IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY DEPARTMENT OF AVIATION, Appellant, VS. SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, AND OFFICE OF THE LABOR COMMISSIONER, Respondent.	NO: 80798 REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

The Southern Nevada Labor Management Cooperation Committee ("LMCC") hereby responds to the Clark County Department of Aviation's ("DOA") Response to the Court's April 17, 2020 Order to Show Cause.

Dated May 28, 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*
Evan L. James, Esq. (7760)
7440 W. Sahara Avenue
Las Vegas, NV 89117
Tel.: (702) 255-1718
Fax: (702) 255-0871
Attorneys for Respondent

NRAP 26.1 DISCLOSURE

In accordance with NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. LMCC is a federal Taft-Hartley trust fund existing under the authority of 29 U.S.C. §§ 175a(a) and 186(c)(6) and pursuant to a collective bargaining agreement ("CBA") between the International Union of Painters and Allied Trades District Council No. 16, Local Union No. 159 ("Union") and various contractors and construction trade organizations and is not affiliated with any corporation. The names of the current Trustees or alternate Trustees who manage the LMCC are Robert Williams, Daniel Lincoln, Jason Lamberth, Thomas Pfundstein, Terry Mayfield, Bob Campbell, Harold Daly, and Mike Davis.

2. The only law firm that has appeared or is expected to appear for LMCC in this case is Christensen James & Martin, 7440 W. Sahara Ave., Las Vegas, Nevada 89117.

3. If litigant is using a pseudonym, the litigant's true name: N/A

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

The Court's question to the DOA is why was your Motion for Reconsideration not a tolling motion? The short answer to that question is that the motion did not meet the requirements for a motion to reconsider, but it could be construed as and was in fact treated by the District Court as a motion for clarification. *See* Appellant's App. at 89:24-25, 90:1-7, hearing transcript of March 31, 2020 hearing on Motion to Reconsider; *see also* Respt's App. at 2:11-26.[1]

Most of the DOA's response to this Court's Order to Show Cause complains that the District Court's Order was wrong. The correctness of that Order is a matter for the appeal briefs and not a response to the Order to Show Cause. Nevertheless, the LMCC's three-pages of argument filed with the District Court in opposition to the Motion for Reconsideration effectively address the DOA's argument. LMCC argued that DOA's Motion for Reconsideration was in reality a motion to clarify the District Court's Order, that clarification of the Order was unnecessary (although not opposed if doing so helped everyone understand matters better), and that the Order was a final judgment appealable to this Court. *See* Respt's App. at 2-5. The District

[1] The appendix is for this brief only and is not intended to be a complete record. Should the court determine it has jurisdiction, either LMCC will file a joint appendix with DOA or file a separate appendix if an agreement on a joint appendix cannot be reached.

Court agreed with the LMCC. *See* Appellant's App. at 90-91. Thereafter, the LMCC submitted a proposed Order to the District Court. *See* Respt's App. at 7-9.

The District Court has yet to enter an Order on DOA's Motion for Reconsideration, but the transcript of the hearing clearly indicates the Court treated the motion as one for clarification. Key to understanding the District Court's original Order Granting LMCC's Petition for Judicial Review and the District Court's position on the Motion for Reconsideration is the idea that the Labor Commissioner, while evaluating wages owed for work performed under the flooring contract at issue, may stumble across work performed outside the terms of the flooring contract at issue and that work may be maintenance. The District Court made clear that it is not binding the Labor Commissioner on such work and that the Labor Commissioner is free to investigate that work as she deems fit. However, as to the work actually performed under the flooring contract, the Labor Commissioner's role is to calculate the amount of back wages due and see that workers are paid. In simple terms, issues as to what the flooring contract is and what it says are over, and the Labor Commissioner's role on remand is to perform the ministerial tasks of calculating, collecting and distributing wages. Work falling outside of the flooring contract will not be affected by the District Court's ruling.

The District Court's Order is sensible. If the work is outside the flooring contract, then it was not addressed in the LMCC's administrative complaint nor the

Petition for Judicial Review. If the Labor Commissioner happens to discover such work, she is free to proceed under her own powers without fear of violating the District Court's Order.

The DOA's September 5, 2019, letter to the District Court Judge was unfortunate. LMCC responded to that letter on September 6, 2019, and identified how the DOA had, after losing on the briefing and in oral argument, sought to gain advantage by having the District Court enter an Order inconsistent with issues presented, arguments made, and the Court's oral ruling. *See* Respt's App. at 10-14. That effort continues on appeal because the DOA's true goal is to relitigate matters already addressed at the administrative and District Court levels.

