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

Electronically Filed
Apr 12 2019 03:34 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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.: 75743

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

# PETITIONER'S SUPPLEMENTAL BRIEF

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

## NRAP 26.1 DISCLOSURE STATEMENT

Petitioner certifies that there are no persons or entities, as described in NRAP 26.1(a), who must be disclosed. There are no corporations or publicly-held companies which Petitioner must disclose. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Petitioner is represented by Rebecca Bruch, Esq. and Charity F. Felts, Esq., of the law firm of Erickson, Thorpe & Swainston, Ltd. Mr. Smaellie is represented by the Adam Levine, Esq., of the Law Office of Daniel Marks.

DATED: April 12, 2019

/s/ Charity F. Felts
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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## Statutes



## Other Authorities

# PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner City of Mesquite (the "City"), submits this Supplemental Brief in response to the Court's *Order Directing Supplemental Briefing* dated February 26, 2019, in which the Court requested that specific issues raised by Amici's briefing be addressed by the parties.

## I. INTRODUCTION

There is a great deal of history in this case. The original complaint filed on February 19, 2014, resulted in dismissal, was appealed to this Court, and resulted in an *Order Affirming in Part and Vacating in Part*. VI APP 018-019; V1 APP 025-027. That Order approved the filing of a hybrid action with the District Court. Following that, a new complaint was filed on August 10, 2017, advancing a hybrid action consisting of a breach of contract claim against the City and a breach of the duty of fair representation claim against the Union. V1 APP 001-003. The City filed a Motion to Dismiss in District Court, seeking dismissal on the basis that the duty of fair representation claim, a key and necessary component to the hybrid action, was beyond the six-month statute of limitations and thus subject to dismissal. V1 APP 005-010. The City further argued that even if the District Court were to borrow from other limitations periods, the action is still time barred. V1 APP 011-013. Mr. Smaellie argued that the applicable limitations period is six

years for written contract. V1 APP 034-043. The District Court agreed and the City's writ petition followed. V3 APP 286-287.

The limitations period applicable to Mr. Smaellie's action is an issue of vital importance to all those affected by Nevada public-sector labor relations, namely local government employers, unions, and employees. As such, an Amicus Brief was filed by a number of local government employers imploring this Court to grant the City's writ petition. The Court has asked the parties to specifically weigh in on the arguments advanced by Amici in this case.

## II. LEGAL ARGUMENT

In its *Order Directing Supplemental Briefing*, the Court summarized the arguments contained in Amici's brief. The City will address each one in detail below but provides the following summary regarding each of these arguments.

(1) The City agrees with Amici's first argument that if a duty of fair representation claim is not raised within the six-month limitations period set by NRS 288.110(4), it is untimely. That limitations period would likewise be applicable to a hybrid action relying on a duty of fair representation claim.

(2) The City agrees with Amici that prior Nevada law has held that the EMRB has exclusive jurisdiction over duty of fair representation claims.

The Court previously rejected, in *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 447, 49 P.3d 651, 653 (2002), *overruled on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007), the exception created by *Vaca v. Sipes*, 386 U.S. 174 (1967) for private-sector employees to advance a hybrid action. If the Court agrees with Amici and elects to rely on *Rosequist*, then Mr. Smaellie's fair representation claim must have been brought to the EMRB within six months.

(3) *Clark County v. Tansey*, Case No. 68951, was an unpublished decision that relied on the federal private sector approach in *Vaca* and *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151 (1983), and concluded that the District Court has subject matter jurisdiction over hybrid actions. Chapter 288 does not provide for a hybrid action although it does permit a duty of fair representation claim to proceed as an unfair labor practice under that Chapter. Federal public-sector employees and Nevada local government employees are not similarly afforded a hybrid action by statute. If the Court elects not to continue to look to federal private-sector law for guidance on hybrid actions, then the result would be that no hybrid action may be brought in District Court and the EMRB is the

proper forum for unfair labor practice claims; however, any such action would be untimely pursuant to NRS 288.110(4).

