Nevada legislature as recognized by the US Supreme Court in *Vaca* to likewise deprive employees of their right to seek redress when their
09:38:14 union prevents them from advancing a grievance.

09:38:18 Contrary to the representation of the defendant, paragraph 7 of the complaint.

THE COURT: I did see that.

MR. LEVINE: Specifically says the union 09:38:26 stopped him from going forward. So even if you analogize and look to federal law under the *Vaca* exception, he has the right to pursue it. Now, the contrary or the other line of cases, the Casey case out of Alaska, and the Arnold case out of California say, 09:38:46 hey, notwithstanding, *Vaca* public policies are different because unlike an employee in the private sector for a post-probationary public employee who has a due process from within his employer protection of the amendment. Of course, we all know that requires a 09:39:02 post-termination hearing; whereas here you fire an employee and he can't get to an arbitration which would serve the duty to defend interest of post-termination hearing when he doesn't get it because the union doesn't advance the grievances. Well, all of a sudden 09:39:17 you have a post-probational just cause employee who gets no hearing when they are terminated.

THE COURT: That was the concern articulated by the Alaska Supreme Court in the Casey case. So this line of cases say, "You know what? Notwithstanding 09:39:32 *Vaca*, you don't actually have to show a breach of the

09:39:35 duty of fair representation." Contrary to what the defendant says under *Del Costello*, you do not have to name both. *Del Costello*, the US Supreme Court decision following *Vaca*, makes very clear. You can name the 09:39:47 employer. You can name the union. Or you can name both. But what you have to show in the lawsuit is the same, but the union breached its duty. No, you -- we don't actually know yet whether the Nevada Supreme Court is going to adopt the *Vaca* standard for Nevada.

09:39:59 MR. LEVINE: Some states it's done so or whether they're going to follow the Casey or Arnold approach. I had hoped we would get some guidance last month when I tried the Mark Tansey case in front of Senior Judge Bonaventure. I was hoping he would make 09:40:15 an initial decision at least. Unfortunately, what he said what he found, I'd say unfortunate for me, he found it doesn't really matter that under the fact of the case Mark Tansey met both standards. So he didn't actually have to make that determination, but he did 09:40:27 recognize under *Vaca*, under the due process if the union stops the employee from pursuing a grievance, so that he can get his arbitration or hearing, that then creates the right of the employee to judicially enforce the bargaining agreement in court.

09:40:43 Now, your Honor, spoke to *Rosequist*, and

09:40:46 you're right. The *Rosequist* decision was not as clear as it could have been. We've all experienced that with our Supreme Court from time to time. In their defense, they have one of the highest caseloads in the country
09:40:56 and have a number of years and sometimes may not be able to put as much into every opinion as we would like.

But if you analyze it very carefully, what you will see is there was a claim for breach of contract
09:41:09 against the employer and a bunch of claims for bad faith, breach of duty of fair representation against the union.

THE COURT: I read it.

MR. LEVINE: Those, the claim denies the
09:41:18 employer. The contract claim was not dismissed. It was deposed of by summary judgment. And it was the claims against the union that were dismissed.

If the district court lacks subject matter jurisdiction over the contract claims, all the claims
09:41:34 would have been dismissed as opposed to the contract claim being disposed of by summary judgment. As we know, summary judgment is a disposition on the merits. You can't have the summary judgment, a determination that there are no genuine issue of material fact over
09:41:49 which reasonable people could defer unless the Court

09:41:52 has subject matter jurisdiction.

So while *Rosequist* was not perhaps written as expeditiously as we would like, when you really sort of pencil it down and look at it very close, it's clear 09:42:07 the Court has jurisdiction over the contract claim which went by summary judgment and the other claims against the counsel to the EMRB.

Now, the EMRB has made very clear it does not have jurisdiction to hear contract claims and the law 09:42:21 does not require a person to undertake a futile act in a Tansey matter, of course, and some other cases I tried to get the EMRB to accept jurisdiction. They have refused.

The EMRB in the *Dixon* matter has now filed an 09:42:35 Amicus brief supporting any position that no contract claims go to the Court, the EMRB has jurisdiction only over breach of duty of fair representation claims and unfair labor practices against the unions and the employers. And as I think you understand and the 09:42:50 Supreme Court has made very clear, the courts are supposed to defer in the interpretation of the statutes, which they implement and oversee. Yes, the Supreme Court does have the right to tell the EMRB you will start hearing contract claims, but until the 09:43:05 Supreme Court does so, the position of the EMRB is no,

09:43:08 we don't hear contract claims, which then takes me go the statute of limitations argument.