CONCLUSION

Despite being called "Motion for Reconsideration," the DOA's Motion was not a tolling motion because it failed to meet reconsideration requirements and was treated as motion to clarify the District Court's Order granting the Petition for Judicial Review. As such, this Court has jurisdiction over DOA's appeal.

Dated May 28, 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*

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Tel.: (702) 255-1718
Fax: (702) 255-0871
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the date the above document was filed with the Court, it was served in accordance with NRAP 25(c)(1)(E) upon the following individuals:

Mark J. Ricciardi, Esq.	mricciardi@fisherphillips.com
Allison L. Khell, Esq.	akheel@fisherphillips.com
Andrea Nichols, Esq.	anichols@ag.nv.gov

/s/ Evan L. James
Evan L. James, Esq.

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY DEPARTMENT OF AVIATION, Appellant, VS. SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, AND OFFICE OF THE LABOR COMMISSIONER, Respondent.	NO: 80798 APPENDIX REPLY TO APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

The Southern Nevada Labor Management Cooperation Committee ("LMCC") hereby submits an Appendix to its Reply to Appellant's Response to Order to Show Cause.

Dated May 28, 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*
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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, by and through its Trustees Terry Mayfield and Chris Christophersen, Petitioner, vs. CLARK COUNTY NEVADA, DEPARTMENT OF AVIATION, a political subdivision of the State of Nevada; and THE OFFICE OF THE LABOR COMMISSIONER, Respondents.	Case No.: A-18-781866-J Dept. No.: 25 **OPPOSITION TO MOTION FOR RECONSIDERATION** **HEARING REQUESTED**

CHRISTENSEN JAMES & MARTIN, CHTD.
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PH: (702) 255-1718 § FAX: (702) 255-0871

COMES NOW, Petitioner, Southern Nevada Labor Management Cooperation Committee, by and through its Trustees Terry Mayfield and Chris Christophersen[1] ("LMCC"), by and through its attorney, Evan L. James, Esq. of the law firm of Christensen James & Martin, and hereby opposes Clark County Department of Aviation's ("DOA") motion for reconsideration ("Motion").

///

///

[1] The original Trustee, John Smirk, identified in the administrative proceedings left office and no longer has authority to act on behalf of the Petitioner. As such, his name is substituted with a current and authorized Trustee.

DATED this 28th day of February 2020.

CHRISTENSEN JAMES & MARTIN

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I

ARGUMENT

1. The Motion is for clarification not reconsideration.

DOA's motion is a motion for clarification and not reconsideration. LMCC does not oppose clarifying – if necessary – a court order, but it does oppose reconsideration of this Court's Order.

Motions for reconsideration are governed by EDCR 2.24 and must be made within 10 days of notice of the entered order. DOA's motion for reconsideration must "present[] … new evidence to this court to serve as a basis for reconsideration under EDCR 2.24", *Matter of Trust of JMWM Spendthrift Trust,* 2016 WL 5800381, at *1 (Nev., 2016), or argue that the "court misinterpreted [a] point of law." *Feda v. Nevada,* 2016 WL 7190008, at *1 (Nev.App., 2016). DOA presents no evidence nor does it argue that the Court misinterpreted law. Rather, DOA argues the Court's Order is unclear regarding retained jurisdiction and that the Court got the maintenance issue wrong – not that it misinterpreted the law.

The motion seeks clarity as to 1) whether the Order is contradictory and 2) the scope to which the Court may retain jurisdiction. As shown below, the Order is fine on both issues.

2. DOA's conflict argument is wrong.

Paragraph 7 is the source of DOA's consternation. Paragraph 7 reiterates the following two existing legal points:

1) The Court retains jurisdiction to enforce its order. *Seem Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2205, 557 U.S. 137, 151 (2009) (holding that a court had jurisdiction to interpret and enforce its own orders); *See also, Las Vegas Metropolitan Police Department v. Eighth Judicial District Court in and for County of Clark*, 2018 WL 6264749, at *3 (Nev., 2018) ("the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order.").

2) Parties may seek judicial review of the Labor Commissioner's final order regarding the remanded matter. See NRS 233B. This Court acts as the first appellate court of review for the Labor Commissioner's decisions. *See Westside Charter Service, Inc. v. Gray Line Tours of Southern Nevada,* 99 Nev. 456, 459, 664 P.2d 351, 353 (1983). ("It is generally accepted that where an order of an administrative agency is appealed to a court, that agency may not act further on that matter until all questions raised by the appeal are finally resolved.")