**A. Amici argues that claims for breach of the duty of fair representation must be brought before the EMRB within six months, which would include any hybrid action relying on that claim.**

The hybrid action is a judicially-created creature in that Chapter 288 does not specifically provide for enforcement of such a claim. Instead, it has been borrowed from federal private-sector law. That federal private-sector law provided the basis for this Court's *Order Affirming in Part and Vacating in Part* in the appeal of the dismissal of Mr. Smaellie's Complaint #1. V1 APP 025-027. That Order noted that Mr. Smaellie was unsuccessful in bringing his hybrid action because he did not properly allege it in Complaint #1. *Id.* In that same Order, this Court relied on *Vaca*, *DelCostello* and the prior unpublished order in *Clark County v. Tansey*, when it determined that a District Court has subject matter jurisdiction to hear a hybrid action against an employer for breach of the collective bargaining agreement and against the union for breach of the duty of fair representation. *Id.* That was the backdrop for the second complaint filed by Mr. Smaellie and the City's Motion to Dismiss seeking to dismiss that complaint due to the expiration of the statute of limitations.

The City agrees with Amici that all roads lead to the application of a six-month limitations period. This is true regardless of whether the Court agrees with Amici's arguments or elects to continue its extension of *Vaca* and *DelCostello* to permit hybrid actions to be filed in District Court. *DelCostello* considered the precise issue of what limitations period should apply to hybrid actions and selected the six-month limitations period stated in the National Labor Relations Act ("NLRA") for claims of unfair labor practices. However, the Court need not rely solely on *DelCostello* to determine that the applicable limitations period is six months. It is clearly provided for under state law at NRS 288.110(4).

The claims at issue in the case are born from the collective bargaining relationship between the local government employer, employee, and union. The claim for breach of the duty of fair representation plainly demonstrates that this is not a run-of-the-mill breach of contract claim. Mr. Smaellie is not suing the City because it did not deliver an agreed-upon number of widgets. He is suing the City because he believes the City violated or exceeded the just cause provisions of the negotiated collective bargaining agreement ("CBA") and because the Union breached its duty of fair representation when it declined to advance his grievance concerning the termination to arbitration. V1 APP 002-003.

A duty of fair representation claim is clearly an allegation of an unfair labor practice. *Rosequist*, 118 Nev. 444, 447, 49 P.3d 651, 653 (2002). Thus, the six-month limitations period found at NRS 288.110(4) would apply. The view that the state statute of limitations for bringing an unfair labor practice claims should apply to claims brought to the District Court for breach of the duty of fair representation has been endorsed by other state courts. In *Ray v. Org. of Sch. Administrators & Sup'rs, Local 28, AFL-CIO*, 141 Mich. App. 708, 711, 367 N.W.2d 438, 440 (1985), the court summarily found the six-month limitations period under the state Public Employment Relations Act should apply to a public employee's claim against his union for breach of the duty of fair representation. *See also, Carlson v. N. Dearborn Heights Bd. of Educ.*, 157 Mich. App. 653, 403 N.W.2d 598 (1987) (applied the six-month limitations period found in the Public Employment Relations Act); *Leider v. Fitzgerald Educ. Ass'n*, 167 Mich. App. 210, 421 N.W.2d 635 (1988) (rejecting the public employee's suggestion to apply the common-law three-year limitations period and applying the six-month period applicable to unfair labor practices claims filed with the Michigan Employment Relations Commission).

Local government employers, unions, and employees are all aware, or presumed to be aware, of the six-month limitations period found in Chapter 288.

*See* NRS 288.110(4); *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915) ("Every one [sic] is presumed to know the law and this presumption is not even rebuttable."). The application of the six-month limitations period found in Chapter 288 to unfair labor practices such as fair representation claims does not exact an unfair result. It is plainly set forth by the statutory framework which sets the standards and expectations of the relationship between local government employers, employees, and unions. There can be no genuine complaint of unfair surprise by virtue of the application of this statutory limitations period.

