IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY NEVADA, DEPARTMENT OF AVIATION, a political subdivision of the State of Nevada; Appellant, vs. SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, by and through its Trustees Terry Mayfield and Chris Christophersen (Petitioner Below), and THE OFFICE OF THE LABOR COMMISSIONER (Respondent Below), Respondent.	**Supreme Court No. 83252** District Court Case No. A-18-781866-J

JOINT APPENDIX – VOLUME 2 OF 3

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Joint Appendix – Volume 2 of 3 was made this date by electronic filing and/or service with the Supreme Court of the State of Nevada addressed as follows:

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Attorneys for Petitioner Southern Nevada Labor Management Cooperation Committee

Dated this 18th day of November, 2021.

/s/ Darhyl Kerr
An Employee of Fisher & Phillips LLP

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June 27, 2018

VIA E-MAIL & U.S. MAIL

Mary M. Huck, Deputy Labor Commissioner
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Re: Clark County Department of Aviation / Case No. NLC-17-001486
Our Matter No. 13790.0064

Dear Ms. Huck:

As detailed below and in the attached budget, the Clark County Department of Aviation ("DOA") budgeted for approximately $556,500,000 in total revenue during the current fiscal year (FY2018). Such revenue is earned from two sources: airline revenues and non-airline revenues. The DOA uses its revenues to finance its operations, including the carpet maintenance that is presently at issue before the Labor Commissioner. Indeed, that carpet maintenance work is financed under the line item in the budget listed as "Repairs and Maintenance" in the amount of $23,703,000. None of those Repairs and Maintenance funds are financed in any part through any taxes or public money, and those funds are instead derived from airline revenues and non-airline revenues. In fact, users of the DOA's facilities provide all the revenues needed to acquire, operate, and maintain the necessary services and facilities. The DOA is not subsidized by any tax revenues of the County and has been a self-sustaining entity since 1966.

Regarding the airline revenues, the DOA meets annually with the Airline-Airport Affairs Committee ("AAAC") which is comprised of 16 airlines who have signed the Airline-Airport Use and Lease Agreement ("Signatory Agreement") with the DOA. These 16 airlines represent approximately 97% of the passengers that flow through McCarran International Airport ("Airport"). During this annual meeting, the DOA presents the proposed operating budget and establishes the rates and charges the airlines will pay for the next fiscal year in accordance with the rate making methodology outlined in the Signatory Agreement.

The rate making methodology is considered in the industry as a residual lease agreement, which means the airlines will pay established rates and charges sufficient enough so that, when combined with budgeted revenues from non-airline sources, the operating expenses and debt service requirements of the DOA's airport system are satisfied.

Regarding the non-airline revenues, the largest source of such funds are terminal concession fees, including the food and beverage concessionaires, news and gift concessionaires, specialty retail outlets, advertising revenue, and passenger services revenue. Non-airline revenues also includes parking fees, ground transportation fees, rental car concession fees, advertising revenue, gaming revenue, and building rental fees.

The attached budget is an excerpt from the Proposed Airline Rates and Charges which was presented to the AAAC on April 25, 2018. The table below summarizes pertinent items in the attached budget and shows the budgeted sources and uses of the DOA's operating revenues and expenses, and debt service.

For the current fiscal year (FY2018) budget (in 000s):

$247,666 in Airline Revenues
$308,834 in Non-Airline Revenues
$556,500 in total Revenue[1]

$273,072 in Operating and Maintenance ("O&M") Expenses[2]
$211,607 in Debt Service
$484,679 in operating costs

$71,821 in Net Revenues

Please let me know if you need any other information.

Sincerely,

Mark J. Ricciardi, Esq.
Regional Managing Partner
For Fisher & Phillips LLP

[1] As explained above, total revenue is derived from airline rates and charges and non-airline revenues. There are no tax dollars (or other sources of public funds) included in these totals.

[2] Included in the $273,072,000 of O&M Expenses is $23,703,000 under the line item "Repairs and Maintenance." The carpet maintenance contract presently at issue before the Labor Commissioner comprises approximately $120,000 of the $23,703,000 allocated for Repairs and Maintenance in the budget.

Table 2
Reconciliation of Revenues, Expenses, Net Deposits and CPE
(Fiscal Years Ending June 30)

	Actual 2015	Actual 2016	Current Year Budget 2017	Current Year Projected 2017	AAAC Budget 2018	Forecast 2019	Forecast 2020	Forecast 2021
Airline Revenues per Calculation (in 000s):								
Terminal Building Rentals	$ 140,554	$ 150,839	$ 160,735	$ 166,558	$ 157,364	$ 166,035	$ 171,040	$ 174,108
Common Use Ticket Counter Fees	8,211	9,215	9,635	10,472	9,759	10,562	10,911	11,140
Common Use Baggage Service Office	102	109	115	120	112	121	124	126
International Passenger Processing Facility Use Fee	7,999	8,569	9,036	9,231	9,648	10,328	10,609	10,782
Aircraft Gate Use Fees	9,711	7,375	9,128	8,483	9,203	9,808	10,012	10,465
Common Use Gate Use Fees	14,783	16,559	16,621	17,709	16,833	18,067	18,472	18,770
Landing Fees - Air Transportation Companies	61,457	43,695	47,221	43,290	44,048	46,965	47,513	48,840
Subtotal Air Transportation Company Rents and Fees	242,816	236,362	252,492	255,862	246,968	261,886	268,681	274,231
Landing Fees - Air Cargo	961	660	639	687	698	743	750	770
Landing Fees - Westside Users	-	-	-	-	-	1,301	1,249	1,245
TOTAL AIRLINE REVENUES	$ 243,777	$ 237,022	$ 253,131	$ 256,549	$ 247,666	$ 263,930	$ 270,681	$ 276,245
		-2.8%	6.8%	8.2%	-3.5%	6.6%	2.6%	2.1%
Non-Airline Revenue (in 000s):								
Aircraft Service Fees	$ 6,569	$ 6,709	$ 6,754	$ 6,837	$ 7,063	$ 7,090	$ 7,118	$ 7,134
Building and Ramp Rentals	49,323	54,068	52,289	53,311	54,617	55,015	55,342	55,560
Land and Other Rents	19,493	19,328	19,245	20,039	20,488	20,609	20,714	20,781
Ground Transportation	50,579	54,797	55,162	58,966	60,078	60,651	61,093	61,403
Gaming Concessions	27,657	29,516	29,000	32,700	33,500	33,820	34,066	34,239
Terminal Concessions	66,572	67,001	68,100	71,386	73,937	74,568	75,068	75,411
Parking Fees	36,005	38,823	38,706	38,635	38,738	38,890	39,043	39,131
Reliever Airport Fees	8,357	9,132	9,581	8,626	9,378	9,449	9,507	9,546
Miscellaneous	2,588	2,980	2,140	2,810	3,160	3,173	3,185	3,192
Subtotal Non-Airline Rents and Fees	267,143	282,354	280,978	293,310	300,959	303,264	305,137	306,397
Interest Income	1,969	4,665	1,875	5,200	7,875	7,875	7,875	7,875
TOTAL NON-AIRLINE REVENUES	$ 269,112	$ 287,019	$ 282,853	$ 298,510	$ 308,834	$ 311,139	$ 313,012	$ 314,272
		6.7%	-1.5%	4.0%	3.5%	0.7%	0.6%	0.4%
Less: Operating and Maintenance Expenses (in 000s):								
Salaries and Benefits	$ 118,497	$ 119,653	$ 135,734	$ 133,185	$ 140,235	$ 147,419	$ 154,233	$ 161,369
Professional Services	52,615	54,687	58,634	57,751	61,664	62,391	62,846	63,165
Utilities and Communication	25,665	24,339	27,667	25,240	26,446	26,758	26,953	27,090
Repairs and Maintenance	21,421	21,176	23,344	22,650	23,703	23,982	24,157	24,280
Materials and Supplies	11,349	12,844	13,713	13,650	14,848	15,023	15,133	15,209
Insurance	2,467	2,395	2,720	2,375	2,720	2,752	2,772	2,786
Administrative	2,357	4,021	3,640	2,960	3,456	3,497	3,522	3,540
Subtotal Operating and Maintenance Expenses	$ 234,371	$ 239,115	$ 265,452	$ 257,811	$ 273,072	$ 281,821	$ 289,616	$ 297,439
		2.0%	11.0%	7.8%	5.9%	3.2%	2.8%	2.7%

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Clark County Department of Aviation - Proposed Airline Rates and Charges
For the Fiscal Year Ended June 30, 2018

Table 2
Reconciliation of Revenues, Expenses, Net Deposits and CPE
(Fiscal Years Ending June 30)

	Actual 2015	Actual 2016	Current Year Budget 2017	Current Year Projected 2017	*AAAC* Budget 2018	Forecast 2019	Forecast 2020	Forecast 2021
Less: Debt Service (in 000s):								
Debt Service (excludes coverage)	$ 207,289	$ 221,264	$ 208,629	$ 227,071	$ 211,607	$ 220,326	$ 221,523	$ 221,034
TOTAL DEBT SERVICE	207,289	221,264	208,629	227,071	211,607	220,326	221,523	221,034
		6.7%	-5.7%	2.6%	-6.8%	4.1%	0.5%	-0.2%
NET REVENUE (LOSS)	$ 71,229	$ 63,662	$ 61,903	$ 70,177	$ 71,821	$ 72,922	$ 72,553	$ 72,045
		-10.6%	-2.8%	10.2%	2.3%	1.5%	-0.5%	-0.7%
Deposits (in 000s):								
Capital Improvement Fund -								
Gaming Concession (excludes CCRF)	$ 27,394	$ 29,231	$ 28,725	$ 32,440	$ 33,240	$ 33,557	$ 33,802	$ 33,973
Net Revenues from CCRF Cost Center	17,752	19,347	18,074	20,800	19,112	19,578	19,652	19,676
Transfers (out) in to Ivanpah and Heliport	(70)	(26)	-	2	-	-	-	-
Reimburse Equipment & Capital Outlays	2,387	3,417	3,633	4,944	5,803	4,190	4,237	4,285
Subtotal Capital Improvement Fund Deposit	47,463	51,968	50,432	58,186	58,155	57,325	57,691	57,934
Amortization in Rate Base - Reimburse Amortization at 50%	11,342	10,947	11,258	10,536	12,012	14,904	14,115	13,488
Coverage Fund - Net increase (decrease) in DS Coverage (1)	12,393	351	(701)	(104)	1,019	(35)	97	(29)
Working Capital and Contingency Reserve Fund	33	395	915	1,558	635	729	650	652
TOTAL DEPOSITS	$ 71,231	$ 63,662	$ 61,904	$ 70,177	$ 71,821	$ 72,922	$ 72,553	$ 72,045
VARIANCE (Rounding)	$ (2)	$ (0)	$ (1)	$ -	$ (0)	$ -	$ (0)	$ -
Calculation of Estimated Cost per Enplaning Passenger								
Air Transportation Company Rents and Fees (in 000s)	$ 243,777	$ 237,022	$ 253,131	$ 256,549	$ 247,666	$ 262,629	$ 269,432	$ 275,001
Passenger Enplanements (in 000s)	21,879	23,346	23,434	23,912	24,188	24,459	24,733	25,011
Airline Cost per Enplaned Passenger	$ 11.14	$ 10.15	$ 10.80	$ 10.73	$ 10.24	$ 10.74	$ 10.89	$ 11.00

Note(s):
Figures may not add due to rounding.
(1) To reduce the impact of additional debt service and increase in coverage fund to the airline rate base in FY13; the CCDOA agreed to make the FY13 deposit to cover the estimated debt service coverage fund on the airlines behalf (approx. $11.5M). For the FY14 AAAC Budget the CCDOA agreed to deferred collection of the FY13 coverage deposit an additional year, through FY15 where it was subsequently deposited in full by the airlines and the CCDOA was refunded its portion of the FY13 & FY14 net deposit amount.

APP 247

STATE OF NEVADA

BRIAN SANDOVAL
GOVERNOR

C.J. MANTHE
DIRECTOR

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Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

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August 30, 2018

CLARK COUNTY DEPARTMENT OF AVIATION
ADMINISTRATION BUILDING RD FLOOR, PURCHASING
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LAS VEGAS, NEVADA 89117

REFERENCE: PREVAILING WAGE CLAIM/COMPLAINT # NLC-17-001486 BID NO 17-604273, CARPET AND BASE COVE INSTALLATION

Clark County Department of Aviation:

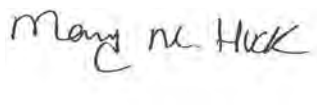
Thank you for your response to the complaint filed against Clark County Department of Aviation (DOA).

The complaint alleged possible violations of Nevada Revised Statues (NRS) 338.010 to 338.090, inclusive, or Nevada Administrative Code (NAC) 338.005 to 338.125, inclusive. DOA asserted carpet maintenance work is financed from two sources airline revenues and non-airline revenues. None of the repairs and maintenance funds are financed in any part through any taxes or public money. The DOA is not subsidized by any tax revenues of the County and has been a self-sustaining entity since 1966. DOA represented in writing that the work in question is not paid for with public money.

The Office of the Labor Commissioner has completed its review of the complaint. The compliance review conducted did not reveal violations of Nevada labor laws with regards to **NRS Chapter 338 or NAC Chapter 338.** This complaint has been closed.

If you have any questions, please contact me at (702) 486-2650 or by e-mail at mhuck@labor.nv.gov

Sincerely,



Mary Huck
Deputy Labor Commissioner
Email: mhuck@labor.nv.gov

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September 4, 2018

Via U.S. Mail & Email

Nevada State Labor Commissioner
Att: Mary Huck
Deputy Labor Commissioner
3300 W Sahara Ave., Suite 225
Las Vegas, NV 89102

mhuck@labor.nv.gov

Re: In Re: Clark County Department of Aviation
NLC-17-001486, Bid No. 17-604273
Objection to Determination, Closure of Case

Dear Ms. Huck:

I am in receipt of the August 30, 2018 letter closing the above-entitled case. The Complainant will treat the letter as a final determination and therefore objects and request a hearing on the mater. If the Labor Commissioner disagrees and does not respond with a hearing date, the Complainant will treat the matter as final and Petition for Judicial Review.

The Determination errs as follows:

1. The Clark County Department of Aviation ("DOA") claims that the improvements are being paid for from a 2018 budgets. However, the DOA confirmed during prior meetings that the materials used for the project were purchased long ago. Thus, there is no factual way that the 2018 budget could have paid for materials purchase prior to the year 2018.

2. The DOA further asserts a faulty legal position that money it possesses is not public money. DOA is a government agency and any money it receives or possesses is in fact public money. The revenues obtained by DOA do not belong to private parties and the facility being improved (the airport) is a public facility. The Nevada Supreme Court has made clear that even private projects developed for a public agency are subject to prevailing wage laws. *See 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 Attorney General's Opinion, 97-22, cited by the Nevada Supreme Court is attached. As another court stated, "To take rent collected from one source and use it to pay obligations would plainly be a payment of public funds...." *McIntosh v. Aubry,*

Cal.Rptr.2d 680, 688, 14 Cal.App.4th 1576, 1588 (Cal.App. 1 Dist.,1993) (superseded by statute).

In addition, the matter is clearly not maintenance. As has been previously explained, the costs of the project likely exceeds $500,000.00. To date, the DOA has produced no evidence otherwise.

Respectfully,

Evan L. James, Esq.

CJ&M

CHRISTENSEN JAMES & MARTIN CHTD.
ATTORNEYS AT LAW

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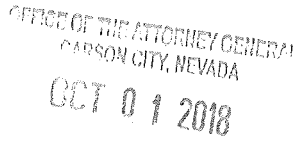

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December 27, 2016

Via Email & U.S. Mail

Email: michaelfo@mccarran.com

Clark County Department of Aviation
Michael Foran
P.O. Box 11005
Las Vegas, Nevada 89111-1005

Re: Southern Nevada LMCC adv. Las Vegas, McCarran International
Classification of Bid No. 17-604273 Carpet and Base Cove Installation

Dear Michael Foran:

This office represents the Southern Nevada Painters and Decorators and Glaziers Labor-Management Cooperation Committee ("LMCC"). We have reviewed your December 1, 2016 letter wherein Bid No. 17-604273 ("Bid") is claimed to be for normal maintenance. We have also reviewed the LMCC's December 2, 2016 request for information regarding material value and your December 12, 2016 response letter in which normal maintenance is again asserted as the basis for not disclosing project material costs associated with the Bid. In sum, the Clark County Department of Aviation ("Clark County") has used normal maintenance as the basis for separating project labor costs and project materials costs. Ms. Diaz was correct in her December 2, 2016 letter; Nevada law does not allow a local government to carve out units to avoid statutory requirements. The assertion of normal maintenance as a basis for separating a project into units is unsustainable.

Moreover, we believe Clark County's normal maintenance reasoning is incorrect and that the Bid must be properly noticed and awarded in accordance prevailing wage requirements. Failure to do so will expose Clark County and its contractor to potential penalties issued by the Nevada Labor Commissioner as well as an order to pay proper prevailing wage rates for work performed.

As correctly noted in Clark County's December 1, 2016 letter, Nevada defines a "public work" as "any project for the new construction, repair or reconstruction of a project financed in whole or in part from public money...." NRS 338.010(17). Clark County's assertion in its December 12, 2016 that "replacement of worn carpet tiles" constitutes normal maintenance is inconsistent with the Labor Commissioner's historical interpretation of what normal maintenance means.

The LMCC recently brought two cases before the Nevada Labor Commissioner against local governments who claimed the normal maintenance exception for work performed on their facilities. The first case was against the Clark County School District ("CCSD") and the second ongoing case is against The City of Boulder City ("Boulder City").

Here is what the Labor Commissioner wrote in her Determination and Award against CCSD:

> CCSD's position is that the painting projects, also called Life Cycle Project(s) that were completed by CCSD in 2011 and 2012, were normal maintenance under NRS section 338.011. While "Normal Maintenance" is not defined, normal maintenance has typically been interpreted by the Office of the Labor Commissioner to mean work that does not require skilled labor, such as janitorial work, or work that is routine, small, or day to day in nature, and not in excess of $100,000.

(See Ex. A, Determination, 8:13-19.) A fair application of this language to the Bid indicates that the normal maintenance exception does not apply because the work requires skilled labor and is not routine or small in scope or value.

The Office of the Labor Commissioner recently stated the following in the City of Boulder City case:

> The OLC has determined pursuant to NRS 338.011, that the requirements of normal operation and normal maintenance were not applicable to this Project based on the size and amount of the Project, and because in-house labor was not used to perform the work. Because the Project was sent out to bid based on the size and amount of the Project, Prevailing Wages should have been paid on the Project pursuant to NRS 338.040 and NAC sections 338.009, and 338.0095.