The Labor Commissioner and parties are therefore subject to the Court's orders and must obey those orders. Paragraph 6 of the Court's Order directs that the LMCC must be allowed as a participant in the remanded proceedings before the Labor Commissioner. Paragraph 7 then clarifies that if the LMCC or any party is being excluded from receiving information necessary for participation, this Court may consider the matter by enforcing the participation directive in Paragraph 6 of the Court's Order.

Paragraph 7 of the Order also acknowledged the legal right to petition the Court for "further review, if any, as may be sought by the parties." Review is sought pursuant to NRS 233B. Plaintiffs mistakenly read into Paragraph 7 the idea that the Court has retained jurisdiction so as to usurp the Labor Commissioner's statutory authority and

responsibilities. Nowhere does the Order say that the Court retains jurisdiction over the Labor Commissioner's decision making authority of the remanded matter.

3. DOA misapplies the *City of Boulder City* case. [2]

DOA misunderstands the *Southern Nevada Labor Management Cooperation Committee v. City of Boulder City & MMI Tank, Inc.*, Case No. 68060, Doc. 16-14802 it cites to for jurisdictional purposes. In *City of Boulder City*, defendant Boulder City asked the district court to 1) stay the case while at the same time asking the court to 2) dismiss the case. The Nevada Supreme Court correctly pointed out that a court cannot retain jurisdiction over a dismissed case. This Court has not dismissed this Case, so *City of Boulder City* does not apply. Indeed, this Court has made findings and directed the parties to take actions to resolve the case consistent with the Court's Order. DOA's Motion really seeks an order by the Court that limits the Court's ability to enforce its remand Order, i.e. "I have no jurisdiction to enforce my remand Order because the Labor Commissioner has jurisdiction over the case now." If an appellate court lacks jurisdiction to enforce its remand orders then the appellate court has no authority at all.

4. This Court's Order is a final judgment appealable to the Supreme Court.

DOA asks the Court to confirm its remand Order is a final judgment for appellate review. [I]n the administrative context, a district court order remanding a matter to an administrative agency is not an appealable order, unless the order constitutes a final judgment on the merits and remands merely for collateral tasks, such as calculating benefits found due." *Wells Fargo Bank, N.A. v. O'Brian,* 129 Nev. 679, 680-81, 310 P.3d 581 (2013). In our Case, the Court's Order in consistent with the rule articulated in *Wells Fargo Bank, N.A.* because it directed the Labor Commissioner to determine how much money (i.e. benefits) is owed to employees in back wages.

[2] Undersigned counsel represented the LMCC in the *City of Boulder City Case* and has firsthand knowledge of the matters explained in this Brief.

To be clear, the Court found that the contract issued by DOA was not a maintenance contract as argued by DOA. As such, no work done under the contract will constitute maintenance. However, the Court recognized, at the request of the Deputy Labor Commissioner who attended the hearing, that workers may have performed some maintenance outside the contract work and that it would be improper to pay prevailing wage rates on such work. The matter was therefore remanded to the Labor Commissioner so that she could determine wages owed considering contract work vs. noncontract maintenance work. The substance and core issues, however, are resolved, making the Court's Order final.

II

CONCLUSION

The Motion must be denied for the foregoing reasons.

DATED this 28th day of February 2020.

CHRISTENSEN JAMES & MARTIN

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CERTIFICATE OF SERVICE

On February 25, 2020, I caused a true and correct copy of the foregoing Opposition to Motion to Reconsider to be served as follows:

☒ ELECTRONIC SERVICE: Pursuant to Rule 8.05 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, the document was electronically served on all parties registered in the case through the E-Filing System.

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CHRISTENSEN JAMES & MARTIN

By: */s/ Natalie Saville*
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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, by and through its Trustees Terry Mayfield and Chris Christophersen, Petitioner, vs. CLARK COUNTY NEVADA, DEPARTMENT OF AVIATION, a political subdivision of the State of Nevada; and THE OFFICE OF THE LABOR COMMISSIONER, Respondents.	Case No.: A-18-781866-J Dept. No.: 25 **ORDER ON CLARK COUNTY DEPARTMENT OF AVIATION'S MOTION FOR RECONSIDERTAION**

Respondent Clark County Department of Aviation's ("DOA") Motion for Reconsideration ("Motion") came before the Court on March 31, 2020. The hearing was held in accordance Administrative Order 20-01 of the Eighth Judicial District Court.

This Clarification Order is not intended to alter or amend the Court's order entered on February 4, 2020 (hereinafter "Final Order") because the Court lost jurisdiction to do so when the DOA appealed the Final Order. This Clarification Order is intended to inform the parties and any reviewing court of how the Court would rule on the Motion had it not lost jurisdiction because of the appeal.