Furthermore, Mr. Smaellie had every opportunity to bring his duty of fair representation claim to the EMRB for its review. Under Nevada law, he could have even brought an unfair labor practice claim against the City for unilateral change – a variation on a breach of contract theory. Such a theory has been presented to the EMRB in the past and has undoubtedly been subject to the jurisdiction of the EMRB. This was the case in *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002). In *City of Reno*, the police officer employee alleged the city violated Chapter 288 when it adopted new criteria for disciplining police officers for off duty conduct without conducting mandatory negotiation on that subject as required by NRS 288.150. *City of Reno*, 118 Nev. at 892. According to the police officer employee, the newly-adopted

disciplinary criteria amounted to a unilateral change which in turn is an allegation of an unfair labor practice. The *City of Reno* case demonstrates the availability of an unfair labor practice claim when an employee alleges that the disciplinary criteria used by the local government employer is allegedly beyond the agreed-upon criteria in the collective bargaining agreement. *See also*, *Mark Anthony Boykin v. City Of North Las Vegas Police Department*, 2010 WL 5647505, at *6 (The Board has jurisdiction over unilateral change claims even if it requires the construction of the collective bargaining agreement.). The forum for such a claim is the EMRB and the limitations period is six months. *City of Reno* at 900; NRS 288.110(4).

**B. Amici argues that the EMRB has exclusive jurisdiction over a claim of breach of the duty of fair representation and this Court, via *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, rejected the exception found in *Vaca v. Sipes*.**

The City further agrees with Amici that unfair labor practice claims fall within the jurisdiction of the EMRB. *Rosequist v. Int'l Ass'n of Firefighters Local 1908*, 118 Nev. 444, 49 P.3d 651(2002). The unpublished decision in *Tansey* and the first *Smaellie* appeal departed from *Rosequist* by allowing the fair representation portion of the hybrid action to proceed in District Court. Thus, the parties to this case worked within those parameters following the issuance of the *Order Affirming in Part and Vacating in Part*. However, it is admittedly difficult

to reconcile the EMRB's jurisdiction over a duty of fair representation claim and the District Court's concurrent jurisdiction over a hybrid action which must consist of a breach of contract claim and a fair representation claim.

In *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. at 895, this Court held that the EMRB has exclusive jurisdiction over unfair labor practices. The same was true in *Rosequist*. In both decisions, this Court looked to the NLRB for guidance on issues involving the EMRB. At issue in *City of Reno* was whether the city had engaged in a prohibited practice by unilaterally changing criteria used to discipline a police officer for off-duty conduct. This was an allegation of an unfair labor practice. *City of Reno*, 118 Nev. 892-93. Mr. Smaellie's allegation of termination without just cause "based upon an off-duty arrest in connection with his private life" is similar to the allegations in *City of Reno*. V1 APP 002, ll. 7-9. More specifically, the terminated police officer in *City of Reno* alleged that the city used criteria for the termination decision that was beyond that which was negotiated pursuant to NRS 288.150 and the city therefore engaged in a prohibited labor practice. This was a viable theory advanced to invoke the jurisdiction of the EMRB in the *City of Reno*.

The EMRB itself, with its six-month limitations period, has also determined that it has jurisdiction over unilateral change claims even when such claims require

the Board to construe a CBA. *Mark Anthony Boykin v. City Of North Las Vegas Police Department*, 2010 WL 5647505, at *6 (Nov. 12, 2010). There currently exists a cohesive system for bringing unfair labor practices claims to the EMRB, and such claims can include the duty of fair representation and unilateral change, by way of example. Mr. Smaellie elected not to advance a unilateral change theory in this case. In fact, he never sought any form of relief by filing a Complaint with the EMRB. His decision was to proceed straight to the District Court.

Amici correctly point out that, pursuant to *Rosequist*, a duty of fair representation claim is an unfair labor practice that falls within the exclusive jurisdiction of the EMRB. *Rosequist*, 118 Nev. at 449. In *Rosequist* the firefighter employee claimed breach of the collective bargaining agreement as well as breach of the duty of fair representation, the same claims present in this case. This Court noted the exception to the exclusive jurisdiction of the NLRB in *Vaca*, but further noted the application of that exception to situations in which the union has sole power to invoke the higher stages of the grievance procedure and the union wrongfully prevents the employee from processing a grievance. *Rosequist*, 118 Nev. at 449.

The Court in *Vaca* was concerned about a union member's ability to receive fair review of his complaint when the NLRB has unreviewable discretion to refuse

to hear the complaint. *Id.* But that same concern was not present in *Rosequist* as pointed out by this Court. *Id.* at 450. Decisions of the EMRB are subject to judicial review. *Id.* That continues to be the case. Thus, this Court can elect to apply *Rosequist* to this case rather than *Vaca* and *DelCostello* and find that allegations of unfair representation by the union be heard by the EMRB exclusively. If that were the result, the Court would also be bound by the clear dictates of NRS 288.110(4) which requires such a claim to be brought within six months.