(See Ex. B, Determination dated August 3, 2016.) Application of this language indicates that the normal maintenance exception does not apply because the size and amount of the project is so extensive that outside skilled labor is needed for its completion. Replacement of a tile or two is normal, but replacement of 12,000 square feet of carpet is extraordinary. Clark County's normal maintenance claim and breaking of the project into units appear to be a fiction designed to avoid Nevada's bidding and/or prevailing wage requirements.

The Office of the Labor Commissioner recently won a challenge to her interpretation of normal maintenance in the case of *Bombardier Transportation v. Nevada Labor Commissioner; The International Union of Elevator Constructors; and Clark County*, A-14-698764-J. In *Bombardier,* the Eighth Judicial District Court upheld the Labor Commissioner's conclusions regarding normal maintenance. The *Bombardier* case

makes clear that Clark County, Department of Aviation (*a party to the matter)* is specifically aware of the limitations applied to the normal maintenance exception found in NRS 338.011 as well as the definition of what constitutes a public work, e.g. "Like the normal operations exemption, the application of this exemption is committed the judgment of the Labor Commissioner. NRS 338.015; NRS 338.090(2)(a); see also NRS 607.205." (See Ex. C, Findings of Fact and Conclusions of Law and Order, 12:8-10.) This office does not presume to speak for the Labor Commissioner, but it is clear from her prior rulings that normal maintenance does not include large scale projects like the one associated with the Bid.

The normal maintenance exception of NRS 338.011 is inapplicable to NRS 332 contracts that require prevailing wage payments.

> **If a performance contract entered into pursuant to NRS 332.300 to 332.440, inclusive, requires the employment of skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor to perform the performance contract, the performance contract must include a provision relating to the prevailing wage as required pursuant to NRS 338.020 to 338.090, inclusive.**

NRS 332.390(1). ***Indeed, NRS 332.390(1) makes clear that the normal maintenance exception found in NRS 338.011 is inapplicable to service contracts.*** That is, the normal maintenance exception of NRS 338.011 is outside a service contract because there is no normal maintenance exception for NRS 332 contracts and NRS 332.339(1) specifically requires prevailing wages to be paid where labor is involved. Service contract providers are obligated to pay prevailing wage rates if labor is necessary to perform the work. Taking up and replacing thousands of yards of carpet without question requires labor. The statute is absolutely clear that Clark County is obligated to insert prevailing wage requirements into its service contracts.

Clark County's actions are creating potential exposure for unpaid prevailing wages and imposed penalties. The LMCC is prepared to present a formal complaint to the Labor Commissioner on the matter if necessary. It is hoped, however, that Clark County will rebid the project, having learned from its past experiences (*Bombardier*) and the Labor Commissioner's prior rulings. If Clark County fails to do so, the LMCC reserves the right to bring the matter before the Labor Commissioner.

Respectfully,

Evan L. James

Evan L. James, Esq.

cc: LMCC
Nevada Labor Commissioner

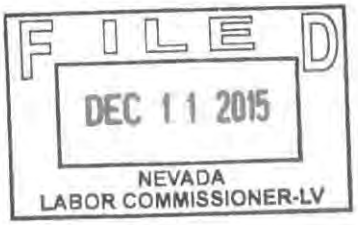
EXHIBIT

A

BEFORE THE NEVADA STATE LABOR COMMISSIONER

LAS VEGAS, NEVADA

IN THE MATTER OF: SOUTHERN NEVADA PAINTERS AND DECORATORS AND GLAZIERS LABOR MANAGEMENT COOPERATION COMMITTEE TRUST, by and through its trustees John Smirk and Jack Mallory, on behalf of FRANCISCO DEL RIO and ELVA MELENDEZ, individuals, Claimants, v. MANPOWER INCORPORATED OF SOUTHERN NEVADA, Respondent. Clark County School District Chaparral HS, Elizabeth Wilhelm ES, Raul Elizondo ES, Diamond ES, Ollie Detwiler ES, Bonanza HS, Foothill HS, Boulder City HS, and Manuel J. Cortez ES.	LCTS No. 24208 24209 **FINAL DECISION**



This matter comes before the Office of the Labor Commissioner ("OLC") in response to a wage claim filed by Southern Nevada Painters and Decorators and Glaziers Labor Management Cooperation Committee Trust ("Southern NV LMCC) on behalf of Francisco Del Rio ("Del Rio") and Elva Melendez ("Melendez"). A Determination was issued by Clark County School District ("CCSD") on December 2, 2014, with regard to work performed by Claimants. Claimants filed an Objection to the December 2, 2014, Determination. CCSD issued an Affirming Determination on January 26, 2015. Timely objections were filed with the Office of the Labor Commissioner. A Pre-Hearing Conference was held on April 13, 2015. A Hearing was originally set for August 4, 2015, and was continued to November 17, 2015. A Hearing was held on November 17, 2015, and the parties stipulated that all Exhibits offered would be admitted into evidence.

STATEMENT OF ISSUES

The following issues were considered at the Hearing:

1. Whether CCSD failed to comply with the provisions of Nevada Revised Statutes (NRS) section 338 and Nevada Administrative Code (NAC) section 338 by failing to properly bid and advertise for work performed on CCSD schools that exceeded $100,000?
2. Whether the work performed on the CCSD schools constituted "Normal Maintenance" under NRS 338?
3. Whether CCSD committed a violation of NRS 338 and NAC 338 by failing to pay prevailing wage on public works projects for painting work performed by temporary employees?
4. Whether Administrative Penalties should be assessed against CCSD for failure to comply with the provisions of NRS 338 and NAC 338?

APPLICABLE LAWS AND DEFINITIONS

I. REQUIREMENTS FOR PUBLIC WORKS PROJECTS

Pursuant to NRS section 338.010 subdivisions 11, 13, 16 and 17, a "Governing Body" means the board, council, commission or other body in which the general legislative and fiscal powers of a local government are vested. A "Local Government" means cities, towns, school districts, etc. A "Public Body" means the State, county, city, town, school district or any public agency of this State or its political subdivisions sponsoring or financing a public work. A "Public work" means any project for the new construction, repair or reconstruction of the following:

(a) A project financed in whole or in part from public money for:
  (1) Public buildings;
  (2) Jails and prisons;
  (3) Public roads;
  (4) Public highways;
  (5) Public streets and alleys;
  (6) Public utilities;
  (7) Publicly owned water mains and sewers;
  (8) Public parks and playgrounds;

(9) Public convention facilities which are financed at least in part with public money; and
(10) All other publicly owned works and property.

The relevant portions of NRS section 338.1385 require a Governing Body or its authorized representative to advertise and bid a Public Work Project that exceeds $100,000. It also prohibits separating and/or breaking portions of a Public Work Project up to avoid the $100,000 requirement for advertising and bidding. Specifically, subdivisions 1(a)(b)(c) states in relevant part as follows: "Except as otherwise provided in subsection 9, (which excludes the normal maintenance of the property of a school district), this State, or a Governing Body or its authorized representative that awards a contract for a public work in accordance with paragraph (a) of subsection 1 of NRS 338.1373 shall not:

(a) Commence a public work for which the estimated cost exceeds $100,000 unless it advertises in a newspaper qualified pursuant to chapter 238 of NRS that is published in the county where the public work will be performed for bids for the public work. If no qualified newspaper is published in the county where the public work will be performed, the required advertisement must be published in some qualified newspaper that is printed in the State of Nevada and having a general circulation within the county.
(b) Commence a public work for which the estimated cost is $100,000 or less unless it complies with the provisions of NRS 338.1386, 338.13862 and 338.13864.
(c) Divide a public work into separate portions to avoid the requirements of paragraph (a) or (b).

Pursuant to NRS section 338.1386, a Local Government, such as CCSD, can award a contract to a contractor to perform work if the Public Work is less than $100,000, or the Local Government, such as CCSD, can perform the work itself. If the Public Work cost is between $25,000 to $100,000, the Local Government is required to obtain three (3) bids from at least three (3) licensed contractors, and if it is less than $25,000, at least one (1) bid from a licensed contractor as required by NRS section 338.13862. Pursuant to NRS section 338.13864, if the State or a local government proposes to perform a public work itself in accordance with NRS 338.1386, the public officer responsible for the management of the public works of the State or the local government, as applicable, must, if the estimated cost

of the public work is more than $25,000 but not more than $100,000 and before work on the public work is commenced, prepare a signed attestation regarding the decision of the State or the local government to perform the public work itself.

Pursuant to NRS section 338.011, the requirements set forth above do not apply to contracts for normal maintenance or a contract awarded for an emergency relating to the health, safety, and welfare of the public.

II. PREVAILING WAGE REQUIREMENTS

NRS 338.020 requires payment of the prevailing wage on public works projects and states in relevant part as follows:

> 1. Every contract to which a public body of this State is a party, requiring the employment of skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workers. The hourly and daily rate of wages must:
> (a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030; and
> (b) Be posted on the site of the public work in a place generally visible to the workers.

NRS section 338.012, and NAC section 338.007 provide the authority for the Labor Commissioner to establish classes of workers. It states in relevant part:

> "Recognized class of workers" defined. (NRS 338.012) Recognized class of workers" means a class of workers recognized by the Labor Commissioner as being a distinct craft or type of work for purposes of establishing prevailing rates of wages. The term includes a class of workers for which the Labor Commissioner has traditionally established a prevailing rate of wages and any other class of workers the Labor Commissioner determines to be a distinct craft or type of work either on his or her own accord or after conducting a hearing pursuant to NAC 338.090.

NRS 338.040 sets forth the requirements for when workers are deemed to be employed on public works.

> Workers deemed to be employed on public works.
> 1. Except as otherwise provided by specific statute, workers who are:
> (a) Employed at the site of a public work; and
> (b) Necessary in the execution of the contract for the public

work, are deemed to be employed on public works.
2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:
(a) Employed at the site of a public work; and
(b) Necessary in the execution of the contract for the public work.

Pursuant to NRS section 338.050, the Prevailing Wage Requirements set forth in NRS sections 338.010 to 339.090, apply to contract workers, such as temporary workers. NRS section 338.050 states in relevant part as follows:

> "For the purpose of NRS 338.010 to 338.090, inclusive, except as otherwise provided by specific statute, every worker who performs work for a public work covered by a contract therefor is subject to all of the provisions of NRS 338.010 to 338.090, inclusive, regardless of any contractual relationship alleged to exist between such worker and his or her employer."

NAC 338.009 provides as follows:

> 1. As used in NRS 338.040, the Labor Commissioner will interpret:
> (a) "Employed at the site of a public work" to mean the performance of work in the execution of a contract for a public work at the physical place or places at which the work is performed or at which a significant portion of the public work is constructed, altered or repaired if such place is established specifically for the execution of the contract for the public work or dedicated exclusively, or nearly so, to the execution of the contract for the public work.
> (b) "Necessary in the execution of the contract for the public work" to mean the performance of duties required to construct, alter or repair the public work and without which the public work could not be completed.
> 2. As used in this section, "site of a public work" includes job headquarters, a tool yard, batch plant, borrow pit or any other location that is established for the purpose of executing the contract for the public work or that is dedicated exclusively, or nearly so, to executing the contract for the public work. The term does not include a permanent home office, branch plant establishment, fabrication plant, tool yard or any other operation of a contractor, subcontractor or supplier if the location or the continued existence of the operation is determined without regard to a particular public work.

NAC 338.0095(1)(a) and (b) set forth the requirements for payment of the prevailing wage on public works projects.

> (a) A worker employed on a public work must be paid the applicable prevailing rate of wage for the type of work that the worker actually performs on the public work and in accordance with

> the recognized class of the worker; and
> (b) Each contractor and subcontractor shall be deemed to be the employer of each worker and apprentice who performs work directly for that contractor or subcontractor in the execution of a contract for a public work, whether the worker or apprentice is employed directly by the contractor or subcontractor or is furnished to the contractor or subcontractor by or through another person or entity such as an employee leasing company or equipment rental business.

NRS section 338.070 and NAC sections 338.106-116 require Public Bodies to to investigate potential violations involving NRS section 338 and NAC section 338.

III. ADMINISTRATIVE PENALTIES

Pursuant to NRS section 338.015, The Labor Commissioner shall enforce the provisions of NRS 338.010 to 338.130, inclusive. In addition to any other remedy or penalty provided in this chapter, if any person, including, without limitation, a public body, violates any provision of NRS 338.010 to 338.130, inclusive, or any regulation adopted pursuant thereto, the Labor Commissioner may, after providing the person with notice and an opportunity for a hearing, impose against the person an administrative penalty of not more than $5,000 for each such violation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. CCSD FAILED TO COMPLY WITH THE REQUIREMENTS FOR PUBLIC WORKS PROJECTS BY FAILING TO PROPERLY ADVERTISE OR BID PROJECTS THAT WERE OVER $100,000 or SELF PERFORMED

The evidence and testimony submitted at the Hearing clearly established that the school painting projects that CCSD initiated in 2011 and 2012, were large projects that involved at least ten (10) schools. These were painting projects where entire schools were being painted, both on the interior and exterior. According to CCSD, the schools that were painted were: Chaparral High School, Elizabeth Wilhelm Elementary School, Raul P. Elizondo Elementary, Cimarron-Memorial High School, Blue Diamond Elementary School, Ollie Detwiler Elementary School, Bonanza High School, Foothill High School, Boulder City High School, and Manuel J. Cortez Elementary School. CCSD used the practice of "Work Orders"

to separate out each of the schools, but the painting projects were part of a larger project, which CCSD termed "Life Cycle Project and/or Projects." Basically, when a school's life cycle for painting was up, based on the number of years since the last time this work was performed, or initiated, they would be put on a list, and a Work Order would be completed to paint the school. In 2011 and 2012, at least ten (10) schools were identified as Life Cycle Project(s) and painting work was performed at these schools. The nature of the painting work was large in scope, and included the painting of entire schools both in the interior, and exterior. Current CCSD employees who testified at the hearing, and who observed the painting projects in 2011 and 2012, described the projects as large or big projects. The testimony evidenced that Work Orders were typically utilized for smaller assignments that were performed by CCSD Maintenance Staff, such as graffiti removal, but not for projects such as painting an entire school.

The painting work at ten (10) schools in 2011 and 2012, was a Public Work Project(s) or series of Public Works Project(s) that CCSD separated out to avoid the requirements of NRS section 338.1385 as set forth above. CCSD even acknowledged that the high schools that were painted would have cost over $100,000. The evidence and testimony also indicated that on certain occasions, CCSD was reducing, or not ordering the needed amount of supplies, such as paint, to paint these schools to keep the costs of the projects under $100,000. CCSD also did not provide an analysis on the costs of the total project, but it is clear from the evidence and testimony provided that the costs of the Life Cycle Painting Project(s) in 2011 and 2012 were over $100,000.

CCSD also failed comply with the requirements of NRS sections 338.1386, 338.13862, and 338.13864. CCSD really provided no credible evidence as to the actual costs of the painting projects for each of the ten (10) schools that were painted in 2011 and 2012, and did not provide a total cost for the Life Cycle Project(s). CCSD also did not provide the required

information and documentation to comply with the requirements of NRS sections 338.1386, 338.13862, and 338.13864. In addition, the testimony provided by CCSD that they could not investigate or obtain information because the painting projects were done by the Maintenance Department and not the Capitol Program of CCSD is simply not credible. While CCSD may be a large organization, it is not unrealistic to assume that somebody from the Capitol Program could have picked up the phone or sent an email to the Maintenance Department to obtain information about the painting projects that were done in 2011 and 2012 by CCSD. Unfortunately, CCSD either chose not to comply with any of the requirements of NRS section 338.1385, 338.1386, 338.13862, 338.13864, or chose simply not to investigate any potential violations of these sections.

2. THE PAINTING/DRYWALL PROJECTS WERE NOT NORMAL MAINTENANCE

CCSD's position is that the painting projects, also called Life Cycle Project(s) that were completed by CCSD in 2011 and 2012, were normal maintenance under NRS section 338.011. While "Normal Maintenance" is not defined, normal maintenance has typically been interpreted by the Office of the Labor Commissioner to mean work that does not require skilled labor, such as janitorial work, or work that is routine, small, or day to day in nature, and not in excess of $100,000. For example, the Office of the Labor Commissioner has no issue or concern with CCSD having its own staff, or temporary workers perform jobs or tasks that are truly normal maintenance, such as patching a small hole with drywall, removing graffiti, or painting a door at a school. When asked if the painting projects that were completed by CCSD in 2011 and 2012, were large projects, the testimony and evidence established that these were large painting projects, and that they were not routine or normal.

The Claimants themselves also testified that these were large projects where entire schools were being painted from the inside out. The photographic evidence that was submitted also established that these were large painting projects that were being done at

multiple schools, and not simply a touch up with paint here or there.

The evidence and testimony simply does not point to "Normal Maintenance" under NRS 338.011 or 338.1385(9), and instead points to Public Works Project(s) that were over $100,000, and not routine or normal based on the painting work performed, and size of the projects.

3. CCSD FAILED TO PAY THE REQUIRED PREVAILING WAGE ON PUBLIC WORKS PROJECTS

Because the evidence established that the CCSD painting projects that were completed in 2011 and 2012 were a Public Work Project(s) over $100,000, CCSD was required to pay Prevailing Wage for those Recognized Classes of Workers that were utilized on the project pursuant to NRS sections 338.020 and 338.040, and NAC sections 338.009 and 338.0095. NRS section 338.050 also requires the payment of Prevailing Wage for contract workers, including temporary workers, on Public Works Projects. The Claimants were temporary contract workers hired through Manpower to perform painting work.

In another shifting theory as to why the painting projects completed in 2011 and 2012 were not Public Works Project(s) or why CCSD should not be required to pay Prevailing Wage to the Claimants, CCSD has asserted that because the term "Painting" is not used or listed next to "new construction, repair or reconstruction" in NRS 338.010, or next to "construct, alter, or repair" in NAC 338.009, that painting jobs are excluded from the Prevailing Wage requirements. CCSD references the Federal Davis-Bacon Act as part of its theory. CCSD's position is simply not supported by the statutory framework and language of Nevada's Prevailing Wage laws or the enforcement of Nevada's Prevailing Wage laws as intended by the Legislature.

Pursuant to NRS section 338.012 and NAC section 338.007, the Labor Commissioner is authorized to establish classes of workers based on the work, skill, or craft, and determine

Prevailing Wage Rates for these classes pursuant to NRS section 338.030. There are currently 42 classifications of workers in Nevada, including Painters. The Job Description for Painter includes, but is not limited to: (1) All painting of walls, equipment, buildings, bridges and other structural surfaces by using brushes, rollers and spray guns; (2) Application of wall coverings/wall paper; (3) Removing old paint to prepare surfaces before painting the surface; (4) Mixing colors or oils to obtain desired color or consistency; (5) Sanding surfaces between coats and polishing final coat to a specified finish; (6) Cutting stencils and brushing and spraying lettering and decorations on surfaces; (7) Washing and treating surfaces with oil, turpentine, mildew remover or other preparations; and (8) Filling cracks, holes and joints with caulk, putty, plaster or other filler by using caulking gun or putty knife.