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The Motion must be denied as one for reconsideration under EDCR 2.24 because it fails to present new evidence or identify misapprehension of law. Nevertheless, the Court would elect to treat the Motion as one for clarification of the Final Order. The Court clarifies that it intended the Final Order to be a final judgment on the merits. The Record and argument presented to the Court indicated that the maintenance contract issue had previously been before the Labor Commissioner. The Court therefore entered a finding consistent with the Record and the argument presented. It was the Court's intent to rule that the flooring contract was not a maintenance contract and that wages earned pursuant to the contract must be paid at the applicable prevailing wage rates. In remanding the matter to the Labor Commissioner, the Court intended for the Labor Commissioner to use applicable prevailing wage rates to determine the value of wages due and ensure that the unpaid wages were properly paid.

In response to a concern raised by the Labor Commissioner, the Court recognized that the Labor Commissioner could encounter a situation where work was performed on the project that fell outside the flooring contract. The Court did not intend to bind the Labor Commissioner on matters that fell outside the Record. To be clear, if wages were earned for work performed on the project pursuant to the flooring contract, those wages are to be paid at the applicable prevailing wage rate. The Labor Commissioner is to calculate the wages due for that work and ensure that the wages are paid. However, if the Labor Commissioner discovers that certain work performed on the project fell outside the scope of work described in the flooring contract, the Labor Commissioner may evaluate that work and determine if the work constituted maintenance or repair and may thereafter enter a separate determination regarding that work as she deems appropriate.

The Court further clarifies that paragraph 7 on page 8 of the Final Order was only intended to allow the Court to enforce the Final Order and to allow the parties to seek judicial review of the Labor Commissioner's wage calculations. Should the Labor Commissioner choose to enter a separate determination regarding work performed

outside the scope of the Flooring Contract and not subject to the remand directive regarding calculation of wages due under the flooring contract, Paragraph 7 also allows for judicial review of such a determination. The Court did not retain jurisdiction over its Final Order to usurp the Labor Commissioner's proper role in calculation of wages or evaluating additional work related to the project that she may determine also requires the payment of prevailing wages.

Dated: April _____, 2020.

_____
District Court Judge Kathleen Delaney

Submitted by:

CHRISTENSEN JAMES & MARTIN

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September 6, 2019

Via Hand Delivery

Judge Kathleen E. Delaney
Eighth Judicial District Court
Regional Justice Center
Department No. 25
200 Lewis Ave.
Las Vegas, NV 89155

Re: Southern Nevada Labor Management Cooperation Committee v. Clark County Department of Aviation, Case No. A-18-781866-J; Response to DOA Letter; Findings of Fact, Conclusions of Law, and Order

Dear Judge Delaney:

On Tuesday, September 3, 2019, the undersigned presented to opposing counsel the proposed Findings of Fact, Conclusions of Law and Order ("Order") contained in Attachment A to this letter. All counsel were instructed that the undersigned intended to submit the Order to you today, Friday, September 6, 2019. Counsel for the Office of the Labor Commissioner ("OLC") responded on September 4, 2019 asserting no objections (other than the misspelling of her name) to the Order. Ms. Nichol's email is attached to this letter as Attachment B. In a preemptive strike, the Clark County Department of Aviation ("DOA") submitted its own order yesterday on the matter. The DOA's reasoning set forth in its letter and proposed order are so alarming that the Court will be justified in issuing an order to show cause under NRCP 11(c)(3).

The DOA, through the same counsel, argued the public money issue before the Nevada Supreme Court in the *Bombardier* case and lost. Rather than accept the Supreme Court's ruling, the DOA asserted that same issue before this Court. In doing so, the DOA failed to disclose the Supreme Court's January 17, 2019 *Bombardier* ruling addressing the public money issue in its Reply Memorandum filed with this Court on February 26, 2019. But for the undersigned's identifying and addressing the Supreme Court's ruling, the DOA would have allowed this Court to proceed under a false statement of law (e.g., the DOA's money is not public money). The DOA's letter of September 5, 2019 shows that same behavior extending throughout the DOA's briefing and arguments to the Court.

The DOA argued that you must consider the entire administrative record. See Clark County Dept. of Aviation's Reply Memo. of Points and Authorities to Petition for Judicial Review (herein after "DOA Reply"). To wit,

> The LMCC focuses on only one issue in its Petition for Judicial Review, in a convenient attempt to distract this Court from the overall picture of what the carpet maintenance contract entails. Thus, a more comprehensive analysis of the contract, as well as the administrative record, is necessary. As explained below, the contract in question involves the simple, day-to-day task of fixing worn carpet tile, and the DOA has properly bid the contract as a maintenance contract, pursuant to NRS Chapter 332, in the past without issue. In its Petition for Judicial Review, the LMCC seeks to conflate the scope of the contract and improperly expand the established precedent of prevailing wage law. The DOA respectfully requests this Court to affirm the Labor Commissioner's determination and to disregard the LMCC's endeavor to obfuscate both the facts and the law of this case.