This Court has a history of looking to federal precedent and the NLRB for guidance on issues involving the EMRB. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. at 896; *Rosequist*, 118 Nev. at 449; *Weiner v. Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 832 (2005). However, recently, this Court has acknowledged that it is not always bound by federal law when interpreting sections of Chapter 288. *Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, 134 Nev. Adv. Op. 86, 429 P.3d 658 (2018). In *Local Gov't Employee-Mgmt. Relations Bd. v. Educ. Support Employees Ass'n*, the Court declined the EMRB's request to follow federal case law to "fill in gaps" in the statutes the EMRB administers. This Court found that the statutes were unambiguous and there were "no gaps for the Board to fill." *Id.* at 663. Thus, the

EMRB was required to adhere to the clear language of the statute, "irrespective of the outcome." *Id.*

Here the state statute on point clearly calls for the filing of an unfair labor practice claim with the EMRB within six months. The outcome is such that Mr. Smaellie's attempted hybrid action is time barred.

### C. Amici argues that *Clark County v. Tansey*, which allowed a claim for the breach of the duty of fair representation as part of a hybrid action, was wrongly decided.

Amici are at liberty to view this case through a different lens in that they were not parties to the first action which was resolved by way of an *Order Affirming in Part and Vacating in Part* in which the Court relied on *Vaca*, *DelCostello*, and *Tansey* in its reasoning.

This Court departed from *Rosequist* when it issued its unpublished decision in *Clark County v. Tansey*, and again when it issued its *Order Affirming in Part and Vacating in Part* in *Smaellie v. City of Mesquite*, Case No. 69741. In both instances the Court relied on the suggested federal precedent found in *Vaca* and *DelCostello* and held that a hybrid action could be brought in District Court but must include the two inextricably intertwined claims. Mr. Smaellie noted the decision in *Tansey* when he filed *Appellant's Supplemental Authorities Pursuant to NRAP 31(e)* on March 13, 2017, in Case No. 69741.

These unpublished decisions, especially the *Order Affirming in Part and Vacating in Part*, clearly stated that Mr. Smaellie did not previously allege the duty of fair representation claim, that such a claim was necessary, and dismissal of the complaint was appropriate. Thus, as of April 17, 2017, Mr. Smaellie had not properly brought a duty of fair representation claim. V1 APP 025-027. This time period far exceeds the six-month limitation period set forth in NRS 288.110(4).

Further, Mr. Smaellie's complaint and claims can be distinguished from those advanced in *Tansey* because Mr. Tansey, who was also represented by Mr. Levine, exhausted his available grievance procedures, the union declined to bring his claim to arbitration, and the complaint was later dismissed by the EMRB before it was reviewed by the District Court. V1 APP 029-030. Mr. Smaellie never filed a complaint with the EMRB in this case.

It was not lost on Amici that Mr. Smaellie is attempting to state a claim founded upon a Section 301 hybrid action as created by *Vaca* while at the same time "selectively eschew[ing] that same foundation when confronted with a statute of limitations challenge." *See* Brief of Amici, p. 10. Complaint #2 filed by Mr. Smaellie seeks to advance his hybrid action by relying on *Vaca*. Mr. Smaellie, along with his original counsel, elected not to pursue a duty of fair representation claim against the Union within the six months after his termination on February 19,

2013. V1 APP 001-003; V3 APP 236, ll.15-16. Instead, one year later, with his new counsel, Mr. Levine, Mr. Smaellie filed a single cause of action against the City for breach of contract, on February 19, 2014. V1 APP 001-003.