To accept CCSD's assertion that because painting is not listed next to "new construction, repair or reconstruction" or next to "construct, alter, or repair," it is excluded from Prevailing Wage Requirements, would be to accept that all of the other 41 Classifications for Workers are now null and void because, these classifications are not listed next to those terms either. This essentially creates a result whereby the express statutory provisions authorizing the Labor Commissioner to create classes of workers and determine Prevailing Wage Rates for these workers would be meaningless and unenforceable. CCSD's position is without merit.

It is clear from the testimony and evidence provided, that the Claimants performed work that fit the Job Description and Classification of a Painter. Because Claimants performed the work of Painters on Public Works Project(s), they are required to be paid the Prevailing Wage Rate for Painters of $47.04 per hour pursuant to NRS sections 338.020 and 338.040, and NAC sections 338.009 and 338.0095. Claimant Del Rio is owed $53,685, and Claimant Melendez is owed $55,282.64

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4. ADMINISTRATIVE PENALTIES ARE APPROPRIATE BASED ON THE FINDINGS

NRS section 338.015 authorizes the Labor Commissioner to assess Administrative Penalties for violations of NRS section 338, and NAC section 338. The facts established that CCSD failed to comply with the requirements of NRS section 338 and NAC section 338. CCSD failed to properly bid and advertise a Public Work Project(s) over $100,000, and by separating out multiple projects, and by failing to meet the requirements of self-performance pursuant to NRS sections 338.1385, 338.1386, 338.13862, and 338.13864.

CCSD failed conduct an investigation regarding the Prevailing Wage Complaints filed by Claimants as required by NRS section 338.070 and NAC sections 338.106-116. At the Hearing, CCSD witness Luci Davis, admitted that CCSD did not investigate the Prevailing Wage Complaints, and did not contact the Maintenance Department to obtain information and documentation that was the subject of Subpoenas. It unfortunate that CCSD simply chose to ignore the issue and not conduct a proper investigation, and demonstrates that the various programs of CCSD may need to work together to maintain future compliance with NRS section 338 and NAC section 338.

CCSD failed to pay the required Prevailing Wage Rates to the Claimants for painting work performed on Public Works Project(s) as required by NRS sections 338.020 and 338.040, and NAC sections 338.009 and 338.0095.

All of these violations, when taken as a whole more than justify an Administrative Penalty of $20,000.

THEREFORE, it is HEREBY ORDERED that:

1. The CCSD school painting projects completed in 2011 and 2012 were Public Works Project(s) that exceeded $100,000 and subject to the requirements of NRS section 338.1385.

2. The CCSD School painting projects completed in 2011 and 201 were not Normal Maintenance pursuant to NRS section 338.011.
3. CCSD failed to pay the required Prevailing Wage based on the Painter Classification for work performed at a Public Work Project(s) in 2011 and 2012. CCSD owes Claimant Del Rio $53,685, and Claimant Melendez $55,282.64. CCSD shall submit payment to the Office of the Labor Commissioner located at 555 East Washington Avenue, Suite 4900, Las Vegas, NV 89101, within 30 days of receipt of this Final Decision.
4. An Administrative Penalty of $20,000 is assessed against CCSD for violations of NRS section 338 and NAC sections 338 as set forth above. CCSD shall submit payment of the $20,000 Administrative Penalty to the Office of the Labor Commissioner located at 555 East Washington Avenue, Suite 4900, Las Vegas, NV 89101, within 30 days of receipt of this Final Decision.

Dated this 11th day of December, 2015.

Shannon M. Chambers
Labor Commissioner
State of Nevada

CERTIFICATE OF MAILING

I, Takia Ballard, do hereby certify that I mailed a true and correct copy of the foregoing **FINAL DECISION**, via the United States Postal Service, Las Vegas, Nevada, in a postage-prepaid envelope to the following:

Rory D. Lorenz. Director
Clark County School District
Contract Procurement & Compliance
4190 McLeod Drive, 1st Floor
Las Vegas, Nevada 89121

Alan J. Lefebvre, Esq.
William D. Schuller, Esq.
KOLESAR & LEATHAM
400 So. Rampart Blvd., Suite 400
Las Vegas, Nevada 89145

Evan L. James, Esq.
Patrick Davis, Esq.
CHRISTENSEN JAMES & MARTIN
7440 W. Sahara Avenue
Las Vegas, Nevada 89117

Francisco Del Rio
201 Fir Street
Henderson, Nevada 89015

Elva Melendez
4470 E. Owens Avenue, A-108
Las Vegas, Nevada 89110

Dated this 11th day of December, 2015.

Takia Ballard, an employee of the
Nevada State Labor Commissioner

EXHIBIT

B

BRIAN SANDOVAL
Governor

BRUCE BRESLOW
Director

SHANNON E. CHAMBERS
Labor Commissioner

STATE OF NEVADA

REPLY TO:

OFFICE OF THE LABOR COMMISSIONER
555 E. WASHINGTON AVENUE, SUITE 4100
LAS VEGAS, NEVADA 89101
PHONE (702) 486-2650
FAX (702) 486-2660

Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
http://www.LaborCommissioner.com

August 3, 2016

Boulder City Public Works
Scott P. Hansen, P.E., Public Works Director
401 California Avenue
Boulder City, NV 89005

RE: **DETERMINATION - CASE #NLC-16-000765**
Hemenway Water Tank Re-Coating 2014 Boulder City Project No. 11-08944-WT

On June 3, 2016, a Formal Complaint ("Complaint") was filed by Southern Nevada Labor Management Cooperation Committee, ("LMCC") with the Office of the Labor Commissioner ("OLC") against Boulder City ("Boulder") and MMI Tank, Inc., ("MMI"). The Complaint alleged possible violations of Nevada Revised Statutes ("NRS") 338.010 to 338.090, inclusive, and/or Nevada Administrative Code ("NAC") 338.005 to 338.125, during the course of execution of the Contract for the Hemenway Water Tank Re-Coating 2014 Boulder City Project No. 11-08944-WT ("Project"). Pursuant to the provisions of NRS Chapter 338 and NAC Chapter 338, the Labor Commissioner commenced an investigation into the Project.

SUMMARY OF FACTS

This Project included the rehabilitation of one 2.5 million gallon potable water welded steel on-grade reservoir. When reviewing the Annual Fiscal Year 2011-2012 Budget, it was found on page 220, that the Water Tank Maintenance Program identified that improvements and repairs were needed to three of the above ground steel water tanks and some of these items were addressed with in-house labor. (See exhibit 1). However, in-house labor was not performed on the Hemenway Project and it was put out to bid. (See exhibit 2).

The Project went to bid on May 22, 2014, at 2:30 p.m. with a total of five bidders. The lowest bidder was MMI in the amount of $533,330.00. The Notice of Award was issued on August 6, 2014, with an effective date of August 11, 2014. Boulder listed the Project as a maintenance project stating the "prevailing wages does not apply". (See exhibit 3 "page 4").

The OLC has determined pursuant to NRS 338.011, that the requirements of normal operation and normal maintenance were not applicable to this Project based on the size and amount of the Project, and because in-house labor was not used to perform the work. Because the Project was sent out to bid based on the size and amount of the Project, Prevailing Wages should have been paid on the Project pursuant to NRS 338.040 and NAC sections 338.009, and 338.0095. (See exhibit 3).

DECISION

The OLC's Investigation finds that Boulder is in violation of NRS 338.010 to 338.090, inclusive, and/or NAC 338.005 to 338.125. See also NRS 338.090 for penalties that may be imposed.

Therefore, the following actions will need to be taken:

1. Boulder will request an Identifying Number from the OLC pursuant to NRS 338.013 within five (5) days of receipt of this Determination;

2. All contractors that performed work on the above site will need to submit certified payroll reports to Boulder, and ***(Boulder only)***, with the Identifying Number on each of the certified payroll reports that will be issued by the OLC;

3. All contractors will submit, attached to each certified payroll report, evidence of the wages that were paid for each of the workers for the applicable prevailing wage rates for the type of work actually performed in accordance with the recognized class of workers;

4. If the workers did not receive the applicable prevailing wage rate, then adjustments will be made for the wages owed along with evidence supporting that the wages have been corrected for each of the weeks in question;

5. The contactors will have one month to provide this information to the Attorney for the Boulder, who will be responsible for ensuring that these documents have been received by Boulder on or before September 5, 2016;

6. The Attorney for Boulder will set up a meeting (on or before September 30, 2016) with the OLC to review the above documents to ensure that the required prevailing wages have been paid; and

7. An Administrative Penalty in the amount of $5,000.00 has been assessed against Boulder for failing to comply with applicable provisions of NRS 338 and NAC 338.

APPEAL RIGHTS

Pursuant to NAC 338.114 a person who is served a copy of this Determination and who is aggrieved by the Determination may file a written Objection/Appeal within fifteen (15) days of the date of receipt of this Determination. The Objection/Appeal must be accompanied by a short statement of the grounds for the Objection/Appeal and evidence substantiating the Objection/Appeal. Any Objection/Appeal must be filed with:

The Office of the Labor Commissioner
555 E Washington Avenue Suite 4100
Las Vegas, Nevada 89101

If you have any questions regarding the above, please contact our office at (702) 486-2650

Sincerely,

Mary Huck
Deputy Labor Commissioner

CERTIFICATE OF MAILING

I, Kristine Garcia, do hereby certify that I mailed a true and correct copy of the foregoing **NOTICE OF DERMINATION**, via the United States Postal Service, Las Vegas, Nevada, in a postage-prepaid envelope to the following:

Boulder City Public Works
Scott P. Hansen, P.E., Public Works Director
401 California Avenue
Boulder City, NV 89005

MMI Tank, Inc.,
Christopher M. Payne
3240 S. 37th Ave,
Phoenix, AZ 85009

City of Boulder City
Dave R. Olsen, Esq.
401 California Avenue
Boulder City, NV 89005

Christensen James & Martin
Evan L. James, Esq.
7440 W. Sahara Avenue
Las Vegas, Nevada 89117

Dated this 3rd day of August 2016

Kristine Garcia, an employee of the
Nevada State Labor Commissioner

EXHIBIT

C

DISTRICT COURT

CLARK COUNTY, NEVADA

BOMBARDIER TRANSPORTATION (HOLDINGS) USA INC., Petitioner, v. NEVADA LABOR COMMISSIONER; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; and CLARK COUNTY, Respondent.	Case No.: A-14-698764-J Dept. No.: XXVI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is before the court on a Petition for Judicial Review arising from the final decision of the Office of the Labor Commissioner dated March 6, 2014. The decision held that the maintenance contract for the Automated Transit System ("ATS") at McCarran International Airport, Contract CBE-552, is a public works project covered by NRS Chapter 338's prevailing wage requirements, and that certain work performed under its terms must be compensated at prevailing wage rates.

Although this Court may not have ruled as the Labor Commissioner did had this Court been the trier of fact, it is not within this Court's purview to substitute its judgment for those Labor Commissioner findings that are based on substantial evidence. This Court finds that the Labor Commissioner's findings are based on substantial evidence. This Court further finds that the Labor Commissioner's conclusions of law are based upon the facts, are not pure questions of law, and are not clearly erroneous, arbitrary, or capricious, and,

therefore, must be upheld. Likewise, the Labor Commissioner's interpretation of its governing statutes and regulations, here NRS Chapter 338 and NAC Chapter 338, is within the statute's and regulations' language and thus is entitled to deference. This Court's order also allows and accounts for the Labor Commissioner's specialized knowledge, experience and expertise when evaluating the evidence. To the extent questions of statutory construction would generally be subject to a de novo review, the Labor Commissioner's interpretation is still entitled to deference under the circumstances of this petition.

The Court affirms the Labor Commissioner's March 6, 2014, Order in its entirety, as set forth below:

I. Factual background

In 2008 Clark County entered into Contract CBE-552 with Bombardier to service the Automated Transit System ("ATS") at McCarran International Airport. The system uses vehicles specially manufactured for the County's specifications which run on abnormally-large rubber tires over a concrete guideway, and weigh over 40,000 pounds each ("ATS cars"). They were brought in using special cranes, required hundreds of man-hours to specially adapt to their location, and they never leave McCarran except when the airport will no longer use them at which time they are not put to use elsewhere, but instead their good parts stripped and the rest sold for scrap.

Contract CBE-552 provided for payment by the County to the Company beginning at $2.7 million annually with 5% annual increases, and involved an anticipated term of 5 years. Tasks done by the ATS technicians employed by Bombardier included replacing broken leaf springs (basic part of the suspension, requiring 3-4 workers and more than 15 manhours), replacing vehicle traction motors (usually taking 3-4 workers and over 12 manhours), replacing the clamshells on the guideway installed there to protect the power lines, replacing the Regional Automatic Train Control electronic circuit boards, and replacing the station doors' autolocks, guides, rollers, controllers, motors, wiring and key switches. Most of the repair work done by the ATS technicians here was done at night or during the daytime window while the system was not operating.

II. Procedural history

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The International Union of Elevator Constructors ("IUEC") filed a prevailing wage complaint on October 9, 2009 against Bombardier. The complaint alleged that workers hired by Bombardier under Contract CBE-552 to perform repair work on the ATS should have been paid the prevailing wage, in accordance with NRS 338, but were not. Deputy Labor Commissioner Keith Sakelhide issued a Complaint on October 13, 2009. He directed the Clark County Department of Aviation ("DOA") to conduct an investigation into the Union's allegations and determine what work was actually performed under the CBE-552 contract and whether Bombardier had committed a violation. On November 24, 2009, the Department of Aviation announced its determination that CBE-552 and the work performed thereunder is not subject to prevailing wage under NRS Chapter 338 because it was a maintenance contract. The Union objected to the Department of Aviation's findings, and the investigation was returned to the Department of Aviation for further investigation.

The DOA issued a second Determination on March 30, 2010, affirming its initial Determination. The Union filed objections, and the Labor Commissioner directed the DOA to investigate the objections and respond. The Labor Commissioner issued an Interim Order on June 7, 2011. The Interim Order found that work on "fixed" portions of the ATS was subject to NRS 338 but work on the ATS cars was not. The DOA issued a second revised Determination on July 25, 2011, asking the complaint to be dismissed because none of the work on the "fixed" portions of the ATS exceeded $100,000 and was therefore exempt from prevailing wage. Finally on July 25, 2011, the Department of Aviation issued a revised determination, and the Union and Bombardier both objected.

The matter was set for hearing, and an administrative hearing was held over six days in June and September, 2013. On March 6, 2014, the Labor Commissioner issued his Decision. In his Decision, the Labor Commissioner found that 20% of the work performed by Bombardier for the DOA was repair work on a public work and therefore not exempt from prevailing wage law. The Commissioner found the proper job class to use was Elevator Constructor, a class he had previously posted pursuant to a survey of employers pursuant to NRS 338.010. He ordered that the repair work performed by ATS Technicians must be compensated at the 2007-2008 prevailing wage rate for Elevator Constructors and that the

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DOA shall calculate the amount due pursuant to the Decision. The Labor Commissioner rejected Bombardier and Clark County's arguments that the work was exempt under NRS 338.011(1), finding that CBE-552 was not directly related to the normal operation of the Airport because it was possible for the Airport to function without the ATS and that the estimated 20% of the technicians' time spent doing "corrective maintenance" was repair work and not normal maintenance. He also rejected their arguments that the work was exempt pursuant to NRS 338.080, the "railroad company" exemption. Bombardier then filed the instant Petition for Judicial Review of the Labor Commissioner's order.

III. Standard of Review

The right to seek judicial review of a final agency decision is both created and constrained by the Nevada Administrative Procedures Act ("APA"), NRS Chapter 233B. The APA provides the exclusive means for a court to review an administrative decision. NRS 233B.130(6). Under the APA, a general standard of deference to the agency applies in a judicial review proceeding.

The substantive controlling standards for conducting a judicial review are set forth in NRS 233B.135(3). Under these standards the Court must presume the agency's decision to be reasonable and lawful and may not substitute its judgment for that of the agency on factual questions. NRS 233B.135(3). Bombardier, as the petitioner in this case, bears the burden of proof in this petition to show that the Labor Commissioner's decision is tainted by one of the errors listed in NRS 233B.135(3).

A court may not foreclose the exercise of an agency's independent judgment on matters that are particularly within the agency's competence. *Nevada Tax Comm'n v. Hicks,* 73 Nev. 115, 310 P.2d 852 (1957). A decision that is based upon an agency's exercise of judgment is subject to an abuse of discretion standard. *Wynn Las Vegas, L.L.C. v. Baldonado*, 124 Nev. 951, 311 P.3d 1179, 1181 (2013) (conducting a review of the Labor Commissioner's determination of whether a particular tip-pooling arrangement was unlawful). Under this standard an agency's decision may only be reversed if it is clearly erroneous or arbitrary and capricious. *Maxwell v. SIIS,* 109 Nev. 327, 331, 849 P.2d 267, 271 (1993).

The Court will not re-weigh the evidence to determine whether a view is supported by a

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preponderance of evidence, and instead is limited to reviewing the decision under the substantial evidence standard. *Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. ____, 327 P.3d 487 (Adv. Op. 27, April 3, 2014); *Construction Indus. Workers' Comp. Grp. ex rel. Mojave Elec. v. Chalue*, 119 Nev. 348, 74 P.3d 595, 598-99 (2003). Substantial evidence is the quantity of evidence which a reasonable person could accept as adequate to support a conclusion. *State Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498-499, n.1 (1986). Further, the Court should also allow for the agency to use its specialized knowledge, experience and expertise when evaluating the evidence before it. NRS 233B.123(5).

> An agency charged with the duty of administrating an act is impliedly clothed with power to construe it as a necessary precedent to administrative action.'" *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (citations omitted). Further, "great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute.'" *Id.* (citations omitted). While the agency's interpretation is not controlling, it is persuasive. *State Engineer v. Morris,* 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

Pyramid Lake Paiute Tribe v. Washoe County, 112 Nev. 743, 918 P.2d 697 (1996). *See also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008) ("the Labor Commissioner is charged with knowing and enforcing the labor laws; these responsibilities acknowledge a special expertise as to those laws.").