They argue that a breach of contract claim here in this Court should be subject to a six-month 09:43:20 statute of limitations governing proceedings in front of the EMRB.

With all due respect, that argument makes no sense. Why would a statute of limitations with regards to an administrative agency that doesn't have 09:43:32 jurisdiction over contract claims govern a contract claim in this Court? The simple answer is it doesn't. If, in the future, the Supreme Court says, no, we want the EMRB to hear the contract claims, well, then, maybe a six-month statute of limitations would apply if you 09:43:48 go in front of the EMRB bureau unless and until the Supreme Court tell us the EMRB --

THE COURT: You know, giving this further thought, I even wondered how the EMRB could constitutionally hear a contract claim.

09:44:00 MR. LEVINE: I don't think they can. Administrative -- as well as articulated by Deputy Attorney Davis in Scott Davis in the brief, he offered administrative agencies only have jurisdiction to hear claims that the legislature has authorized them to 09:44:16 hear, the Nevada legislature.

09:44:18 THE COURT: I don't think the Nevada legislature could authorize them to hear breach of contract claims. And if they did, it would be probably in violation of the state constitution.

09:44:28 MR. LEVINE: That's an argument I hadn't contemplated yet. You're most likely right. I haven't actually given it that thought, but it's clear that, and under the circumstances, very clear as made, as evidenced by the brief.

09:44:39 THE COURT: I mean, when you really look at it from this perspective, I understand the charge in the administrative agency. And when we take a look at the *Allstate* case and, I guess, the pull back by the Supreme Court, they said, Look, when it comes to -- let

09:44:55 me see here. I believe it was -- I forget which footnote it was, but, I guess, at the end of the day I can see why you would -- you would have to exhaust specific administrative remedies, and some of them potentially might not be appealable. I get that. But

09:45:14 when it comes to issues regarding contract and breach of contract, ultimately at the end of the day that's the jurisdiction of the courts of general jurisdiction of the state of Nevada.

MR. LEVINE: You took the words out of my

09:45:24 mouth. It's just going to talk further about a Court

09:45:27 of general jurisdiction. I think your Honor stands --

THE COURT: A constitutional analysis, I think that's how it has to go.

MR. LEVINE: I am in agreement with you.

09:45:34 Unless you want to hear further from me on any particular issue, I'd like to segue into my motion to stay.

THE COURT: I mean, we can talk and then they can. Of course, I'm going to make sure everybody gets

09:45:44 more than enough time because this is a really interesting issue.

MR. LEVINE: Right.

THE COURT: This is what the city says. They said, Look, Judge. You know, okay. You have to rule

09:45:51 on our motion whether you -- if you don't grant our motion to dismiss, they feel, you know, what, stay is okay, but, you know, we get to conduct some discovery, Judge. That's why she says because we're concerned about memories fading, and all those good things. And

09:46:07 we want to, you know, maybe we set a trial, but we want to take depositions and find out what happened. And that's why we think a stay would be proper under the facts of this case.

I guess as it relates to the discovery issues,

09:46:18 is that essentially what you said, ma'am.

09:46:21 MS. FELTS: Correct, your Honor. We were concerned that, you know, the stay might be appropriate denial, the pendency of this motion to dismiss, but continuing on with the stay.

09:46:30 THE COURT: Yeah. While the Supreme Court is deciding this larger issue perhaps would be -- which makes kind of --

MS. FELTS: I thought about it.

MR. LEVINE: I understand. And I am prepared

09:46:38 to go forward. My concern is this, which is that for purposes of judicial economy and the resources of the litigants, I don't want --

THE COURT: I understand that too.

MR. LEVINE: -- I don't want to be spending a

09:46:49 bunch of time if the Supreme Court turns around and says, "You know what, EMRB? You're dead wrong. You're going to hear these cases."

I don't want to be spending time having to do discovery on what -- you know, the union's breach of a

09:47:03 duty of fair representation if the Supreme Court is going to come back and say we agree with the approach taken by Arnold and Casey. You don't need that in court. One of the reasons I didn't wait six -- didn't wait for the Supreme Court to rule before I filed this

09:47:19 suit was I wanted to put the City of Mesquite on notice

09:47:23 of the claim rather than sit back. But the issue is now clearly and squarely before the Nevada Supreme Court, such that they're going to have to decide it.