Mr. Smaellie has characterized his complaint as a hybrid action. V1 APP 003. He wants to move forward in the District Court, presumably because the limitations period applicable to EMRB cases expired before he took action. But his request is disingenuous. He seeks to move forward in the District Court at his own leisurely pace because he argues the standard six-year limitations period for written contracts should apply. *See* NRS 11.190. He wants the application of *Vaca* and *DelCostello* to push his hybrid action to the District Court while conveniently ignoring the remainder of *DelCostello*, which extended *Vaca* and applied the six-month statutory limitations period applicable to unfair labor practice claims. *See e.g.*, V3 APP 240. To allow Mr. Smaellie to cherry pick and rely on only the components most favorable to a situation of his own making renders an unjust result. *See City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 639, 261 P.3d 1071, 1076 (2011) (six-month limitations period found in NRS 288.110(4) is modeled after section 10(b) of the NLRA). That result morphs a six-month limitations period into a tortured six-year

limitations period and destroys any reliable finality in local government labor relations.

If the Court wants to recognize the availability of a hybrid action by analogy to federal private-sector law, the result should not allow for an expansive six-year limitation period in which to bring the action. The City agrees with Amici that this would fly in the face of public policy relative to local government collective bargaining relationships.

If this Court elects to continue to recognize hybrid actions but assigns a six-year limitations period to these actions, then it will result in an inconsistent application of limitations periods to unfair labor practices. The employee who advances a duty of fair representation claim to the EMRB will be subject to a six-month limitations period. The employee who brings a hybrid action, which includes a fair representation claim, to the District Court will be subject to a six-year limitations period.

Different limitations periods for different employees are inherently unfair and would produce unreasonable and inconsistent results. This was the decision of the Court of Appeals of Washington when it determined that an employee who proceeded directly to the Superior Court with a breach of contract action against his public employer and a duty of fair representation claim against his union must

do so within the time period set by state statute for unfair labor practices. *See Imperato v. Wenatchee Valley Coll.*, 160 Wash. App. 353, 364, 247 P.3d 816, 821 (2011). Washington, like Nevada, has a six-month limitations period for public-sector unfair labor practice claims. The Washington court reasoned that "[a]pplying a six-month statute of limitations places state employees and private employees on equal footing. Moreover, a six-month statute of limitations provides consistency and predictability to both employees and employers." *Id.* at 364, 821. This type of consistency promotes a greater degree of certainty and fairness and prevents claims from languishing for up to six years.

## III. CONCLUSION

The City's writ petition asks this Court to reject the District Court's determination that the applicable statute of limitations period in this case is six years under NRS 11.190. There is overlap in the arguments of Amici and the City. Regardless of which theory this Court embraces – a return to *Rosequist* or continuing to extend *Vaca* and *DelCostello* hybrid actions – the result is still the same and a writ should issue to compel the District Court to apply the limitations period applicable to unfair labor practices and dismiss Mr. Smaellie's Complaint.

The limitations period for a hybrid action, which includes a fair representation claim as a necessary component, requires application of the six-

month period found in NRS 288.110(4). The result is likewise the case under Amici's theory that a duty of fair representation claim must be brought to the EMRB within six months. To apply a six-year limitations period would be to ignore the nature of the action advanced by Mr. Smaellie and would further result in unpredictability and inconsistency in labor relations between local government employers, employees, and unions.

DATED: April 12, 2019

/s/ Charity F. Felts
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

## CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 28 & 32

1. I hereby certify that this Supplemental 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 Microsoft Word in font 14 Times New Roman.

2. Excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 points or more, and contains 3,781 words, and 17 pages.

3. Finally, I hereby certify that I have read this Supplemental 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 Supplemental Brief complies with all applicable Nevada Rules of Appellate Procedures, in particular NRAP 28(e), which requires every assertion in the Supplemental 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.

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

DATED this 12th day of April, 2019.

/s/ Charity F. Felts
Charity F. Felts, Esq.
Nevada Bar No. 10581
Erickson, Thorpe & Swainston, Ltd.
99 W. Arroyo Street
Reno, Nevada 89509
(775)786-3930
cfelts@etsreno.com
Attorneys for Petitioner
City of Mesquite

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1), I certify that I am an employee of Erickson, Thorpe & Swainston, Ltd., and that on this date I caused to be served from Reno, Nevada, a true and correct copy of the Petitioner's Supplemental Brief via US Mail addressed to:

The Honorable Gloria Sturman
Eighth Judicial District Court, Dept. 26
200 Lewis Avenue
Las Vegas, NV 89155

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

DATED this 12th day April, 2019.

/s/ Jennifer Jacobsen
Jennifer Jacobsen