A court may conduct an independent review of pure questions of law. *DMV v. Jones-West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998). However, an agency's legal conclusions that are based upon the facts are not pure questions of law, and therefore are entitled to deference. *Id.* Where statutory interpretation is concerned, a court may conduct an independent review, but in doing so must still give consideration to the Labor Commissioner's interpretation. *Office of Labor Commissioner v. Granite Const. Co.* 118 Nev. 83, 90, 40 P.3d 423, 428 (2002) (explaining that "[a]lthough we review questions of statutory construction *de novo*, an administrative agency charged with the duty of administering an act is impliedly clothed with the power to construe the relevant laws and the construction placed on a statute by the agency charged with the duty of administering it is entitled to deference."); *see also Wynn Las Vegas*, 311 P.3d at 1181-1182. While an agency's interpretation of a statute is not

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necessarily controlling, it should be regarded as persuasive even in the context of an independent review. *Nevada Power Co. v. Pub. Serv. Comm'n of Nevada*, 102 Nev. 1, 4, 711 P.2d 867, 869 (1986).

IV. Nevada's prevailing wage law

Nevada's prevailing wage statute, codified in NRS Chapter 338, requires that an employee on a public work must be paid according to the prevailing wage schedule published annually by the Nevada Labor Commissioner. NRS 338.020-.030. A public body sponsoring a public work is responsible for ascertaining the proper prevailing wage rate from the Labor Commissioner and ensuring that provisions for payment of prevailing wages are included in a public works contract. NRS 338.020(1); NRS 338.030(1). The Nevada Labor Commissioner is charged with ensuring compliance with these requirements and enforcing the prevailing wage statutes. NRS 338.015. The Labor Commissioner is empowered to award back pay to workers that have not been properly compensated and to assess fines and other penalties against contractors that fail to comply with the prevailing wage laws. NRS 338.090(2); *see also City Plan Dev., Inc. v. Office of Labor Commissioner*, 121 Nev. 419, 436, 117 P.3d 182, 193 (2005). Neither the Labor Commissioner's enforcement authority nor the workers' rights to prevailing wages are constrained by the terms of a contract. NRS 338.050; NAC 338.008.

The actual wage rates for the recognized worker classifications are established annually by a list published by the Labor Commissioner's office as mandated by NRS 338.030. These lists identify the job classifications that have been recognized for prevailing wage purposes, provide a short description of those classifications, and specify the applicable wage rate for each. *See Labor Com'r of State of Nevada v. Littlefield,* 123 Nev. 35, 40, 153 P.3d 26, 29 (2007).

Nevada's prevailing wage laws are derived from the federal Davis-Bacon Act. *Granite Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002). Just like the federal act, Nevada's prevailing wage laws are not intended to benefit employers or even the public body sponsoring a project; the beneficiaries of prevailing wage laws are the workers themselves who benefit from protections against substandard earnings when working on a public work. *United States v. Binghamton Const. Co.*, 347 U.S. 171, 178 (1954); *City of Reno v. Bldg. & Const. Trades*

Council of N. Nevada, 12 Nev.Adv. Op 2, 251 P.3d 718, 721, n. 3 (2011).

Where the legislature adopts a law of this type that is intended to protect workers' wages, the Nevada Supreme Court has recognized that such laws serve a remedial purpose and "...should receive the most liberal construction to give full effect to its provisions." *Alexander v. Archer*, 21 Nev. 22, 29, 24 P. 373, 375 (1890); *see also Terry v. Sapphire Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014). When construing such an act, the Court's obligation is to do so in a way that will suppress the mischief and advance the remedy contemplated by the legislature. *Archer,* 21 Nev. at 29, 24 P. at 375; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 560-61 (2008) (recognizing that "...remedial statutes... should be liberally construed to effectuate the intended benefit .").

V. The Labor Commissioner properly found that CBE-552 was a public works contract

Payment of prevailing wage is required for all public works contracts not otherwise exempt. A "public work" is defined, in relevant part, as "any project for the new construction, repair or reconstruction of...a project financed in whole or in part from public money for...public buildings and all other publicly owned works or property." NRS 338.010(16) (emphasis added). Bombardier does not contest the "public" nature of this work. CBE-552 concerned repair work (including maintenance) on the publicly-owned ATS system at McCarran Airport. The ATS is property of Clark County and was paid for with public funds.

Instead, Bombardier assigns error to the Commissioner's interpretation of "project". Only publicly- financed "projects" require the payment of prevailing wage. NRS 338 does not define "project" for purposes of interpreting its provisions. The Labor Commissioner took the common-sense approach of applying dictionary definitions of the word. *See*, e.g., *Terry v. Sapphire Gentleman's Club*, 130 Nev. Adv. Op. 87 (Oct. 30, 2014) (repeatedly looking to dictionary definitions in order to ascertain the meaning of terms contained in Nevada's wage and hour laws). The Labor Commissioner looked to two dictionary definitions that highlighted advanced planning, a specific purpose, and work which extends over a considerable period of time.

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CBE-552 was a five-year contract with many complicated tasks to be performed over that time, all with the central object of keeping the ATS running 99.65% of the time. Bombardier argues this work was not a "project" because not every task was listed with a deadline in the contract. However, CBE-552 spends 5 pages listing various maintenance and repair tasks, and then also incorporates Preventative Maintenance Schedules, three single-spaced sheets listing more than 50 scheduled inspections of different systems. The industry standard from the American Society of Civil Engineers which Bombardier helped develop requires a "comprehensive maintenance plan" which Bombardier cannot deny having.

The Labor Commissioner was not required to adopt Bombardier's preferred interpretation of "project" as requiring prescheduling. It serves the purposes of the statute far less well than the Labor Commissioner's interpretation. NRS 338 covers "repairs". It must cover work that is not scheduled well in advance, because that is in the very nature of many (if not most) repairs: one cannot readily predict when elevators, air conditioning or plumbing systems are going to break down. Injecting a requirement that work be short-term or pre-scheduled is an unrealistic narrowing of the meaning of "repair" that is inconsistent with underlying purposes of prevailing wage law to protect workers and local contractors from low wages.

Courts and agencies have broadly construed the term "project." *See, e.g., Arco Materials, Inc. v. State, Taxation and Revenue Dept. Court of Appeals of New Mexico*, 878 P.2d 330 (N.M. 1994) (materials sold for unscheduled road maintenance and repair deemed part of "construction project" where "construction" defined elsewhere in code as including repairs); *People ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1323 (9th Cir. 1985) amended, 775 F.2d 998 (9th Cir. 1985) ("repairs to water-related structures are 'projects' within the meaning of the Compact.").

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Bombardier's approach is also contrary to the holdings of courts and agencies that unscheduled work in repairing construction equipment and delivering materials on site is covered work. *State of Nevada Bus. & Ind. v. Granite Construction Co.*, 40 P.3d 423, 118 Nev. 83 (2002) (delivery drivers); *So. Nev. Operating Engineers v. Johnson*, 121 Nev. 523, 119 P.3d 720 (2005) (equipment greasers and repairmen); *Heller v. McLure & Sons*, 963 P.2d 923, 927 (Wash. App. 1998) (equipment maintenance and repair); *Griffith Co.*, 17 BNA Wage & Hour Cases 49 (DOL WAB 1965) (same); *U.S. v. Sparks*, 939 F. Supp. 636 (C.D. Ill. 1996); *In re Vecellio & Grogan, Inc.*, 1984 WL 161749 (DOL WAB 1984)(same); *In re Dworshak Dam*, 1973 DOL Wage App. Bd. LEXIS 9 (1973)(same); *Chester Bross Const. Co. v. Missouri Dept. of Labor and Indus.*, 111 S.W.3d 425, 427 (Mo.App. 2003)(same).

VI. "Elevator Constructor" is the applicable classification for ATS repair work

The Labor Commissioner's determination that "elevator constructors" was the appropriate classification is supported by substantial evidence. Decisions about the appropriate classification are specifically reserved to the Labor Commissioner. See *City Plan, supra*; NRS 338.030; NRS 338.090. The Labor Commissioner clearly stated his rationale in his order. The ATS was the same type of equipment that elevator constructors work on; many of the same technical skills translate between elevator constructors and the ATS technicians. Many of the same tools are also used by both elevator constructors and ATS technicians. An elevator constructor who became an ATS tech testified to the overlap in skills and duties. The Labor Commissioner looked to the Service Contract Act's definition of elevator repairer that included automated people movers and to the statement of Dan Safbrom addressing the similarities between elevator constructors and ATS technicians. Elevator Constructor is the job class used by the U.S. Department of Labor for automated people mover ("APM") work. IUEC labor agreements filed with the Commissioner's office expressly included APMs in their scope of work. Published sources repeatedly refer to APMs as "horizontal elevators". The Decision that repair work under CBE-552 should have been paid at the Elevator Constructor rate of pay is amply supported in the record.

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VII. The Decision did not constitute "rule making" under the Administrative Procedures Act

The Labor Commissioner's decision that the repair work should be paid at the Elevator Constructor rate did not violate the Administrative Procedures Act. The Labor Commissioner does not engage in *ad hoc* rulemaking when he applies the job descriptions from the prevailing wage list to determine the correct classification. The Nevada Supreme Court was quite clear about this in *City Plan Development, Inc. v. Office of the Labor Commissioner*, 121 Nev. 419, 117 P.3d 182 (2005). Bombardier's reliance upon *Southern Nevada Operating Engineers Contract Compliance Trust v. Johnson,* 121 Nev. 523, 530, 119 P.3d 720, 725 (2005) and *Labor Commissioner v. Littlefield,* 123 Nev. 35, 153 P.3d 26 (2007) to the contrary is not justified. Each of those cases concerned the wholesale removal of a recognized classification from the prevailing wages list, not the application of a job description to determine the applicable classification. The Court in *Johnson* and *Littlefield* reaffirmed the conclusion in *City Plan*. *Johnson* 121 Nev. at 530, 119 P.3d at 725 (stating that a scenario where the Labor Commissioner makes recourse to predefined job classifications "...would not have been subject to the rulemaking requirements of the APA."); *Littlefield* 123 Nev. at 43, 153 P.3d at 31 (stating "the APA's notice and hearing requirements do not apply to decisions that merely set prevailing wage rates or place individual workers into specific classes.").

The absence of the specific duties performed by the Bombardier employees does not affect this conclusion. The Commissioner's published job descriptions use the phrase "includes but is not limited to" to make clear to everyone that the descriptions are not exhaustive. The Commissioner's introduction to his descriptions instructs all parties not finding some task expressly listed in the descriptions to contact the Commissioner's office for guidance. The Decision did not add or delete any classifications but simply found the classification applicable to the work in question and was therefore not rule making under the APA.

VIII. Bombardier's repair work was not exempt as "normal operations" or "normal maintenance"

NRS 338.011(1) creates an exemption for some types of work that would otherwise

satisfy the definition of a "public work" in NRS 338.010(16). By its very terms, the exemption is both qualified and limited. The exemption only applies to a contract "...which is directly related to the normal operation of the public body or the normal maintenance of its property." The Labor Commissioner concluded that neither of these exceptions applied in this case. His conclusion is supported by substantial evidence.

A. *"Normal Operations"*

In order for the NRS 338.011(1) operations exemption to apply, a contract must concern operations that are "normal." NRS 338.011(1). The Labor Commissioner found that CBE-552 did not involve McCarran Airport's normal operations. He concluded that while the ATS is a convenience to passengers, it does not affect the taking off and landing of airplanes and getting passengers to their destinations, which is the normal operation of the airport. It is not the exclusive means of transit from one part of the airport to another. He accepted that the ATS was important to McCarran Airport but held that importance alone does not equate with "normal operations." Importance in and of itself cannot satisfy this exemption as any governmental expenditure is arguably important or it should not be made. He also pointed to the fact that much of the work on the ATS is done at night when the system is not in use by passengers. The repair work of the ATS technicians is not involved in the "normal operation" even of the ATS itself let alone the airport.

Bombardier highlights that which it considers to be favorable evidence and requests the Court to re-weigh the evidence, this time in Bombardier's favor. But this does not show reversible error as an administrative agency does not err merely by preferring one view of the evidence over another. *Langman v. Nevada Administrators, Inc.*, 114 Nev. 203, 210, 955 P.2d 188, 192 (1998); *see also Malecon Tobacco, LLC v. State ex rel. Dept. of Taxation,* 118 Nev. 837, 841, 59 P.3d 474, 477, n.15 (2002) (courts "...must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.") (internal citations omitted).

Bombardier's reliance on its interpretation of legislative history is unavailing. The statute clearly commits the application of the "normal operations" exemption to the expertise of the Labor Commissioner. NRS 338.011(1): NRS 338.090(2); NRS 233B.135(3). In

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analogous situations where the Legislature has established a general standard and committed the application of a statutory standard to an agency the Nevada Supreme Court has recognized that the agency's decision should be afforded "great deference." *Clark Cnty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 446, 530 P.2d 114, 117 (1974); *Mirin,* 92 Nev. 503, 553 P.2d 966.

b. *Normal Maintenance*

The NRS 338.011(1) exemption also applies to a contract that is "directly related to ... normal maintenance." Like the normal operations exemption, the application of this exemption is committed the judgment of the Labor Commissioner. NRS 338.015; NRS 338.090(2)(a); *see also* NRS 607.205. The Labor Commissioner determined that some of the work under CBE-552 did in fact contain normal maintenance work, but that "some of the heavy or corrective maintenance tasks go beyond the normal maintenance that would be exempt under NRS 338.011. Those tasks cross over into the realm of repair." It was only these tasks that went beyond normal maintenance that were subject to the prevailing wage requirement.

Consequently CBE-552 included some exempt normal maintenance work with some non-exempt repair work. The Commissioner properly concluded that prevailing wage work retains that character even when it is bundled with exempt work. The Labor Commissioner reasoned that NRS 338.011(1) was not intended to be used as a tool to avoid paying prevailing wages for work that would rightfully be subject to prevailing wages.

IX. The "railroad" exemption does not apply to the ATS or to Bombardier

NRS 338.080(1) exempts work that is "...carried out by or for any railroad company or any person operating the same..." from the prevailing wage requirements. The Labor Commissioner took this subdivision to mean that a railroad company under this provision of Nevada law is one that operates a railroad within Nevada. His conclusion is supported by substantial evidence and accords with legal precedent. *Westinghouse Elec. Corp. v. Williams*, 325 S.E.2d 460, 462 (Ga. Ct. App. 1984) (considering whether a similar system installed at Atlanta's airport was a "railroad" and finding that it was not).

Bombardier does not seriously challenge the Labor Commissioner's finding that the

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ATS was not a railroad. Bombardier's APM system does not use a manned vehicle with steel wheels running on metal rails past various properties and streets like a real railroad, but instead is an unmanned car with rubber tires running over an elevated concrete guideway inside a single facility. It is akin to a driverless bus. It does not run across any property lines, not even leaving the property of a single public agency. For these reasons Bombardier's predecessor (Westinghouse) successfully persuaded the courts that an airport APM is not a "railroad" in *Westinghouse Elec. Corp.* NRS 705.690 exempts the Las Vegas Monorail from Chapter 338. That exemption would have been unnecessary if any type of transit on a guideway is somehow a "railroad".

Instead, Bombardier claims the railroad exemption based upon facts unrelated to this project or even to this State. Bombardier points to the fact that it operates a railway system in the east and also manufactures and sells railroad equipment elsewhere. The Commissioner rejected this argument on the basis that there was no evidence to support a finding that Bombardier was acting in the capacity of a railroad company within the State or in connection with this project. He pointed out that Bombardier has not claimed to be a railroad under Nevada law for any other purpose. Because of the public purpose served by a railroad company, it is granted statutory powers that are not attached to other private corporations. *Chicago Great W. Ry. Co.* at 59. It is the unique feature of operating railroad lines that allowed states to single out railroad companies and treat them differently than other corporations. *Missouri Pac. Ry Co. v. Mackey*, 127 U.S. 205 (1888) (considering an equal protection challenge under the Fourteenth Amendment to state railroad-specific legislation). The Nevada Constitution gives special treatment to railroad companies due to the public interest provided by railroads. *See* Nev. Const. art. 8, § 10. Nevada statutes also afford railroad companies special treatment on this same basis. See NRS 78.075-.085 (allowing for specific organization of railroad companies and granting certain powers such as eminent domain); NRS 705.010 (granting same railroad privileges to foreign railroad corporations subject to the requirements of NRS Chapter 80). The record contains no evidence that Bombardier was incorporated specifically as a railroad company. *See Randolph Cnty. v. Post*, 93 U.S. 502, 511 (1876) (looking to company charter to determine whether a company was a

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railroad company). True railroads in Nevada pay fees to (and are regulated by) the Public Utilities Commission of Nevada (NRS 704.309), which Bombardier has not paid.

The Labor Commissioner pointed out that extending the railroad company exemption to companies with railroading activities elsewhere in the world would overextend the exemption to permit a wide-scale avoidance of the prevailing wage obligations. The Labor Commissioner's narrower application of the exemption to a company actually operating a railroad is consistent with the remedial purpose of prevailing wage laws as well as the plain language of NRS 338.080 that refers to "operating" a railroad company.

X. The remedy ordered by the Labor Commissioner was within his authority

The Labor Commissioner did not obligate Bombardier to pay prevailing wages on exempt maintenance work. He ordered that the prevailing wage be paid for 20% of the hours worked under CBE-552, which he estimated to be the amount of time spent on repair work that went beyond normal maintenance. The contract itself attributes 20% of the work to be performed to "corrective" work that the Labor Commissioner found to be repair work. Faced with conflicting evidence from the parties that this type of work ranged anywhere from 10% to 40%, he settled the question by relying about what the contract itself provided. Bombardier, a party to the contract, can hardly be heard to complain that it is inaccurate or that the Labor Commissioner abused his discretion in relying upon it.

The Labor Commissioner's decision is in accordance with applicable law, which specifies that the payment of prevailing wages is based upon the work actually being performed. NAC 338.094(2)(a); *City Plan Dev., Inc.*, 121 Nev. at 433, 117 P.3d at 191 (upholding Labor Commissioner's prevailing wage determination that looked to the type of work actually performed); *see also D.A. Elia Const. Corp. v. State*, 180 A.D.2d 881 (N.Y. App. Div. 1992) (applying New York's prevailing wage law).

The "corrective maintenance" tasks at the outset of the contract were 60% of the work. They dropped in percentage on Bombardier's records largely because the Bombardier removed the codes used by workers to indicate repairs. Employers are or should be "in position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). *Mt.*

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Clemens Pottery allows a fact-finder to make a just and reasonable inference to approximate the amount of such compensable time in the absence of reliable records. *Mt Clemens Pottery* at 687-88; *see also Mid Hudson Pam Corp. v. Hartnett*, 156 A.D.2d 818, 820, (N.Y. App. Div. 1989) ("When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer.") Bombardier argues that it was not aware of its obligations to keep the payroll records required by the prevailing wage laws. *See* NRS 338.094. But this is immaterial as *Mt. Clemens Pottery* still applies even where there is a *bona fide* mistake. *Mt. Clemens Pottery* at 687-88.