See DOA Reply at 5 lns. 26-25, 6 lns. 1-8. The DOA further argued:

> During the course of the Labor Commissioner's review of the complaint, the DOA raised numerous arguments to dispute LMCC's alleged violations of NRS Chapter 338, including the point that the carpet maintenance contract is not subject to prevailing wages because it pertains to the normal maintenance of the DOA's property. At no time did the DOA abandon or waive this argument [that the contract was a maintenance contract], which may be found, in its entirety, in the administrative record. See AAR 0221-0225. The DOA reiterates this argument here and summarizes it below.
>
> Notwithstanding the fact that the carpet maintenance contract was not financed by public money, **the Labor Commissioner's determination must still be affirmed on the basis that the contract pertains to the normal maintenance of the DOA's property. NRS Chapter 338, including its prevailing wage requirement, is explicitly excluded from contracts issued under NRS Chapter 332 related to the normal maintenance of property.**

See DOA Reply at 8 lns. 12-24 (emphasis added). Indeed, the DOA's primary argument (its first argument made) was that the OLC determination was made upon findings of fact found in the administrative record. In support of this argument the DOA asserted, with citations to the administrative record, a page of "maintenance facts" it argued supported the OLC's determination. See DOA Reply at 6 lns. 9-28, 7 lns. 1-20.

> In support of the DOA Reply, counsel for the DOA certified the following to you:
>
> 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 Procedure, in particular NRAP 28(e)(1), 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. 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.

See Certification of Compliance DOA Reply which is found in the DOA Reply at 20.

Yesterday, in its letter to you, the DOA asserts that the facts and law it presented and certified as true to you in the DOA Reply do not exist and that if you make findings of such facts you will violate the DOA's due process rights and Nevada law: "The Petitioner's attempt to have the court make **factual findings never made by the agency** usurps the agency's duties and deprives the Clark County Department of Aviation of its right to due process." (Letter from Mark J. Ricciardi, Esq. to Judge Kathleen E. Delaney dated September 5, 2019) (emphasis added). The DOA, without question, allowed you to labor under fact and law that it presented as true but now, after losing on the points, claims were false or do not exist.

These contradicting representations to you violate Court rules.

> By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

NRCP 11(b).

This conduct is not only offensive to the Court, it violates fairness to opposing counsel: "A lawyer shall not: Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Professional Rule of Conduct 3.4(c).

The DOA wants an impermissible do-over, and it is willing to violate court rules to obtain that do-over. "These rules govern the procedure in all civil actions and proceedings in the district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." NRCP 1. As the undersigned explained to the Court at the hearing on August 27, 2019, the DOA will seek to relitigate matters it already argued as decided. The DOA's proposed order does just that! That is not the "just, speedy, and inexpensive determination of every action and proceeding" required by procedural rules.

As to the DOA's argument that this Court cannot enter findings of fact, here is the applicable law for your benefit:

> The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
>
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.
>
> 4. As used in this section, "substantial evidence" means evidence which a reasonable mind might accept as adequate to support a conclusion.

NRS 233.135(3) and (4). It appears that you are certainly entitled to enter findings of fact and conclusions of law regarding the Petition for Judicial review. While you are not entitled to reweigh evidence in the record, you are certainly entitled to find the OLC's determination is contrary to fact. How else could you reach a conclusion that the OLC's determination is "Clearly erroneous in view of reliable, probative and substantial evidence on the whole record?" NRS 233.135(3)(e). Nevada's Administrative Procedures Act should not be an enigma to the DOA; its complete ignorance of NRS 233.135 in its letter to you is consistent with prior conduct and appears to be a continued willful attempt to have you labor under false understandings of what the facts and law are.

> Professional Rule of Conduct 3.3 is on point:
>
> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> …
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

PRC 3.3. The DOA Reply and its letter of yesterday are more than inconsistent; they are patently adverse to one another. A false statement has been made, and it appears to be in yesterdays' letter.