I have tried to do that with the Tansey case, 09:47:34 affirm the EMRB rejected jurisdiction and Judge Cory denied judicial review under the Administrative Procedures Act and said no, the EMRB -- I agree with the EMRB. But I have jurisdiction over the contract claim. I filed an appeal, and, of course, the Supreme 09:47:47 Court said it's not ripe for the appeal because the contract claim isn't adjudicated. Therefore, it's not a final judgment.

But in the *Dixon* case, it's squarely before them, the briefing is done there. They're going to 09:47:58 have to decide. There's no way they can avoid deciding, A, where is the contract claim brought, and, B, under what standards. And given the uncertainties in the state of Nevada law and given the fact that this is going to be clarified, I think judicial economy 09:48:18 weighs in favor of a stay. Although, I am prepared to go forward and do discovery if you feel that a stay is not warranted.

THE COURT: I understand. Ma'am.

MS. FELTS: I think you understand that we 09:48:30 said.

09:48:31 THE COURT: You know what it is? And I don't mind. I'm sitting here contemplating this case, and I'm thinking about it. And clearly from the district court's position, I think all judges, this is kind of
09:48:45 like an issue of first compression, and I sit back and I think about where would be the appropriate place to go with this. And I'm not 100 percent certain yet as to where I would go. Because, I mean, I read everything. I read your motion, ma'am. And you are
09:49:02 correct.

And like in *Rosequist*, that case even talks about looking to the federal law and LRB. I kind of get that. And I'm sitting there and that -- and many times we get into issues in front of me, and they're
09:49:18 fairly clear cut. I think at the end of the day, No. 1, I want to kind of get it right, if you understand where I'm going.

MS. FELTS: Sure.

THE COURT: You know, and I'm not sure what is
09:49:26 right right now. Because there's a lot of really intellectually challenging issues, I guess. So I'm looking at this, and I don't mind making factual decisions because, hopefully, the case you have up there addresses this issue, and so you look at it from
09:49:41 that perspective. But if I had to tee it up and make

09:49:44 the right decision, I guess, ultimately, I'd be making a policy decision also.

MS. FELTS: Agreed, your Honor. And, you know, and it's a decision of probably staying

09:49:59 consistent with what the federal labor laws on these issues have done in the past, and then that's kind of taking a different approach --

THE COURT: We have California.

MS. FELTS: -- with California and Alaska.

09:50:08 THE COURT: I know. I know. So what do we do with this case?

MR. LEVINE: There's one other consideration I'd like to raise, which is one of the other reasons I did ask for the stay, was you already have *Dixon*

09:50:21 squarely in front of them.

THE COURT: How long has *Dixon* been there?

MR. LEVINE: The briefing, the opening brief, and the answering brief are done. My time is ticking on the reply. My reply brief will be filed within 30

09:50:33 days, and then it's going to go under submission. Whether they ask for oral argument is up to them. My thought is the Tansey decision --

THE COURT: I think what I'm going to do is --

MS. FELTS: The Tansey final judgment entered

09:50:44 on Judge Bonaventure last May or April, actually it was

09:50:47 entered this month. I take that back. The 30 days has not run to appeal. Obviously if Clark County appeals that decision, I will notify the Supreme Court in connection with my docketing statement that it's the 09:50:58 same issue pending in front of *Dixon*.

If you were to dismiss this case, you're basically forcing somebody to expend resources in the Supreme Court for an issue that's already been briefed adequately once in *Dixon* and will be briefed a second 09:51:12 time in Clark County. And that was one of the other reasons.

Adding a third case to decide the issue when there's one and about to be a second case in front of them, I'm not really sure it serves any purpose for 09:51:23 purposes of judicial economy.

THE COURT: I understand. I do, ma'am.

Anything else?

MS. FELTS: No, your Honor.

THE COURT: Okay. This is what I think I'm 09:51:38 going to do. And this will be considered, I guess, more of a safe approach as far as the two issues are concerned. Number one, the motion to dismiss, and, Number 2, the request for stay.

Regarding the motion to dismiss, what I'm 09:51:56 going to do at this point, I'm going to deny the motion

09:52:01 to dismiss without prejudice. And you essentially, at least at this point in time, it appears to me that the contract claim original jurisdiction would be with the district court, the court of general jurisdiction.