The recent U.S. Supreme Court case of *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036 (2016), demonstrates the continued vitality of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). When employers such as Bombardier fail to keep proper records (as Bombardier would have been required to do had the contract been properly awarded under NRS Chapter 338), and employees thereby have no way to establish with exactitude the time spent doing uncompensated or undercompensated work, the remedial nature of Nevada's prevailing wage statutory scheme, and the public policy which it embodies, militate against making the burden of proving uncompensated or undercompensated work an impossible hurdle for the employee. Instead of punishing the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work, an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inferences. *Tyson Foods*, 136 S.Ct. at 1047, quoting *Anderson*, 328 U.S., at 687. Under these circumstances, the burden then shifts to the employer (Bombardier) to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Id.*, quoting *Anderson*, 328 U.S., at 687-688.

In this case, as in *Tyson Foods*, it was proper for the Commissioner to consider representative evidence to establish the amount of time the Bombardier employees spent, on

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average, on prevailing wage work, because "each employee worked in the same facility, did similar work, and was paid under the same policy." *Tyson Foods*, 136 S.Ct. at 1048. The Commissioner properly considered the estimates of both Bombardier and its employees in reaching his conclusion that the 20% figure in the contract probably was an accurate prediction of the amount of time employees spent on "corrective" repair work.

XI. IUEC's Motion to Strike

The Court grants IUEC's Motion to Strike Exhibit A to Bombardier's Opening Brief for the reasons set forth therein, and likewise declines to take notice of the "study done by the University Reno Economics Department professors" referenced in IUEC's Motion to Strike.

XII. ORDER

Having reviewed and considered the Petition for Judicial Review, the numerous briefs of the parties, the legal authorities contained therein, the administrative record and supplement to the administrative record, the Court hereby affirms the Nevada Labor Commissioner's March 6, 2014, Decision in its entirety, and remands the Decision to the Labor Commissioner solely for supervision and jurisdiction by the Labor Commissioner over the payment by Bombardier pursuant to calculation to be performed by the Clark County Department of Aviation as ordered in conclusions 5 and 6 on pages 12 and 13 of the Decision. This order and partial remand are made pursuant to NRS 233B.135(3).

IT IS SO ORDERED.

DATED this 6th day of July, 2016.

DISTRICT COURT JUDGE

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Approved as to form:

NSB 1419
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Attorney for Bombardier Transportation (Holdings) USA Inc.

[1] Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the Proposed Order is consistent with the District Court's instruction that the Proposed Order adopt the arguments in the respective Respondents' Briefs. Petitioner, however, disagrees with the Proposed Order's substance. Petitioner's position is that Proposed Order, including its adopted contents, are not supported by the record. The Proposed Order, including its adopted contents, contains reasoning and factual findings which are not present in the Labor Commissioner's Administrative Decision.

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[1] Petitioner Bombardier Transportation (Holdings) USA Inc. agrees that the form of the Proposed Order is consistent with the District Court's instruction that the Proposed Order adopt the arguments in the respective Respondents' Briefs. Petitioner, however, disagrees with the Proposed Order's substance. Petitioner's position is that Proposed Order, including its adopted contents, are not supported by the record. The Proposed Order, including its adopted contents, contains reasoning and factual findings which are not present in the Labor Commissioner's Administrative Decision.

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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 **PETITIONER'S OPENING MEMORANDUM OF POINTS AND AUTHORITIES**

The Petitioner hereby files its Opening Memorandum of Points and Authorities.

Executed on this 11th day of December 2018.

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JURISDICTIONAL STATEMENT

The basis for the Court's jurisdiction is NRS 233B.130 as the Office of the Labor Commissioner entered her final determination ("Determination") in a contested case. Petitions for judicial review must be filed with 30 days of a final decision. NRS 233B.130(2)(d). The Determination was entered on August 30, 2018. The Petition for Judicial Review ("Petition") was filed twenty-eight days later on September 27, 2018. The Petition is therefore timely.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The first issue for the court is whether or not money collected by the Clark County Department of Aviation ("DOA") from operations at the McCarran International Airport is public money within the meaning of NRS 338.310(17).[1]

STATEMENT OF THE CASE

The DOA let out for bid the replacement of its carpeting and base cove at the McCarren International Airport. The replacement was to include the removal and disposal of 12,000 square yards (approximately the size of two football fields)[2] of carpeting and 5,000 (approximately one mile)[3] linear feet of base cove. However, DOA refused to follow the provisions of NRS 338 et seq., asserting that the carpet and base cove replacement was excluded from NRS 338 et seq. as normal maintenance pursuant to NRS 338.011(1). The LMCC objected and filed a complaint with the Nevada State Labor Commissioner. The DOA abandoned its normal maintenance defense and asserted that even though it is a public agency and the airport is a public facility, it did not have to follow the provisions of NRS 338 because its 23+ million dollar repair and maintenance

[1] The Labor Commissioner's Determination addresses the DOA's public money argument. At no time does the Labor Commissioner address the specifics of normal maintenance issue that was presented by the DOA but later abandoned in favor of the public money argument.

[2] The size of a normal football field is 6396 square yards, 53.3 yards x 120 yards.

[3] 5208 feet equals a mile.

budget is financed with money received from airport operations. The DOA asserted, and the Labor Commissioner accepted, the proposition that work done at the airport is not a "public work" as defined by NRS 338.310(17) because the work is paid for with money received primarily from leases with airlines.

STANDARD OF REVIEW

The issue before this Court, the meaning of the term "public money," requires de novo review as the Court must review an issue of law. *State Tax Com'n, ex rel., Nevada Dept. of Taxation v. American Home Shield of Nevada, Inc.*, 254 P.3d 601, 603, 127 Nev. 382, 386 (2011). During de novo review, the Court examines the administrative agency's decision to determine if it is "affected by errors of law." *Nevada Service Employees Union/SEIU Local 1107 v. Orr*, 119 P.3d 1259, 1261, 121 Nev. 675, 678 (2005). "Unambiguous statutory language is given 'its ordinary meaning unless it is clear that this meaning was not intended.'" *American Home Shield of Nevada, Inc.* at 603, 386. "Courts are empowered to reverse or modify an agency's decision if the aggrieved party has been prejudiced by administrative findings, inferences, conclusions or decisions that are, inter alia, affected by error of law…." *Dredge v. State ex rel., Dept. of Prisons*, 769 P.2d 56, 58, 105 Nev. 39, 43 (1989).

FACTS

The DOA let out for bid a carpeting and base cove replacement project. (Record at 8.)[4] The project included 12,000 square feet of carpeting and 5,000 linear feet of base cove replacement, and other "Non-specified work." (Record at 89.) The LMCC objected to the bidding not being done in accordance with NRS 338 et seq. and not including the requirement for the payment of prevailing wages to laborers, which eventually culminated in the filing of an Administrative Complaint. (Record at 1.) The DOA ultimately defended the matter on the basis that the money used to pay for project was

[4] All Record references are to the Amended Administrative Record filed by the Office of the Labor Commissioner.

not public money. (Record at 229-32.) The Labor Commissioner accepted the DOA's assertions and entered a Determination that no violations of NRS 338 occurred because no public money was used. (Record at 233-34.)

ARGUMENT

1. Nevada's statutory definition of public money is contrary to the DOA's position and the Labor Commissioner's Determination.

Money received by the DOA is public money.

> "Public money" means all money deposited with a depository by any of the following:
> …
> (b) An official custodian with plenary authority, including control over money belonging to, or held for the benefit of, the State or any of its political subdivisions, public corporations, municipal corporations, courts, or public agencies, boards, commissions or committees.

NRS 356.330(1). "The term includes, without limitation, savings deposits and demand deposits." NAC 356.080. The word "all" in NRS 356.330(1) establishes that the source of the DOA's money is irrelevant to it being public money. The DOA's argument and the Labor Commissioner's Determination that money received from airport operations is not public money is inconsistent with Nevada law and must be rejected.

2. Even without an operative definition for "public money," additional statutes establish that money received from airport operations is public money.

The DOA's position that money received from airport operations is private money and not public money violates Nevada's statute governing airports.

> All land and other property and privileges acquired and used by or on behalf of any municipality or other public agency in the manner and for the purposes enumerated in this chapter shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity, and, in the case of a county or municipality, for county or municipal purposes, respectively.

NRS 496.250(2). This airport statues makes clear that all "*other property*" obtained by the DOA is for a public use. '"Property" means: Money…." NRS 205.2195(2).[5] Since money is property, NRS 496.250(2) compels the conclusion that "[money] … acquired and used by or on behalf of [the Clark County DOA] in the manner and for the purposes enumerated in this chapter [governing airports] shall and are hereby declared to be acquired and used for public and governmental purposes…."

To be clear, the Nevada Legislature declared that money collected by the DOA is "acquired and used for public and governmental purposes," which must include the purposes of NRS 338 et seq. for work at airport facilities. See also NRS 496.250(1) (Confirming that all airport operations "are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity….") To conclude that money collected and used by the DOA for airport construction projects or operations is not public money requires explicit indifference to Nevada statutory authority.

Case law supports the statutory analysis that money collected from airport operations is public money. "To take rent collected from one source and use it to pay obligations would plainly be a payment of public funds...." *McIntosh v. Aubry*, Cal.Rptr.2d 680, 688, 14 Cal.App.4th 1576, 1588 (Cal.App. 1 Dist., 1993) (superseded by statute). DOA asserts that it collects money from airline rents[6] for the purpose of

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[5] See also, *Hanson v. Estate of Bjerke*, 95 P.3d 704, 706 (Mont., 2004) ("[T]he statutory definition of 'personal property' reflects the widely accepted definition. Black's Law Dictionary states that personal property is, '[i]n [a] broad and general sense, everything that is the subject of ownership, not coming under denomination of real estate.' Black's Law Dictionary, 1217 (6th ed.1990).'"); *U.S. v. Baker*, 183 F. 280, 282 (C.C.N.Y. 1910) ("It is, of course, true that money is personal property.").

[6] An interesting statutory point exists as to airlines. '"Public utility' means a person who operates any airline…." NRS 496.020(7). As such, the DOA is actually receiving money from a public utility pursuant to the lease agreements with airlines. The money being transferred from the airlines to the DOA is therefore moving from a public utility to a public entity for a public purpose. The DOA's argument and the Labor Commissioner's conclusion that such money is not public and subject to public laws is inconsistent with the money's public nature and purpose.

meeting its public obligations. *McIntosh* makes clear that the DOA's conduct is a plain receipt and expenditure of public money.

The Nevada Supreme Court memorialized the fact that private money expended in a private project that is intended for a public purpose is subject to NRS 338's prevailing wage requirements. "For example, a private project constructed to a public agency's specification as part of an arrangement for the project's eventual purchase by the public agency would be a public work." *Carson-Tahoe Hosp. v. Building & Const. Trades Council of Northern Nevada*, 128 P.3d 1065, 1068, 122 Nev. 218, 222 (2006). The Supreme Court's example clearly implicates the use of private money in the construction of what will eventually become public facilities. The example shows the Supreme Court's attitude and intent toward NRS 338 and the government's obligation to following its provisions, including bidding and the payment of prevailing wages. The Supreme Court did not care about where the money came from. It cared about what the money was intended for. In sum, private money is subject to NRS 338 requirements where it is invested in a public facility. Otherwise, public bodies, as the DOA has clearly demonstrated, will seek to avoid statutory commands through manipulative efforts and policies inconsistent with legal requirements. This Court cannot let the DOA's policies and legal positions supersede those established by the Nevada Legislature and the Nevada Supreme Court.

CONCLUSION

The Court must reverse the Labor Commissioner's Determination and enter judgment in favor of the LMCC that the DOA's collection of money and use on the airport constitutes public money and that its failure to properly bid in accordance with NRS 338 is a violation of Nevada law.

Executed on this 11th day of November 2018.

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ATTORNEY'S CERTIFICATE

In accordance with NRAP 28.2, I hereby certify the following:

(1) I have read the brief;

(2) To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) By signing the brief, I believe that it complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the record where the matter relied on is to be found; and

(4) To the best of my knowledge, the brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

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CERTIFICATE OF SERVICE

On December 11, 2018, I caused a true and correct copy of the foregoing Petitioner's Opening Memorandum of Points and Authorities to be lodged with the Court and served in the following manner:

☒ 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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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 Department No.: 25 **CLARK COUNTY DEPARTMENT OF AVIATION'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES TO PETITION FOR JUDICIAL REVIEW**

Respondent, Clark County Department of Aviation, ("Respondent" or the "DOA"), by and through its counsel, Fisher & Phillips, LLP, hereby files this Reply Memorandum of Points and Authorities in response to Petitioner's Opening Memorandum of Points and Authorities for its Petition for Judicial Review as follows:

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I. JURISDICTIONAL STATEMENT

The DOA does not dispute this Court's jurisdiction over the Petition for Judicial Review.

II. STATEMENT OF THE ISSUES

The issues are listed as follows:

A) Should the Labor Commissioner's determination be affirmed because the carpet maintenance contract pertains to the normal maintenance of the DOA's property?

B) Should the Labor Commissioner's determination be affirmed because the carpet maintenance contract was not financed by public money?

III. STATEMENT OF THE CASE

On April 28, 2017, Petitioner Southern Nevada Labor Management Cooperation Committee ("LMCC") filed a complaint with the Office of the Labor Commissioner against the DOA, alleging that the DOA failed to properly invite project bids pursuant to NRS Chapter 338 on Bid No. 17-6044273, Carpet and Base Cove Installation at the McCarran International Airport. *See* Amended Administrative Record ("AAR") 0001-0147. During the Labor Commissioner's review of the complaint, the DOA maintained that the contract in question is not subject to prevailing wages under NRS Chapter 338 because it does not involve a "public work" as defined by NRS Chapter 338. *See* AAR 0215. Because the contract pertains to the ongoing maintenance of worn carpet tiles in various areas throughout the McCarran International Airport, the DOA properly bid the contract as a maintenance contract under NRS Chapter 332. *Id.* Moreover, the carpet maintenance contract is not financed in any part through any taxes or public money. *See* AAR 0233. On August 30, 2018, the Labor Commissioner completed its review of the LMCC's complaint, determining that there were no violations of NRS Chapter 338. *Id.*

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

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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.

IV. STATEMENT OF THE FACTS

The contract in question, Bid No. 17-6044273, Carpet and Base Cove Installation, is directly related to the ongoing maintenance of worn carpet tiles in various areas and as needed throughout the McCarran International Airport. *See* AAR 0032, 0215. The contract involves the simple, day-to-day task of fixing worn carpet tile for the upkeep of the airport, as needed. *See* AAR 0032 (bidding document listing various objectives for the removal of existing carpet tile and the installation of new carpet tile, such as: "[r]emove existing carpet tile as required," "[p]ackage and recycle carpet tile as outlined in the manufacturer's Recycling Instructions," "[i]nstall carpet, accessories and adhesive in accordance with manufacturer's instructions," "[i]ntegrate and blend carpet to ensure minimal variation in color match," "[c]ut carpet clean," "[f]it carpet tight to intersection with vertical surfaces without gaps," and "[b]ind cut edges where not concealed by edge strips and fully adhere").

The DOA has properly bid the contract as a maintenance contract, pursuant to NRS Chapter 332, in the past without issue. *See* AAR 0215. As asserted by the DOA in the proceedings before the Labor Commissioner:

> Based on our carpet maintenance schedule, we review each area for wear and tear and also aesthetic and safety issues (as a result of spills, damage, etc.). During the course of normal operations, some of the airport's high traffic areas require maintenance due to aesthetic or safety reasons. If an area is scheduled for replacement, we review the condition of the existing carpet to determine if replacement is needed. Often, the carpet is still in

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acceptable condition, and is therefore not replaced.

See AAR 0216. (Emphasis added.)

Moreover, all carpet installation performed as part of this bid is budgeted for as a part of the DOA's operations and maintenance budget. *See* AAR 0216, 0229. This budget is approved annually by the DOA's airline partners and charged to them through the DOA's airport rates and charges. *Id.* All costs associated with operating the airport are paid for by the airlines, airport tenants, and concessionaries. *Id.* Since the airport is a self-sustaining entity, none of these costs are sourced from public funds. *Id.* Accordingly, no public money was used to finance the carpet maintenance contract, as none of the revenue involved taxpayer money or obligated County funds.

The DOA's status as a self-sustaining entity is largely due to its contractual obligations with the Federal Aviation Administration ("FAA"). The DOA receives Airport Improvement Program funds in the form of federal grants. As a condition of receiving those federal grants from the FAA, the DOA has agreed to adhere to numerous Grant Assurances, which are codified in federal law. Among these Grant Assurances, the DOA has a duty to be as self-sustaining as possible in order to receive federal grants. *See* 49 U.S.C. § 47107(a)(13)(A). Thus, pursuant to its Grant Assurances with the FAA, the DOA is contractually bound to ensure that all revenue generated by the airport must be expended for airport purposes. *Id.*

V. STANDARD OF REVIEW

In its Opening Memorandum of Points and Authorities, the LMCC misstates the applicable standard of review. A petition for judicial review may only be granted if the agency's decision is "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record." NRS 233B.135(3)(e). This Court must review the Labor Commissioner's decision for an abuse of discretion or prejudicial legal error. *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385, 254 P.3d 601, 603 (2011). "While a reviewing court may decide pure questions of law without affording the agency any deference, the agency's conclusions of law, which will necessarily be closely related

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to the agency's view of the facts, are entitled to deference, and will not be disturbed if they are supported by substantial evidence." *Department of Motor Vehicles v. Jones-West Ford, Inc.*, 114 Nev. 766, 962 P.2d 624 (1998).

VI. ARGUMENT

A. The Labor Commissioner's determination must be affirmed because the carpet maintenance contract pertains to the normal maintenance of the DOA's property.

In its Opening Memorandum of Points and Authorities, the LMCC argues that the DOA "abandoned its normal maintenance defense" in favor of the public money argument that is primarily at issue. *See* LMCC Memo at p. 1, ln. 20-26. Nothing could be further from the truth, and the DOA objects to this mischaracterization of the administrative record. 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, 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* NRS 338.011(1). Specifically, NRS 338.011 provides in pertinent part as follows:

> NRS 338.011 Applicability: Contracts related to normal operation and normal maintenance; contracts related to emergency. The requirements of this chapter do not apply to a contract:
>
> 1. Awarded in compliance with chapter 332 or 333 of NRS which is directly related to the normal operation of the public body or the normal maintenance of its property.