In regard to having the Court retain jurisdiction, the proposed Order in Attachment A hereto does not call for interference with the OLC's proceedings. First, even if it did, courts retain jurisdiction over their own orders for enforcement regardless of the OLC's proceedings. The OLC and DOA must comply with your order, and you have the right to take steps to ensure compliance therewith. Such enforcement is not meddling in the OLC's business; it is preventing a party from flouting your authority and order, which is necessary to the rule of law. Second, the retention of jurisdiction language applies to proceedings that may be properly referred to the Court. For example, the OLC may file an action on wages or may ask the Court to enforce her subpoenas. See NRS 607.170. Retention of jurisdiction accomplishes the requirements of NRCP 1, a just, speedy and cost effective resolution to future issues that may arise. You are now familiar with the case, and it makes complete sense that appropriate future issues, if any, be brought before you for resolution.

The undersigned drafted the proposed Order to be consistent with the proceedings before you. Briefs and the administrative record were reviewed in an effort to parallel arguments and evidence. I believe the document is accurate and its reasoning consistent with your oral instructions.

Respectfully,

Evan L. James, Esq.

cc: Mark J. Riccardi, Esq.
Holley Walker, Esq.
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(All via Email)

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DISTRICT COURT

CLARK COUNTY, NEVADA

SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, by and through its Trustees Terry Mayfield and Chris Christophersen, Petitioner, vs. CLARK COUNTY NEVADA, DEPARTMENT OF AVIATION, a political subdivision of the State of Nevada; and THE OFFICE OF THE LABOR COMMISSIONER, Respondents.	Case No.: A-18-781866-J Dept. No.: 25 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

The Court hereby enters findings of fact and conclusions of law in granting the Petition for Judicial Review. The Court remands the matter to the Nevada State Labor Commissioner for further proceedings consistent with this Court's findings, conclusions and order.

FINDINGS OF FACT

1. The Clark County Nevada Department of Aviation (hereinafter "DOA") operates the McCarran International Airport ("Airport") in Clark County, Nevada.

2. The DOA is part of the Clark County, Nevada government.

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3. The Airport is funded by two primary sources. Revenue from Airport operations such as charges to airlines and lease payments from vendor operations is one source of income. Revenue from grants from the United States Government Federal Aviation Administration ("FAA") is another source of income. However, to receive revenue from the FAA, the DOA is contractually required to be financially self-sustaining and not dependent upon revenue from government sources separate from its own operations.

4. The DOA has operated the Airport as a financially self-sustaining operation for many years, consistent with its contractual obligations with the FAA.

5. The DOA, in 2016, published an Invitation to Bid, Bid No. 17-604273, for the removal and replacement of 12,000 square feet (approximately the area of two football fields) of carpet and 5,000 linear feet (approximately the distance of one mile) of base cove (collectively referred to herein as "Project").

6. The DOA advertised and proceeded with the Project pursuant Nevada's Local Governments Purchasing Statue, NRS 332 et seq. and specifically NRS 332.065.

7. The Southern Nevada Labor Management Cooperation Committee ("LMCC") exists pursuant to 29 U.S.C. §§ 175a(a) and 186(c)(6) and a collective bargaining agreement between the International Union of Painters and Allied Trades Local Union No. 1512 and employers engaged in the floorcovering industry.

8. LMCC was created and is governed by an Agreement and Declaration of Trust ("Trust Agreement") and is "established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern."

9. LMCC also exists pursuant to NRS § 613.230 for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment."

10. To achieve its purposes, the LMCC works to ensure that labor laws are followed, including prevailing wage laws, which laws and associated activity are a matter of public concern and public policy.

11. On April 28, 2017, the LMCC filed a complaint with the State of Nevada Office of the Labor Commissioner ("OLC") alleging that the DOA had violated numerous labor laws with regard to the Project, including violations of NRS 338 et seq.

12. On May 2, 2017. the OLC issued a notice to the DOA of the LMCC's complaint.

13. The DOA answered the complaint on May 23, 2017, admitting that it is a political subdivision of the state of Nevada, but generally denying the complaint's allegations due lack of information.

14. The OLC proceeded to conduct an investigation of the matter and requested and received documents from the DOA.

15. The OLC did not hold a hearing, but certain investigatory meetings were held, including one on January 10, 2018.

16. On February 12, 2018, the DOA sent a letter to the OLC wherein it asserted that the Project was not a public work subject to NRS 338. The DOA further asserted that the Project work constituted maintenance by replacing up to 12,000 square feet of carpet and 5,000 feet of base cove over the course of a year and that none of the work is paid for with public money because the Airport is a financially self-sustaining operation. The DOA further asserted that the carpet and base cove replacement was performed in smaller sections and so as not to interfere with Airport operations.

17. On March 12, 2018, the DOA sent a letter to the OLC asserting that the Project constituted normal maintenance and further asserting that the Project did not constitute public funds as defined by NRS 338.010(17) because it was not "financed in whole or in part from public money."