09:52:21 Secondly, regarding the stay is concerned I'm going to deny the stay. What you're going to do is this: Have you meet with the discovery commissioner and hammer out what would be a reasonable discovery schedule in light of the competing interest.

09:52:46 Mr. Levine, trust me. I respect your position. Say, Look, Judge, we don't want to spend money because we might lose before the Supreme Court. I mean, I get that. I practiced as a private practitioner. I spent a lot of time on behalf of

09:53:01 plaintiffs. Sometimes you lose a lot of money. I get that.

But competing with that I have the duplicative rights of -- and I think, you know, justice delayed is justice denied, and at least from this perspective they

09:53:14 should be able to conduct some discovery. I don't know specifically what that is, but I worked with Commissioner Bulla for 10 years, so I can tell you that. And -- and she's very insightful when it comes to that because I've known her for a long time so I

09:53:28 think that's kind of like the way we do -- we'll do

09:53:31 this.

And it's kind of -- it's really an interesting case. And maybe in three months, five months, or whatever it will be, at least the city wouldn't have 09:53:40 been prejudiced from a discovery standpoint, and they get what they have to get done, and then who knows. Maybe it will be ripe for summary judgment or maybe we will have some clarity by the Supreme Court, and we can make a decision as to whether or not the Supreme Court 09:53:54 said, Look, we have to -- those two claims have to be combined, and we're following federal law as precedent in the case. Or they might say no. Maybe we're going to say you can bring that separate, especially under a factual scenario where the union fails to pursue the 09:54:12 claim in the appropriate administrative arena. I don't know.

But I think that's probably the best way to handle it from a cautious standpoint today. So I just wanted to tell you why I ruled the way I ruled.

09:54:26 MR. LEVINE: Your Honor, understand. Instead of -- just as a sort of procedural housekeeping issue instead of ordering us to go in front of the discovery commissioner, I think under 16.1 the parties can stipulate and try to work out a plan for limits, and if 09:54:39 we can't --

09:54:41 THE COURT: You're probably right from an efficiency standpoint. 16.1 mandates you meet and confer. And if you have a problem, you know, you can go in front of discovery commissioner if it's a small
09:54:52 problem. You can even come before me.

MR. LEVINE: Okay.

THE COURT: Save you time.

MR. LEVINE: How do we do -- do we have to stipulate right now that discovery issues will come
09:54:59 before you?

THE COURT: No. I want you -- it depends. I don't want you to come before me for every discovery issue.

MR. LEVINE: Okay.

09:55:05 THE COURT: I'm just more concerned about the discovery issues, getting a jump start --

MR. LEVINE: Okay.

THE COURT: -- on discovery, regarding any key depositions and comments the city might need to
09:55:18 preserve its due process rights.

MR. LEVINE: That's fine.

THE COURT: That's all I'm really concerned with and try to work it out first.

MR. LEVINE: I just didn't want the order to
09:55:25 say we had to go in front of the commissioner and we

09:55:28 can fully work it out --
THE COURT: Work it out.
MR. LEVINE: -- through the normal 16.1 process.
09:55:32 THE COURT: Work it out.
MS. FELTS: Your Honor, if I may.
THE COURT: Ma'am.
MS. FELTS: Point of clarification. We would be proceeding just on the breach of contract claim.
09:55:38 THE COURT: Absolutely.
MR. LEVINE: Yes.
MS. FELTS: And that's all we're worried about.
THE COURT: That's all you're concerned about
09:55:41 from the discovery standpoint.
MS. FELTS: Appreciate it.
MR. LEVINE: Okay. May I have the liberty of trying to draft the order? Running it by --
THE COURT: You can handle it this way. You
09:55:49 can. Sir, I have no problem if counsel wants to, but make sure --
MR. LEVINE: No, I guess to run it by her for approval for form and content.
THE COURT: All right. Well briefed. It was
09:56:00 very interesting, Counsel. Thank you.

09:56:02 MS. BRUCH: Thank you, your Honor.

MS. FELTS: Thank you.

MR. LEVINE: I'm sorry about being only in this case of time.

09:56:06 THE COURT: That's okay.

(THE PROCEEDINGS WERE CONCLUDED.)

* * * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

/s/ Peggy Isom
PEGGY ISOM, RMR, CCR 541