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The importance of this exemption cannot be overstated. Normal maintenance, defined as "a patterned upkeep of property to keep it operating," directly encompasses the carpet maintenance contract at hand. *Bombardier Transportation v. Nev. Labor Commissioner*, 135 Nev., Adv. Op. 3, 9-10 (No. 71101, Jan. 17, 2019).[1] By excluding normal maintenance contracts, the Nevada Legislature sought to avoid burdening public bodies with the prevailing wage requirement for contracts that involved simple, day-to-day tasks. *Id.* at 10; *see also* Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981). These simple, day-to-day tasks expressly include "such activities like window washing, janitorial and housekeeping services, fixing broken windows." *Bombardier*, 135 Nev., Adv. Op. 3, at 10. (Emphasis added.) Here, fixing broken carpeting falls directly in line with these types of activities. Similarly, a contract that is directly related to the normal operation of the airport is exempt. As demonstrated before the Labor Commissioner, the DOA reviews its property for wear and tear, based on its carpet maintenance schedule; during the course of normal operations, some of the airport's high traffic areas require maintenance due to aesthetic or safety reasons. *See* AAR 0216. Accordingly, fixing broken carpeting is a simple, day-to-day task involving a routine aspect of the airport's operations. *See Bombardier*, 135 Nev., Adv. Op. 3, at 14 (explaining how contracts are directly related to normal operations when they involve normal, rather than abnormal, events). Thus, because carpet maintenance is directly related to the normal operation of the airport and the normal maintenance of its property, the contract is not subject to the payment of prevailing wages.

[1]In the Administrative Record, the LMCC cites to a case brought before the Labor Commissioner, which involved the Clark County School District: *Southern Nev. Painters and Decorators v. Manpower Incorporated of Southern Nev.*, LCTS No. 24208, 24209 (Dec. 11, 2015). *See* AAR 0242-0254. The LMCC does not cite this case within its petition for judicial review; however, to the extent that the LMCC wishes to raise it before the district court, the case is inapplicable and distinguishable from the facts here. In particular, the LMCC uses the case for the proposition that "the normal maintenance exception does not apply because the work requires skilled labor and is not routine or small in scope of value." AAR 0239. *Southern Nevada Painters* pertained to "large projects that involved at least ten schools," named collectively as "Life Cycle Projects," in which "entire schools were being painted, both on the interior and exterior." AAR 0247-248. In that case, "the testimony and evidence established that these were large painting projects, and that they were not routine or normal." AAR 0249. Here, the scope of the carpet maintenance contract is much smaller and more narrow, involving the routine and normal task of fixing worn carpet tiles.

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Moreover, prevailing wages are only required under NRS Chapter 332 within the narrowly defined category of "performance contracts." *See* NRS 332.340 (defining "performance contract" as "a written contract between a local government and a qualified service company for the evaluation, recommendation and implementation of one or more operating cost-savings measures"); NRS 332.320 (defining "operating cost-savings" as "any expenses that are eliminated or avoided on a long-term basis as a result of the installation or modification of equipment, or services performed by a qualified service company," and expressly "does not include any savings that are realized solely because of a shift in the cost of personnel or other similar short-term cost savings").

Here, the contract at issue is for carpet maintenance (*i.e.*, worn carpeting will be replaced with new carpeting of a similar style). As such, there are absolutely no "operating cost-savings measures" being attempted, utilized or that will be realized under this contract. In other words, replacing carpet titles with similar carpet tiles does not fall within the definition (or even the spirit) of either the term "operating cost-savings measure" or the term "operating cost-savings." In sum, prevailing wages are only required under NRS Chapter 332 within the narrowly defined category of "performance contracts." The contract at issue is for the "the normal maintenance of [the DOA's] property," covering the simple, day-to-day task of fixing worn carpet tiles for the upkeep of the airport; thus, it is not a "performance contract." Accordingly, this contract is not subject to prevailing wages under either NRS Chapter 338 or NRS Chapter 332.

B. <u>The Labor Commissioner's determination must be affirmed because the carpet maintenance contract was not financed by public money.</u>

1. Under Nevada law, the carpet maintenance project cannot constitute a "public work" because it is not financed by public money.

As properly determined by the Labor Commissioner, the carpet maintenance contract does not involve a "public work" subject to NRS Chapter 338 because it was not "financed in whole or in part from public money." *See* NRS 338.010(17). Pursuant to NRS 338.020(1), prevailing wages must be paid in "[e]very contract to which a public

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body of this state is a party" that requires "the performance of public work." A "public body" is defined as "the State, county, city, town, school district or any public agency of this State or its political subdivisions sponsoring or financing a public work." NRS 338.010(16). A "public work" is defined as "any project for the new construction, repair or reconstruction of . . . [a] project financed in whole or in part from public money for" various publicly owned works and property. NRS 338.010(17).

The Nevada Supreme Court has expressly held that a project cannot constitute a public work if it is not financed through taxpayer money or if it does not obligate public funds. *Carson-Tahoe Hosp. v. Bldg. & Constr. Trades*, 128 P.3d 1065, 1067, 122 Nev. 218, 222 (2006) (holding that the construction of a new hospital through economic development bonds, which were sanctioned by the city board, "cannot be classified as a public work" because "no public money was used to finance this project, as the issuance of the revenue bonds did not involve taxpayer money or obligate county funds," and concluding that "the statute does not require that prevailing wages be paid in this instance"). (Emphasis added.)

Moreover, the Nevada Supreme Court has emphasized that the source of the funds involved (*i.e.*, whether the revenue bonds are financed by taxpayers) is essential to the characterization of a project as a public work. *See City of Reno v. Building & Const. Trades Council of Northern Nev.*, 251 P.3d 718, 722, 127 Nev. 114, 120 (2011). Indeed, if the Legislature intended that *any* money a public body uses toward a project should be subject to prevailing wages, then NRS 338.010(17) would have been drafted without including the significant qualifying phrase "financed in whole or in part from public money." However, NRS 338.010(17) was not drafted in that manner, and this Court is bound to interpret and uphold the statute as written. *See Carson-Tahoe Hosp.*, 122 Nev. at 220 ("When the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. No part of a statute should be rendered meaningless, and this court will not read statutory language in a manner that produces absurd or unreasonable results.").

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(Internal quotations and citations omitted.)

Here, the Labor Commissioner properly determined that the carpet maintenance contract is not paid for with public money. The DOA receives Airport Improvement Program funds in the form of federal grants. As a condition to receiving those federal grants, the DOA has contractually agreed with the Federal Aviation Administration ("FAA") to adhere to numerous Grant Assurances, which are codified in federal law. *See* 49 U.S.C. § 47107(b); 49 U.S.C. § 47133(a).

Thus, pursuant to its Grant Assurances with the FAA, the DOA is contractually bound to ensure that all revenue generated by the airport must be expended for airport purposes. *Id.* As properly determined by the Labor Commissioner, the DOA uses its own revenues to finance its operations, particularly the carpet maintenance project. *See* AAR 0229. The DOA must ensure that, as a self-sustaining entity, its users provide all the revenue required to operate the airport's services and facilities. *Id.* As a result, the DOA is not subsidized by any tax revenues of Clark County, and the carpet maintenance contract at issue did not involve any taxpayer money from any source. *Id.*

2. The LMCC mischaracterizes the definition of "public money."

In its Opening Memorandum of Points and Authorities, the LMCC contends that public money was somehow used to finance the carpet maintenance contract, even though both the airline revenues and non-airline revenues did not involve taxpayer money or obligate County funds. The LMCC's overbroad interpretation of "public money" holds no relevance to this case and mischaracterizes the true issue. *See* Opening Memorandum of Points and Authorities ("LMCC Memo") at p. 3, ln. 5-27; p. 4, ln. 1-27. The LMCC completely disregards the structure of the DOA's financial operations as a self-sustaining entity; all operations and maintenance costs associated with operating the McCarran International Airport are paid for by the airlines, airport tenants, and concessionaries. None of the DOA's operations and maintenance costs, including the carpet maintenance at issue in this matter, are financed in whole or in part from public money. The Labor Commissioner was presented with ample evidence that no public money was used to

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finance the carpet maintenance work, and its factual determination is entitled to deference. *See* AAR 0229-234; *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011). The LMCC's casual and irrelevant citations to various Nevada statutes (*i.e.*, NRS Chapters 356, 496, and 205), in an attempt to cobble together an expansive definition of "public money" that serves its interests, does not change this fact. The DOA addresses each nonsensical argument below.

a. "Public money," as defined by NRS 356.330(1), does not apply to the prevailing wage law under NRS Chapter 338.

First, the LMCC cites to NRS 356.330(1) for a definition of "public money," a provision that is entirely unrelated to the prevailing wage statutes within NRS Chapter 338. *See* LMCC Memo at p. 3, ln. 7-18. The LMCC attempts to transpose a definition from one statutory scheme into an entirely distinct context. Nowhere in NRS Chapter 356 does the Legislature expressly provide that the definition of "public money" should be used in the context of the prevailing wage law. *See State Indus. Ins. Sys . v. Wrenn*, 104 Nev. 536, 539, 762 P.2d 884, 886 (1988) (providing that the Nevada Supreme Court has "repeatedly refused to imply provisions not expressly included in the legislative scheme"). In fact, the exact opposite is true. NRS Chapter 356 itself, which governs the depositories of public money and securities, expressly limits the definition of "public money" for the purposes of that specific chapter. *See* NRS 356.300 ("Definitions. As used in NRS 356.300 to 356.390, inclusive, unless the context otherwise requires, the words and terms defined in NRS 356.305 to 356.340, inclusive, have the meanings ascribed to them in those sections."). Thus, "public money," as defined by NRS 356.330(1), can only be used within the confines of NRS Chapter 356 and not for the purposes of any other chapter.

Notwithstanding this, the definition of "public money" under NRS 356.330(1) still would not apply to the DOA. As quoted by the LMCC, public money "means all money deposited with a depository by . . . [a]n official custodian with plenary authority." NRS 356.330(1). The LMCC fails to establish how the DOA qualifies as "an official

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custodian with plenary authority," exerting absolute control over money that supposedly belongs to the County. An official custodian with plenary authority would be able to spend the money however it desires; that is far from the case here. As explained above, the DOA is contractually bound with the FAA to maintain its status as a self-sustaining entity and to only spend its money for purposes of maintaining and operating the airport. Accordingly, although the DOA is a division of Clark County, it cannot distribute that money freely or unconditionally. For instance, the DOA cannot make its revenue available to the County for the purpose of hiring social workers, repairing potholes on the street, or for any other purpose to benefit the County. All revenue generated by the DOA must be expended for airport purposes only. Contrary to the picture that the LMCC endeavors to paint, the DOA is, in effect, holding the money it generates in trust for the exclusive benefit of passengers and the airport's tenants.

b. NRS Chapter 496, the statutory scheme governing municipal airports, undermines the LMCC's argument.

Second, the LMCC misconstrues NRS Chapter 496, which governs municipal airports, and contends that the money generated by the DOA is for a public use.[2] *See* LMCC Memo at p. 3, ln. 21-27; p. 4, ln. 1-6. NRS 496.250(2) states as follows:

> All land and other property and privileges acquired and used by or on behalf of any municipality or other public agency in the manner and for the purposes enumerated in this chapter shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity, and, in the case of a county or municipality, for county or municipal purposes, respectively. (Emphasis added.)

The LMCC argues that the phrase "other property" includes the money generated by the DOA, which automatically makes it for a public use. *See* LMCC Memo at p. 4, ln. 1-6. This is yet another instance where the LMCC interprets a statute out of context, in a hasty attempt to grasp at straws. Nowhere does NRS Chapter 496 define "other

[2] In addition, the LMCC cites to NRS Chapter 496 for the irrelevant observation that airlines are public utilities. *See* LMCC Memo at p. 4, fn. 6. It is no secret that the DOA serves the general public through its airlines; this does not mean that the DOA receives money from taxpayers or the County in order to finance the carpet maintenance contract. Again, the LMCC takes its statutory citations completely out of context.

property" as "money," especially in light of the prevailing wage law in NRS Chapter 338.

Moreover, NRS 496.290, which provides for the uniformity of interpretation and construction of NRS Chapter 496, states: "This chapter shall be so interpreted and construed as to make uniform so far as possible the laws and regulations of this State and other states and of the Government of the United States having to do with the subject of municipal airports." (Emphasis added.) NRS Chapter 496 itself expressly provides for its harmonization with federal laws and regulations, including those administered by the FAA. Thus, although NRS 496.290 is inapplicable here, no conflict exists; if this Court chooses to interpret the statute, it must be read harmoniously with the Grant Assurances that the DOA must follow, as codified by 49 U.S.C. § 47107(b) and 49 U.S.C. § 47133(a). NRS 496.290; *see also Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 993, 860 P.2d 720, 723 (1993) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes.").

c. The LMCC's overbroad argument that "property means money" lacks merit and obfuscates the true issue.

Third, the LMCC exceeds the bounds of reason by presenting an overbroad definition of "public money" and merely tries to deluge this Court with irrelevant citations to distract from the fact that its arguments are meritless. In particular, the LMCC quotes a criminal statute (*i.e.*, NRS Chapter 205, which governs crimes against property) to establish the assertion that "'property' means: [m]oney . . ." *See* LMCC Memo at p. 4, ln. 2. Not only is this a vague and generic reference, but it also holds no relevance to the prevailing wage law at hand. None of the statutory provisions cited by the LMCC bolster its fallacious contention that the carpet maintenance contract constitutes a "public work" financed by "public money."

In support of its expansive definition of "public money," the LMCC also cites to three cases from California, Montana, and New York. As a preliminary matter, the LMCC conveniently omits the fact that none of these cases pertain to Nevada law and thus are not binding on this Court. Notwithstanding this, these cases are also factually

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and legally distinguishable from the issue at hand and should not be considered persuasive by this Court. Specifically, the LMCC cites to *Hanson v. Estate of Bjerke*, 95 P.3d 704, 706 (Mont. 2004) and *U.S. v. Baker*, 183 F.280, 282 (C.C.N.Y. 1910) for the generic proposition that "money is property." *See* LMCC Memo at p. 4, ln. 2-3. Neither of these cases discuss prevailing wage law or in any other way are relevant to this matter.

In addition, the LMCC cites to and misconstrues *McIntosh v. Aubry*, 18 Cal.Rptr.2d 680, 688, 14 Cal.App.4th 1576, 1588 (Cal.App. 1 Dist. 1993), *overruled by State Building & Construction Trades Council of California v. Duncan*, 76 Cal.Rptr.3d 507 (Cal.App. 1 Dist. 2008). *See* LMCC Memo at p. 4, ln. 15-27. Once more, the LMCC takes one small statement completely out of context. *McIntosh* involved the construction of a private residential care facility, originating from Riverside County's efforts to shelter and treat minors under its charge. *Id.* at 682. The successful bidder of the project entered into a sublease with the county, in which the contractor would use the land for constructing, operating, and maintaining the facility in exchange for the forbearance of rent during the first 20 years. *Id.* The California court held that the county's agreement to forego rent did not constitute payment of "public funds." *Id.* at 688.

Here, the LMCC takes an irrelevant snippet from a California case and attempts to draw the nonsensical conclusion that *any* money that the DOA deals with, in *any* capacity, automatically constitutes "public money." Again, the LMCC blatantly disregards the structure of the DOA's financial operations as a self-sustaining entity and the fact that none of the DOA's costs with regard to the carpet maintenance contract are financed in whole or in part from public money.

d. Even with the limited authority on prevailing wage law, the LMCC blatantly misconstrues the holding of each case.

Moreover, the LMCC cites to *Carson-Tahoe Hosp. v. Bldg. & Const. Trades Council of Northern Nev.*, 128 P.3d 1065, 1067, 122 Nev. 218, 222 (2006), improperly claiming that the Nevada Supreme Court "memorialized the fact that private money expended in a private project that is intended for a public purpose is subject to NRS 338's

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prevailing wage requirements." LMCC Memo at p. 5, ln. 3-19. However, the LMCC misstates the holding of the case. The *Carson-Tahoe* case pertained to the construction of a hospital through $95 million in economic development bonds, which were sanctioned by the city board and issued pursuant to the County Economic Development Revenue Bond Law. 122 Nev. at 219, 128 P.3d at 1066. The economic development revenue bonds at issue did not utilize public money because they did "not involve taxpayer money or obligate county funds." *Id.* at 221, 128 P.3d at 1067. Therefore, the Nevada Supreme Court concluded that payment of prevailing wages was not required because the contract did not involve a public work. *Id.* at 222, 128 P.3d at 1068. Contrary to the LMCC's position, the Nevada Supreme Court certainly *did* care about where the money came from. Indeed, the source of a project's funds is essential to the analysis of whether or not it is a public work.

The LMCC asks this Court to disregard the DOA's status as a self-sustaining entity -- one that is contractually obligated with the FAA to generate its own revenue to fund its operations, particularly the carpet maintenance contract. As explained above, the source of the DOA's funding is a combination of airline revenues and non-airline revenues, none of which involve money from taxpayers or the County.[3] Thus, the LMCC's interpretation of "public money" under NRS Chapter 338 leads to the absurd and unreasonable result that all revenue from the airport must automatically be classified as public, solely because the airport is owned by the County. *See Carson-Tahoe*, 122 Nev. at 220, 128 P.3d at 1067 ("[T]his court will not read statutory language in a manner that produces absurd or unreasonable results."). Accordingly, the carpet maintenance contract is not a "public work" subject to NRS Chapter 338 because it was not financed in whole or in part from public money. Therefore, the Labor Commissioner properly determined that no violation of NRS Chapter 338 occurred.

/ / /

[3] If the LMCC is attempting to suggest that the rent charged to airlines and tenants by the DOA is a "tax," there is certainly no factual or legal basis for that proposition.

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C. The DOA pays the prevailing wage on multiple projects, where appropriate, but it is not appropriate to pay the prevailing wage here because the carpet maintenance contract is a normal maintenance contract.

The DOA has paid the prevailing wage on multiple projects, where appropriate, and it will continue to do so in the future; however, the payment of prevailing wages is not appropriate in this case because the carpet maintenance contract is a normal maintenance contract. The LMCC is attempting to improperly encroach upon the well-established precedent of prevailing wage law by compelling the payment of prevailing wage on even normal maintenance contracts, which are expressly exempted under NRS Chapter 338.

The contract at issue has always been bid as one for maintenance, without objection until now. Not only is the LMCC's contention legally improper, but it also has extensive repercussions on how the DOA will function within the state. The DOA is obligated, pursuant to its Grant Assurances with the FAA, to be economically self-sustaining. Given such economic pressures and constraints, if maintenance contracts (including the carpet maintenance contract) are expanded to be considered "public work" projects subject to prevailing wages under NRS Chapter 338, then the costs of maintenance work at the airport will significantly increase. Such increased costs would, in turn, force the DOA into situations where it will not bid maintenance contracts as often or at all. The DOA may simply elect to have its employees perform such maintenance, which would result in increased internal labor obligations, fewer bidding opportunities for contractors, as well as the possibility of inferior maintenance compared to what specialized maintenance contractors could perform. Additionally, the DOA may be forced to delay or completely forego performing certain maintenance. Under those realistic scenarios, the airport would suffer from deteriorating facilities, which would impact the airport's operations as well the traveling public's experience at the airport.