18. On June 4, 2017, the DOA, through counsel, sent an email to the OLC further asserting that the Project is not subject to NRS 338 et seq. because the Airport is self-funded.

19. On June 13, 2017, the OLC requested documents from the DOA confirming the sources of the Airport's revenue.

20. On June 27, 2017, the DOA responded, through counsel, that the Airport's 2018 fiscal year budget consisted of $556,500,000 and that $23,703,000 of that money was budgeted for what the DOA self characterizes as maintenance.

21. On August 30, 2017, the OLC issued a determination that acknowledged the DOA's argument that the Project was maintenance. The OLC accepted the DOA's representation that "[n]one of the repairs and maintenance funds are financed in any part through taxes or public money."

22. The Special Conditions section of the Project's bid documents state that "[f]looring, adhesive and base cove are OWNER supplied, successful bidder installed."

23. The DOA separated Project material costs from Project labor costs.

24. The DOA intended for the Project to be completed in smaller sections such as individual rooms or smaller areas.

25. The DOA did not bid the Project pursuant to NRS 338 requirements.

26. At oral argument, counsel for the DOA questioned whether or not the LMCC had a right to bring the original complaint filed with the Labor Commissioner.

CONCLUSION OF LAW

1. The DOA, as a political subdivision of the State of Nevada, is subject to all the laws of the State of Nevada. The DOA cannot, whether intentionally or unintentionally, selectively choose what laws it will or will not follow.

2. The Airport, its operations, and its funding, consisting of hundreds of millions of dollars, are a matters of public concern because the Airport services all of southern Nevada and its presence and use has a financial impact on the entire State of Nevada.

3. Governmental compliance with established law is a matter of public concern.

4. Moreover, prevailing wage laws are a matter of public policy and their application and impact are a matter of public concern because they have an economic impact on the community and affect the community by impacting the construction industry.

5. Because the LMCC is established and exists under both federal and state law to address matters of public concern and public policy within the construction industry, it has a direct interest in ensuring that laws within the construction industry are adhered to and followed, giving the LMCC standing to challenge the DOA's conduct in regard to NRS 338 et seq. and the payment of prevailing wages.

6. There is no definition of "public money" in NRS 338 et seq. The Court finds the reasoning and arguments regarding public money as set forth in the LMCC's briefing persuasive, being consistent with statute and case law.

7. The DOA's contractual relationship with the FAA does not excuse compliance with Nevada law. Contractual relationships under 49 U.S.C. § 47101, upon which the DOA relies, for the purposes of receiving grants are voluntary. There is no indication in 49 U.S.C § 47101 that the United States Congress intended to preempt state laws of generally applicability. Nevertheless, allowing a party, such as the DOA, to contract around state law would create the unchecked ability to nullify Nevada law where there was no congressional intent to do so. *See California Trucking Association v. Su*, 903 F.3d 953, 963 (9th Cir. 2018). In addition, the DOA's obligations under 49 U.S.C. § 47101(a) specifically require that "the [A]irport will be available for public use…." The DOA is therefore legally obligated to operate the Airport for the benefit of the public regardless of the source of its funding. The Court concludes that contractual obligations that the Airport be self-sustaining do not nullify Nevada law. The Court further concludes that because the DOA is legally obligated to operate the Airport for a public purpose the money it uses for Airport operations is intended for a public purpose.

8. There is no definition of "public money" in NRS 338 et seq. The Court must therefore look elsewhere for an appropriate definition. The Nevada Supreme Court addressed the issue of "public money" in the case of *Bombardier Transportation (Holdings) USA, Inc. v. Nevada Labor Commissioner*, 433 P.3d 248, 251 (Nev., 2019).[1] The DOA was a party to the *Bombardier* case and made the same public money argument that it now makes to this Court. The DOA argued to the Nevada Supreme Court that money from its "normal operating funds" is not subject to Nevada's prevailing wage laws because the Airport operates "without the County's general tax fund revenue." The Nevada Supreme Court rejected that argument, noting that "Bombardier's arguments are belied by the plain language of NRS 338.010(15) … the financing language in the statute does not require a particular type of funding, only that the project be financed by public money, which the contract was." *Bombardier* at 248 n. 3. The Court concludes that pursuant to *Bombardier*, the Airport's funds, the funding of which is common between the *Bombardier* case and the Project, are in fact public money within the meaning of NRS 338.010(17).