Here, the LMCC attempts to apply an overbroad definition of "public work" to a basic and routine maintenance contract. This improper application of the law directly

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contradicts NRS Chapter 332 and the explicit exception created in NRS 338.011(1). The airport's operations, and the traveling public's experience at the airport, should not suffer, merely due to the LMCC's improper interpretation of prevailing wage law.

VII. CONCLUSION

Based on the foregoing, the DOA respectfully requests that this Court deny the LMCC's Petition for Judicial Review and affirm the Labor Commissioner's determination.

Dated this 25th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Times New Roman font.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains exactly 5,259 words.

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.

Dated this 25th day of February, 2019.

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of February 2019, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **CLARK COUNTY DEPARTMENT OF AVIATION'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES TO PETITION FOR JUDICIAL REVIEW**, as follows:

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Attn: Shannon Chambers
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via the Court's e-file and e-service system on those case participants who are registers users.

By: */s/ Stacey L. Grata*
An employee of Fisher & Phillips LLP

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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

OFFICE OF THE LABOR COMMISSIONER'S RESPONSE TO PETITIONER'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Respondent Office of the Labor Commissioner agrees with and adopts the Jurisdictional Statement contained in Respondent Clark County Department of Aviation's ("DOA") Reply Memorandum of Points and Authorities to Petition for Judicial Review.

II. STATEMENT OF THE ISSUES

Respondent Office of the Labor Commissioner agrees with and adopts the Statement of the Issues contained in Respondent DOA's Reply Memorandum of Points and Authorities to Petition for Judicial Review.

III. STATEMENT OF THE CASE

Respondent Office of the Labor Commissioner agrees with and adopts the Statement of the Case contained in Respondent DOA's Reply Memorandum of Points and Authorities to Petition for Judicial Review.

IV. STATEMENT OF THE FACTS

Respondent Office of the Labor Commissioner agrees with and adopts the Statement of the Facts contained in Respondent DOA's Reply Memorandum of Points and Authorities to Petition for Judicial Review.

V. STANDARD OF REVIEW

Respondent Office of the Labor Commissioner agrees with and adopts the Standard of Review contained in Respondent DOA's Reply Memorandum of Points and Authorities to Petition for Judicial Review.

VI. ARGUMENT

Respondent Office of the Labor Commissioner, by and through its counsel, Attorney General Aaron D. Ford and Deputy Attorney General Melissa L. Flatley, hereby joins Respondent DOA's Reply Memorandum of Points and Authorities, filed on February 7, 2019.

As the DOA argues, the contract at issue was not funded with public money and therefore could not be considered a public work. Because the contract is not a public work,

it is unnecessary to reach the question of whether the contract is for the repair or maintenance of property. Thus the prevailing wage requirements of NRS Chapter 338 do not apply to this contract.

Whether the funds that the DOA uses to pay for the contract are public money is a mixed question of law and fact. A pure question of law is a question that is not dependent upon, and must necessarily be resolved without reference to any fact in the case before the court. *See Beavers v. State, Dept. of Motor Vehicles and Public Safety*, 109 Nev. 435, 438, 851 P.2d 432, 438, n.1 (1993). However, in order to determine if the contract is funded by public money, the court is obligated to consider facts presented by DOA regarding the source and use of those funds.

As a mixed question of law and fact, the Labor Commissioner's determination on the issue is entitled to deference if the decision is supported by substantial evidence. *Kolnik v. Nevada Employment Sec. Dept.*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." *State Employment Sec. Dept. v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986), *quoting Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). It is not, however, an opportunity for the court to weigh the evidence anew "to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence." *Hilton Hotels* at n.1, citing *Robertson Transp. Co. v. P.S.C.*, 159 N.W.2d 636, 638 (Wis. 1968).

The decision of the Labor Commissioner is supported by substantial evidence, as outlined by the DOA in its points and authorities here. The DOA is a self-supporting entity funded entirely with operating revenues generated from airlines and non-airline sources; there are no taxes or public money used to fund the airport, nor is DOA revenue turned over to Clark County for non-airport uses. Based on these facts, the Labor Commissioner concluded that the contract at issue would not be paid for with public money. The court must defer to the Labor Commissioner's conclusion.

///

VII. CONCLUSION

Based on the foregoing, the Office of the Labor Commissioner supports DOA in this petition for judicial review, and joins in the legal arguments, points and authorities as presented in the Reply Memorandum of Points and Authorities to Petition for Judicial Review.

The Office of the Labor Commissioner requests that this Court deny the Southern Nevada Labor Management Cooperation Committee's Petition for Judicial Review and affirm the Labor Commissioner's determination of August 30, 2018.

Dated: February 26, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on February 26, 2019, I filed the foregoing **OFFICE OF THE LABOR COMMISSIONER'S RESPONSE TO PETITIONER'S OPENING BRIEF** via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

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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 **PETITIONER'S REPLY BRIEF**

The Petitioner hereby files its Reply Brief to both the of the Respondents' Briefs.

Executed on this 16th day of April 2019.

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STATEMENT REGARDING ISSUES PRESENTED FOR REVIEW

The Labor Commissioner never reached a conclusion about whether the football field sized carpeting project at issue in this Case should be classified as normal operations or maintenance. Nowhere in the Decision does the Labor Commissioner address this issue, let alone conclude that the Clark County Department of Aviation ("DOA") was engaging in mere maintenance. Rather, the Labor Commissioner's Decision was based solely upon a conclusion that money used by DOA for its maintenance projects is not "public money" under NRS 338's prevailing wage laws.[1] *See* Record 228 ("We do not need the declaration of Mr. Pirukowski but would request that you provide the budget document evidencing the sources of CCDOA's revenue."); *See also* Record at 233-234

> DOA asserted carpet maintenance work is financed from two sources airline revenues and non-airline revenues. None of the repairs and maintenance funds are financed in any part through any taxes or public money. The DOA is not subsidized by any tax revenues of the County and has been a self-sustaining entity since 1966. DOA represented in writing that the work in question is not paid for with public money.

The DOA never sought judicial review of the Labor Commissioner's refusal to go beyond the public money argument and evaluate the matter under the normal operations and normal maintenance exception found in NRS 338.011, and neither did the Petitioner. As such, that issue is not before the Court. Out of caution, the Southern Nevada Labor Management Cooperation Committee ("LMCC" or Petitioner) will address the issue, but believes any rulings on the issue will constitute error, as the Labor Commissioner made no factual findings or legal conclusions related to issue, and the LMCC was never allowed to conduct discovery related to, nor to challenge any of the representations made by the DOA to the Labor Commissioner.

[1] The Labor Commissioner's legal conclusion is based upon questionable representations made by the DOA—representations the Petitioner was not allowed to challenge.

As to the public money issue, the DOA seemingly agrees that if it received government grants or monies paid to DOA from taxes, these would be "public money." But DOA claims that money received from vendors and airlines doing business at McCarran International Airport can never be "public money" and the Labor Commissioner agreed.

STANDARD OF REVIEW

The sole issue before this Court—the meaning of "public money"—is a legal question. As such, the LMCC properly cited the standard of review. "This court is limited to the record before the agency and cannot substitute its judgment for that of the agency on issues concerning the weight of the evidence on questions of fact. This court does, however, review questions of law de novo." *Bob Allyn Masonry v. Murphy*, 183 P.3d 126, 128 (Nev. 2008). It is true that this Court, operating as an appellate court, reviews the entire administrative record, but that review is done for the purposes of analyzing the Labor Commissioner's legal conclusions and not to establish new factual findings relating to issues that were never reached by the Labor Commissioner. The DOA, in particular, improperly seeks to use whole record review rule as a tool to bootstrap the normal operations and normal maintenance issue up to this Court when, in fact, the Labor Commissioner never address the mater.

ARGUMENT

1. The DOA's "public money" argument has been rejected by the Nevada Supreme Court.

In her August 30, 2018 Decision, the Labor Commissioner accepted DOA's written representation "that the work in question is not paid for with public money" and then ruled that the prevailing wage laws of NRS 338 did not apply because "none of the

repair and maintenance funds [were] financed in any part through any ... public money."[2] The Labor Commissioner did not have the benefit of an opinion issued by the Nevada Supreme Court in January 2019, *Bombardier Transportation (Holdings) USA, Inc. v. Nevada Labor Commissioner*, 135 Nev. Adv. Op. 3, 433 P.3d 248 (2019), in which the DOA made the same argument to similar circumstances and soundly rejected.

In *Bombardier*, the DOA's Director gave testimony seeking to show that work performed at McCarran International Airport (the "Airport") under a maintenance contract was not subject to Nevada's prevailing wage laws because the money used for the contract comes from "normal operating funds." This is the very same argument made by the DOA in this Case—that money obtained from vendors and airlines (as opposed to government grants or direct tax revenues) is not "public money."

To be clear, on page 5 of its own answering brief before the Nevada Supreme court in the *Bombardier* case, the DOA (acting through the same law firm that continues to represent it in this Case) joined in and adopted the entirety of Bombardier's Opening Brief, and then went on to argue that the Labor Commissioner's decision in *Bombardier* to require the payment of prevailing wages was

> legally improper, but it also has extensive repercussions on how the Clark County Department of Aviation will function within the state. Clark County is the largest local government entity in Nevada, and unlike other Departments within the Clark County government, the Department of Aviation operates without the County's general fund tax revenue.

Respondent Clark County's Answering Brief at 5, *Bombardier*, 433 P.3d 248 (No. 71101).[3] On page 7 of that same brief, the DOA expressly acknowledged (in an apparent

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[2] The LMCC contends that the Labor Commissioner erred by conducting her investigation in such a way as to deprive the LMCC of the opportunity to conduct discovery related to, or to challenge in any way the DOA's factual representations.

[3] The Court is requested pursuant to NRS 47.150(2) to take judicial notice of the briefing, which is allowed pursuant to NRS 47.130 and may be taken at any time pursuant to NRS 47.170. A copy of the brief is included herewith as Exhibit 1.

reference to this very Case) that the decision in *Bombardier* would be binding in future cases like this one, stating:

> Indeed, other contractors and labor unions are already using the clearly erroneous decisions from the Labor Commissioner and the district court in the subject case, in an attempt to apply an overly broad definition of "public works" to basic maintenance contracts. If this improper precedent from the Labor Commissioner and the district court is not overturned, labor unions and contractors will continue to try to apply prevailing wages to more and more maintenance contracts, which is contrary to NRS Chapter 332 and the explicit exception created by NRS 338.011(1).

Id. at 7. From this history, it is clear that the Nevada Supreme Court fully understood and actually intended that its decision in *Bombardier* would be controlling in cases like this one as the Supreme Court specifically stated that the money used by the DOA on its operational and maintenance contacts is in fact public money.

While the Labor Commissioner uncritically accepted the DOA's public money argument in this Case, the Nevada Supreme Court plainly rejected that argument, stating:

> Bombardier also contends that … the "financ[ing]" language in NRS 338.010(15) excludes maintenance contracts from the definition of "project" because such contracts are paid for with normal operating funds rather than bonds or long-term debt measures.
>
> We conclude 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 (emphasis added).

The DOA asserted that the contract in *Bombardier* was a maintenance contact just like it asserts that the contract in our Case is a maintenance contract. The DOA asserted that the *Bombardier* contract was paid for from non-tax revenues just like it asserts that the contract in our Case is paid for from non-tax revenues. The DOA's arguments and positions are the same in both cases, and the Nevada Supreme Court has already made a decision at that argument.

2. Issue preclusion defeats the DOA's public money argument.

In light of the DOA's participation in the *Bombardier* decision and given the result of that case, the DOA is now precluded from continuing to assert that its funds do not qualify as "public money" for purposes of NRS 338. DOA was represented in *Bombardier* by the same law firm now representing the DOA here. The issue was identical. The area of law and the controlling statutes were the same. The issue was actually and necessarily litigated. The ruling was final and was based on the merits. The DOA was a party in *Bombardier* (or was in privity with a litigant who adequately asserted the DOA's rights, as shown by the DOA's wholesale adoption of Bombardier's opening brief) and the DOA is now a party in this Case. All requirements for issue preclusion have been met. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048 (2008).

The DOA cannot be permitted to relitigate the "public money" argument on which it previously and finally lost. The sole stated legal basis for the decision of the Labor Commissioner in this Case was rejected by the Nevada Supreme Court in *Bombardier*. This Court must now reverse the decision of the Labor Commissioner.

3. The DOA's argument that it may contract around prevailing wage laws is impermissible and defies logic.

The DOA asserts that contracts with the Federal Aviation Administration ("FAA") pursuant to 49 U.S.C. § 47101 et seq. somehow authorize the DOA to unilaterally declare that monies it realizes from Airport operations are not public money. But the DOA has pointed to no language in those statutes to support this contention. In reality, the DOA is expressly required to assure that the "the airport will be available for public use…" 49 U.S.C. § 47101(a). As such, the money used and held by the DOA (regardless of source) is used for public purposes and is unquestionably public money.

If anything, federal statutes require the payment of prevailing wages, just as NRS 338 does. *See* 49 U.S.C.§ 47112(b). DOA-controlled money is designated for public uses and is public money. The *Bombardier* case discussed above is not an anomaly. It is

consistent with the *Carson-Tahoe* case discussed below, wherein the Nevada Supreme Court looked to the purpose of the money when it specifically stated that money from a private developer used to construct a private building to be purchased by a public entity is public money.

The DOA's "I can contract around the statute" argument also defies logic. As one court has stated, "Our conclusion that Congress did not intend to preempt these generally applicable labor laws could be nullified if motor carriers have the unchecked ability to contract around these laws…." *California Trucking Association v. Su*, 903 F.3d 953, 963 (9th Cir. 2018). If a public entity had the ability to contract around labor laws, that would put an end to such labor laws.

4. DOA's argument that the money it collects is not "public money" is defeated by its own admission that it pays prevailing wages.

After affirmatively arguing that it is not subject to prevailing wage requirements, the DOA admits that it pays prevailing wages: to wit. "The DOA has paid the prevailing wage on multiple projects, where appropriate, and will continue to do so in the future." See DOA's Br. at 18:4-5. The DOA cannot have it both ways; it is either serving a public purpose or it is not serving a public purpose.

If the DOA can avoid prevailing wage laws simply by earmarking certain revenues for payment of specified obligations, as the Labor Commissioner has erroneously allowed in this Case, then the exceptions found in NRS 338 will have "swallow[ed] Nevada's prevailing wage requirement rule." The Nevada Supreme Court declared in *Bombardier* that this is not permissible under the statute. *Bombardier* at 255.

5. The DOA's definition of the term "public money" and its interpretations of case law are incorrect.

DOA's arguments are premised solely upon its *ipse dixit* assertion that money it collects from leases, vendors and airlines is not public money. It provides no case law stating that money earned or otherwise received by a government is not public money. It

provides no analysis of any relevant statute showing why money that DOA collects should be regarded as anything other than public money. Indeed, the DOA seems to ask this Court to believe that it keeps the **$556.5 MILLION** dollars it receives (See Record AA 231) lying around in the petty cash drawer rather than deposited in a financial institution in accordance with NRS 356.

The DOA seemingly argues that only tax revenues should be considered "public money." But the cases cited by the DOA do not stand for such a proposition:

City of Reno v. Building & Const. Trades Council of Northern Nevada, 251 P.3d 718, 719, 127 Nev. 114, 116 (2011). In *Reno,* the Nevada Supreme Court concluded that NRS 338 applied because a project was funded by sales tax revenues. The court did not hold, as asserted by DOA, that taxpayer financing is essential to characterizing a project as a public work under NRS 338. The argument made by DOA is expressly defeated by the Nevada Supreme Court's private money example from *Carson-Hahoe Hosp.* and its holding in *Bombardier.*

Carson-Tahoe Hosp. v. Building & Const. Trades Council of Northern Nevada, 128 P.3d 1065, 1066, 122 Nev. 218, 219 (2006) is a case in which prevailing wages were not required. But this result should have been obvious. The first sentence of the "FACTS" section in *Carson-Tahoe* reads, "Appellant Carson–Tahoe Hospital (CTH), a private nonprofit membership corporation, is constructing a replacement hospital on hospital-owned land." *Id.* No government was involved. In addition, the revenue bond statute at issue in *Carson-Tahoe* explicitly exempted the government from any obligation for funds derived thereunder. *Id.* In contrast, the federal statute relied upon by the DOA in this case specifically requires money collected by the DOA to be used for the public. *See Supra.*

Moreover, *Carson-Tahoe* specifically ruled that private money (meaning money that the government does not touch) used for a private project is subject to NRS 338 where that money is intended for a governmental purpose: "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." *Id.* at 1068, 222. This explanation from the Nevada Supreme Court proves that the source of the money used to fund a project is not the sole deciding characteristic of what constitutes "public money." The touchstone of the Supreme Court's example was the public purpose behind the expended funds; money expended for a public purpose is clearly public money, even if the money was supplied and paid directly to a contractor by a private entity.

6. The DOA's "in whole or in part" argument is wrong because even privately funded projects may be considered as using public money.

The DOA is wrong in its argument that the legislature's use of "in whole or in part from public money" requires a conclusion that only money received from taxes is public money. The phrase "in whole or in part" modifies rather than defines the term "public money" as used in NRS 388.010(17). In addition and as shown above, the Nevada Supreme Court has expressly stated that private money used on a private project may be considered as public money for purposes of NRS 338. In that example, no money touched the government's hand yet the money was deemed as public.

7. The DOA's criticism of the NRS 356.330(1)'s "public money" definition fails because NRS 356 et seq. is a statute of general applicability for government funds, including funds that may be expended pursuant to NRS 338 et seq.

NRS 356 et seq. is a statute of general applicability. It is a financial statute that addresses how government held funds—regardless of source or intended use—may be deposited in financial institutions. Such funds include money held by the DOA and money expended pursuant to NRS 338, NRS 332, or any other Nevada statute, regulation, county code, municipal code, or government policy. There is no NRS 338 money tree that allows government entities to pick dollars at will. Those dollars must be held in and withdrawn from an account, and NRS 356 et seq. defines what is in that account. The definition of public money from NRS 356 is therefore applicable as it includes by

necessity money used for public works. In sum, there is no reason to believe that the legislature intended NRS 356 to be inconsistent with the definition of "public money" in NRS 338.