9. The Court also concludes that the funds by which the Airport operates are in fact public money even in the absence of the *Bombardier* holding. The Nevada Supreme Court provided guidance of what constitutes public money in the case of *Carson-Tahoe Hosp. v. Building & Const. Trades Council of Northern Nevada*, 128 P.3d 1065, 1068, 122 Nev. 218, 222 (2006) ("For example, a private project constructed to a public agency's specifications as part of an arrangement for the project's eventual purchase by the public agency would be a public work.") The Airport is owned and operated by a public entity. The Airport is for public use. The money by which the Airport operates, regardless of source, is therefore public and within the meaning of "public money" as used in NRS 338 et seq.

[1] The OLC did not have the benefit of the *Bombardier* decision when issuing her determination because the opinion was issued after the determination.

10. Subject to the remand order below, the Court concludes that the Project did not constitute maintenance. The DOA's unilateral separation of the Project into smaller construction units and the separation of material costs and labor costs violated Nevada law. "A unit of the project must not be separated from the total project, even if that unit is to be completed at a later time…." NRS 338.080(3). Replacing 12,000 square feet of carpet and 5,000 linear feet of base cove involves a significant amount of work and is not reflective of the type of work constituting maintenance as articulated in *Bombardier*. The Nevada Supreme Court articulated maintenance as involving "such activities like window washing, janitorial and housekeeping services, [and] fixing broken windows." *Bombardier* at 255. The Court concludes that the OLC's accepting the DOA's assertion that the Project constituted maintenance is contrary to fact and law. The Project was bid with the potential of replacing carpeting that would cover approximately two football fields and base cove that extended for approximately a mile. The intent of the bid and Project execution was clearly an effort to manage costs. The DOA's assertion that it may or may not have replaced 12,000 feet of carpet and 5,000 linear feet of base cove is inconsequential because the intent of the bid and the Project allowed for a large volume of repair work. Accepting an argument allowing the DOA to incrementally finish the Project's scope of work "would run afoul of NRS Chapter 338's purpose and would allow parties to insulate themselves from the statutes' applicability by simply including repair work in a maintenance contract." *See Bombardier* at 254. The law does not allow the DOA to bid large repair projects to be completed through smaller projects purported to qualify as "maintenance."

11. The Court concludes that the OLC's determination was arbitrary, capricious and inconsistent with fact.

12. Although the bid and intent of the Project violated Nevada law, the *Bombardier* Court holding suggests that the OLC should conduct a post construction analysis to

determine what, if any, of the completed work actually constituted maintenance and what constituted repair, being subject to prevailing wage rates.

ORDER

1. The Court Orders that matters set forth in its Conclusions of Law may also be considered findings of fact to the extent necessary to maintain the coherence of its conclusions.

2. The LMCC's Petition for Judicial Review is granted. The OLC's Determination is hereby vacated and reversed as arbitrary, capricious and inconsistent with fact.

3. The Court rules and Orders that the money received by the Airport is public money within the meaning of NRS 338 and that the Project did not constitute maintenance within the meaning of NRS 338 et seq.

4. The Court further Orders the matter remanded to the OLC for the sole purposes of determining the amount, if any, of the completed work that constitutes maintenance and to whom and how much additional wages should be paid for work subject to NRS 338 et seq.'s prevailing wage requirements. In making any such determinations, the OLC must not separate the Project into smaller units as doing so is in violation of Nevada law.

5. This Order does not preclude the OLC from issuing administrative fines and similar assessments pursuant to her statutory and regulatory authority.

6. The Court further Orders that the LMCC must be included in the proceedings on remand as a proper and interested party with appropriate standing to participate.

7. The Court further Orders that it retains jurisdiction over any subsequent proceedings that may be necessary for the collection of information, the enforcement of this Order or for further review, if any, as may be sought by the parties.

Dated: September, _____ 2019.

_____

District Court Judge Kathleen Delaney

Submitted by:

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ATTACHMENT

Subject: RE: 190829.Findings of Fact and Conclusions of Law (Draft).pdf
From: "Andrea H. Nichols" <ANichols@ag.nv.gov>
Date: 9/3/2019, 2:15 PM
To: 'Evan James' <elj@cjmlv.com>
CC: "'hwalker@fisherphillips.com'" <hwalker@fisherphillips.com>

Evan,

The Office of the Labor Commissioner has no objection to the Order you attached.

I request that you change the spelling of my first name.

Sincerely,

Andrea Nichols,
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From: Evan James <elj@cjmlv.com>
Sent: Tuesday, September 3, 2019 11:58 AM
To: Andrea H. Nichols <ANichols@ag.nv.gov>; Walker, Holly <hwalker@fisherphillips.com>
Subject: 190829.Findings of Fact and Conclusions of Law (Draft).pdf

Andria and Holley:

The attached Findings of Fact and Conclusions of Law are what I intend to submit to the Court this Friday.

Thank you,

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