8. It is illegal for the DOA to break the carpeting project into smaller projects.

An essential, but not fully articulated position of the DOA, has been its belief that it may avoid NRS 338 responsibilities by separating a larger project into several smaller projects and contracts. That position/belief is incorrect as NRS 338.080(3) expressly makes such efforts illegal. Yes, replacing a few carpet tiles, like replacing a few broken windows, is surely maintenance within the legislative intent. The DOA unfortunately extrapolates the spirit of that intent into the idea that it can avoid NRS 338 by carpeting the entire Airport one tile and one purchase order at a time. The Nevada Supreme Court told the DOA in *Bombardier* that such conduct is impermissible. Yet, here we are; the DOA wants the Court to sanction its whole hearted effort to avoid NRS 338 and *Bombardier.*

9. The DOA asserts facts not reached or found by the Labor Commissioner.

The LMCC specifically objects to the DOA's effort to insert non-findings into the Record. Of particular interest to the LMCC is the reality that a fact finding hearing was never held by the Labor Commissioner, making it impossible for the LMCC to even challenge the information that the DOA now improperly presents to the Court as fact. The Labor Commissioner never made any factual findings with regard to the DOA's normal operations and maintenance argument. That argument places the Court and the LMCC in the impossible positions of evaluating and arguing "facts" not found by the Labor Commissioner. *See Bombardier Transportation (Holdings) USA, Inc. v. Nevada Labor Commissioner*, 433 P.3d 248, 252 (Nev., 2019) ("We defer to the agency's findings of fact, but review its legal conclusions de novo.") It is true and undisputed that the flooring project included a football field sized carpeting project and approximately a mile of base cove installation. However, beyond those limited facts, there is no accepted

evidence and the Labor Commissioner made no conclusions as to how the work is/was performed. It would be error to confirm the Labor Commissioner's ruling based upon nonexistent factual conclusions.

10. The DOA's reliance upon *ipse dixit* statements to the Labor Commissioner cannot justify any conclusion that the work was normal maintenance.

The DOA relies upon its own unchallenged statements to the Labor Commissioner as evidence that the carpeting work was mere normal maintenance. See e.g. Response Brief at 6:25-28, 7:1-4. As an example, the DOA asserts the self-serving conclusion that the project is normal maintenance because "all carpet installation performed as part of this bid is budgeted for as a part of the DOA's operations and maintenance budget." Id. at 7:3-4.[4] The idea that a government bureaucrat may invoke the normal maintenance provisions of NRS 338.011 by characterizing the work through a budget or contract process rather than the actual work being performed is repugnant to NRS 338 et seq. and the legislative authority upon which it was created. As stated by the Nevada Supreme Court, "Such a limitation 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." *Bombardier Transportation (Holdings) USA, Inc.* at 254.

11. There is nothing normal about replacing 12,000 yards of carpeting and 5,000 feet of base cove.

The DOA's argument that replacing 12,000 yards of carpeting and 5,000 feet of base cove is a normal operation and maintenance function is not even specious. The Nevada Supreme Court intentionally interprets NRS 338 narrowly, to ensure that the exceptions expressly stated in the statute cannot swallow the general rule requiring payment of prevailing wages. *See Bombardier* at 255.

[4] Again, this argument was rejected by the Nevada Supreme Court in *Bombardier*.

After reading the normal operations and maintenance exceptions narrowly, the Nevada Supreme Court in *Bombardier* focused upon how major the repairs were. In other words, it looked to the reality that major repairs cannot be considered operationally normal or maintenance centric, a logical conclusion necessary to avoid the nullification of NRS 338 by its internal exception. So while replacing a few failing carpet tiles may be normal, resurfacing large swaths of flooring under the guise of normal operations or maintenance is inconsistent with legislative intent[5] and with the reasoning and conclusions of the Nevada Supreme Court in *Bombardier*.

CONCLUSION

The DOA's collection of money and use of that public money at the Airport to fund the carpet replacement project at issue in this Case requires the payment of prevailing wages. The only basis for avoiding prevailing wages must come from the express exceptions found in NRS 338. DOA did not prove that any such exception applied to this matter, and the arguments on which the Labor Commissioner based her decision have been rejected by the Nevada Supreme Court. The Court must reverse the Labor Commissioner's Determination, enter judgment in favor of the LMCC, and direct the DOA to pay proper prevailing wages on the project.

Executed on this 16th day of April 2019.

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[5] *Bombardier* relied upon legislative intent to establish that normal operations and maintenance relate to day-to-day repairs that include "such activities like window washing, janitorial and housekeeping services, and fixing broken windows." *Bombardier* at 255.

ATTORNEY'S CERTIFICATE

In accordance with NRAP 28.2, I hereby certify the following:

(1) I have read the brief;

(2) To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) By signing the brief, I believe that it complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the record where the matter relied on is to be found; and

(4) To the best of my knowledge, the brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

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CERTIFICATE OF SERVICE

On the date of filing, I caused a true and correct copy of the foregoing document to be lodged with the Court and served in the following manner:

☒ 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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EXHIBIT

1

S IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. 71101
District Court Case No. A698764

BOMBARDIER TRANSPORTATION, (HOLDINGS) USA, INC.,

Appellant,

vs.

NEVADA LABOR COMMISSIONER; THE INTERNATIONAL UNION OF, ELEVATOR CONSTRUCTORS; AND CLARK COUNTY,

Respondents.

RESPONDENT CLARK COUNTY'S ANSWERING BRIEF

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TABLE OF AUTHORITIES

Cases

Statutes

I. JURISDICTIONAL STATEMENT

Respondent Clark County agrees with and adopts the Jurisdictional Statement contained in Appellant Bombardier Transportation's Opening Brief.

II. STATEMENT OF THE ISSUES

Respondent Clark County agrees with and adopts the Statement of the Issues contained in Appellant Bombardier Transportation's Opening Brief.

III. ROUTING STATEMENT

Respondent Clark County agrees with and adopts the Routing Statement contained in Appellant Bombardier Transportation's Opening Brief.

IV. STATEMENT OF THE CASE

Respondent Clark County agrees with and adopts the Statement of the Case contained in Appellant Bombardier Transportation's Opening Brief.

V. STATEMENT OF THE FACTS

Respondent Clark County agrees with and adopts the Statement of the Facts contained in Appellant Bombardier Transportation's Opening Brief.

VI. SUMMARY OF THE ARGUMENT

Respondent Clark County agrees with and adopts the Summary of the Argument contained in Appellant Bombardier Transportation's Opening Brief.

VII. STANDARD OF REVIEW

Respondent Clark County agrees with and adopts the Standard of Review contained in Appellant Bombardier Transportation's Opening Brief.

VIII. ARGUMENT

Respondent Clark County, by and through its counsel of record, Mark J. Ricciardi, Esq., hereby responds to and joins Appellant Bombardier Transportation's Opening Brief ("AOB"), filed on December 1, 2017.

As Bombardier asserts in its Opening Brief, the type of contract at issue, CBE-552, has never been considered a public works project that requires the payment of prevailing wages under NRS Chapter 338. *See* AOB 1-2. Instead, CBE-552 is a contract providing for the maintenance of the automated train system ("ATS") at McCarran International Airport ("Airport"). *See id.* CBE-552 is similar to the County's other maintenance contracts, such as those for the maintenance of its buses and elevator systems, which also are not considered public works projects requiring the payment of prevailing wages under NRS Chapter 338. *See id.*

Moreover, a contract awarded in compliance with NRS Chapter 332, which is directly related to the normal operation of the public body or the normal maintenance of its property, is not subject to the requirements of NRS Chapter 338. NRS 338.011(1). CBE-552 was awarded in compliance with NRS

Chapter 332, and as Bombardier establishes in its Opening Brief, directly related to the normal operation and maintenance of the County's Airport. *See* AOB 12, 33-48. Thus, the prevailing wage and specialized bidding requirements of NRS Chapter 338 do not apply to CBE-552.

This Court has stated that it will reverse an administrative decision "that is clearly erroneous in light of reliable, probative, and substantial evidence on the whole record." *Day v. Washoe County Sch. Dist.*, 121 Nev. 387, 387, 116 P.3d 68, 69 (2005) (internal quotations omitted). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotations and citations omitted).

Here, both the Labor Commissioner and the district court ignored substantial evidence that Clark County has consistently handled all of its major maintenance contracts the same way – as exempt from the prevailing wage requirements. For over thirty years, Clark County has applied a common sense, reasonable interpretation of the plain language of NRS 338.011(1) to distinguish between ATS maintenance contracts and construction contracts. *See* Appellant Bombardier Transportation's Appendix ("ER") 0421, 1322 (briefing this issue before the Labor Commissioner). As Bombardier emphasizes, the purpose of NRS 338.011(1) was to prevent the overbroad and unreasonable interpretation of prevailing wage laws, which previously frustrated the local government's right

to opt-out of competitive bidding requirements when it best served the public interest. *See* AOB 46-47. In enacting NRS 338.011(1), the Legislature intended to provide a safe harbor to protect public entities from a multitude of obligations placed upon public works projects, as well as help them manage costs by avoiding the harmful impact of a 1944 Opinion of the Attorney General. *See* AOB 47-48; Respondent Clark County's Appendix ("RCCA") 0021-0022 (briefing this issue before the district court).

Whenever Clark County has previously contracted for the on-site construction or major rehabilitation of any part of its ATS, the County has required that prevailing wages apply to workers at the Airport site. *See* ER 0420-0422 (briefing this issue before the Labor Commissioner); RCCA 0013-0015 (briefing this issue before the district court); ER 0426-0469 (relevant portions of prior contracts to which Clark County has applied the prevailing wage requirements of NRS Chapter 338).

Likewise, whenever Clark County has contracted for the maintenance of the ATS, the County has regarded the procurement of the services, supplies, materials, and equipment necessary to the normal operation and normal maintenance of the ATS as a contract properly awarded pursuant to NRS Chapter 332. *See* ER 0423-0424, 1325-1326 (briefing this issue before the Labor Commissioner); RCCA 0013-0015 (briefing this issue before the district court);

ER 0470-0549 (relevant portions of the "Shuttle Bus Operations and Maintenance for the Consolidated Car Rental Facility at McCarran International Airport" contract, which is analogous to CBE-552).

Further, the Labor Commissioner and the district court disregarded substantial evidence of the absolute necessity of the ATS system in relation to the normal operation and maintenance of the Airport. *See* AOB 35-41. Ample testimony, including testimony from Randall H. Walker (former Director of the Clark County Department of Aviation), was presented that the ATS system is essential to the Airport's normal operation and that the Airport simply cannot function without the ATS. *See* AOB 10-12, 20, 29-41; ER 1326-1329 (briefing this issue before the Labor Commissioner); RCCA 0013-0017 (briefing this issue before the district court).

The Labor Commissioner's clearly erroneous decision directly undermines Clark County's common sense and reasonable interpretation of NRS 338.011(1), which the County has consistently applied to its prior contracts for over thirty years. Not only is this decision legally improper, but it also has extensive repercussions on how the Clark County Department of Aviation will function within the state. Clark County is the largest local government entity in Nevada, and unlike other Departments within the Clark County government, the Department of Aviation operates without the County's general fund tax revenue.

As such, the Department of Aviation must strive to achieve a delicate balance in its operations – between acting as a good steward of the assets it is entrusted to manage and staying competitive as a self-sufficient enterprise.

With the threat of the application of the prevailing wage and specialized bidding requirements of NRS Chapter 338, vendors must weigh the benefits of conducting business with Clark County with the risks of pending litigation. Thus, the Labor Commissioner's decision creates tension for the Department of Aviation's fiscal operations, which results in arduous consequences for the County. As a matter of public policy, it must be noted that the Department of Aviation is obligated, pursuant to its Federal Aviation Administration grant assurances, to be economically self-sustaining. Given such economic pressures and constraints, if CBE-552 and other maintenance contracts are expanded to be considered "public works" projects subject to prevailing wages under NRS Chapter 338, as incorrectly determined by the Labor Commissioner and the district court, then the costs of maintenance work at the Airport will significantly increase. Such increased costs would, in turn, force the Department of Aviation into situations where the Department will not bid maintenance contracts as often or at all. The Department of Aviation may simply elect to have its employees perform such maintenance, which would result in increased internal labor obligations, fewer bidding opportunities for contractors, and the possibility of

inferior maintenance compared to what specialized maintenance contractors could perform. Additionally, the Department of Aviation may be forced to delay or completely forego performing certain maintenance. Under those realistic scenarios, the Airport would suffer from deteriorating facilities, which would impact Airport operations as well the traveling public's experience at the Airport.

Indeed, other contractors and labor unions are already using the clearly erroneous decisions from the Labor Commissioner and the district court in the subject case, in an attempt to apply an overly broad definition of "public works" to basic maintenance contracts. If this improper precedent from the Labor Commissioner and the district court is not overturned, labor unions and contractors will continue to try to apply prevailing wages to more and more maintenance contracts, which is contrary to NRS Chapter 332 and the explicit exception created by NRS 338.011(1).

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IX. CONCLUSION

Based on the foregoing, Clark County supports Bombardier in this appeal and concurs with the legal arguments, points, and authorities as presented in the Opening Brief. Thus, Clark County respectfully requests that this Court reverse and remand this matter because the district court erred in dismissing Bombardier's Petition for Judicial Review of the Labor Commissioner's decision.

Dated this 15th day of February, 2018.

FISHER & PHILLIPS LLP

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent Clark County's Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

I further certify that Respondent Clark County's Answering Brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read Respondent Clark County's Answering 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 Respondent Clark County's Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion 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

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/ / /

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of February, 2018.

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I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on the 15th day of February, 2018, Electronic service of the foregoing **RESPONDENT CLARK COUNTY'S ANSWERING BRIEF** shall be made in accordance with the Master Service List as follows:

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TRAN
CASE NO. A-18-781866-J
DEPT. NO. 25

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SOUTHERN NEVADA LABOR MANAGEMENT COMMITTEE, Plaintiff, vs. CLARK COUNTY, NEVADA DEPARTMENT OF AVIATION, Defendant.	REPORTER'S TRANSCRIPT OF DECISION ON PETITION FOR JUDICIAL REVIEW

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, AUGUST 27, 2019

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

APPEARANCES:

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For the Defendant:	EVAN JAMES, ESQ.

* * * * *

LAS VEGAS, NEVADA; TUESDAY, AUGUST 27, 2019

P R O C E E D I N G S

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THE COURT: Page 5, Southern Nevada Labor Management vs. Clark Count Nevada Department of Aviation.

MS. HUCK: I'm the deputy labor commissioner. I came to hear the decision. Mr. Evans is not here.

THE COURT: I thought they would be present. This was supposed to be on last Tuesday, then the court needed additional time because of a trial schedule that had gotten away from the court. So I put it over to this week. I thought they'd be here. I don't want to hold you up. Do you think there's a chance someone coming.

MS. HUCK: I thought they'd be here too. They are not. So they might be waiting for the minute order. I kind of --

THE COURT: So the clerk is telling me now she's saying that that rings a bell. I intended to, when I had it on last week, I was offsetting it to try to get through as much of the 9:00 calendar as possible, then announce my decision so they didn't have to wait. When it got reset to this week, it got reset to 9:00. It's technically 9:00. If they've seen that, when it got switched, that it

moved to 9:00 I think they'd have been here. I can't rule out the fact they might trickle in.

MS. HUCK: I'll wait. That's fine.

THE COURT: So 10:30 --

MS. HUCK: I think Andrea Nichols is calling in at 10:30. I'm not sure.

THE COURT: She's up in Carson. She was present. I told her she could be telephonic. Generally they have to give us that request in advance. You'd have the number.

MS. HUCK: It doesn't matter. I'm here on behalf of the labor commission.

THE COURT: What I'll do is wait till 10:30. I do have several Rule 16 conferences at that time. If I can finish the 9:00 calendar by 10:30, if I can't I'll take that matter first right at 10:30, get that disposed of, then do the Rule 16s quickly.

If you want to come back, come back by 10:30.

MS. HUCK: Thank you.

(Matter to be recalled.)

THE COURT: Recalling page 5, Southern Nevada Labor Management Cooperation Committee vs. Clark County Nevada Department of Aviation.

We're going to get Ms. Nichols on the phone. This is Judge Delaney. It's a little after 10:30. There was some

confusion about the timing on the calendar for the court to announce its decision in Southern Nevada labor Management Corporation vs. Clark County Nevada Department of Aviation.

When we reset it to this week, we set it at 9:00, but only the Assistant Labor Commissioner was here.

Do I have your title correct.

MS. HUCK: Mary Huck, deputy labor commissioner.

THE COURT: We realized because of the time change that perhaps folks would be coming at 10:30. I apologize for any confusion. You're on the horn now. Let's go ahead and get appearances.

MR. JAMES: Evan James on behalf of the Petitioner, your Honor.

MS. WALKER: Holly Walker from Fisher Phillips on behalf of Clark County Department of Aviation.

THE COURT: You're here in Mr. Ricciardi's place.

MS. WALKER: Yes.

MS. HUCK: Mary Huck, office of the Labor Commission.

THE COURT: Good morning. Then we have Ms. Nichols, announce your appearance.

MS. NICHOLS: Andrea Nichols on behalf of the

labor commission, Deputy Attorney General -- sorry.

THE COURT: You're fine. Thank you so much.

Thank you for being present telephonically, and for the others here in the courtroom. Thank you for your patience when we had to continue this matter from last week because of a trial schedule that had just not given us time to further review matters.

It is the Court's determination to grant the petition for judicial review. I do make the finding that the office of the labor commissioner, closing the matter, was contrary to fact and law and was arbitrary and capricious. I think that the errors are that the -- this was not -- the record belies any argument that this was just strictly maintenance. That it does appear to be the type of work that was project work and that it could not be separated out in this way.

I do believe that there was evidence -- sufficient evidence to show that the materials for the work were purchased prior to a 2018 budget and part of the larger project that were then later disbursed and that would be an inappropriate end run around the prevailing wage requirements. And that ultimately the argument that was made from a legal basis that this is simply not -- the Department of Aviation is simply not something that operates using public monies is also incorrect under the

law.

I did review the case law. I did spend a little bit more time with the decisions, including the Bombardier decision and some other things. I appreciate very much the labor commissioner's argument that we didn't have the benefit of that decision at the time we made our decision. I understand and agree with that, but that doesn't necessarily mean that this is not the way that the law should be interpreted under the prevailing circumstances here.

The only issue that I maybe struggled with a little bit was the standing issue that was raised, would this entity that has brought this, this union group, really be able to have the standing to bring this issue, and I do believe they do have the standing. This is a matter of not only public interest but public policy. This is something that, you know, these individuals in the bargaining unit, in the circumstances who either could have been harmed by this or would be harmed by these types of actions do have standing to bring the case. And that ultimately it is the Court's determination that although I don't think necessarily I'm subscribing any nefarious conduct here at all to trying to circumvent prevailing wage, I just think the natural circumstances of what occurred here did circumvent the prevailing wage, and the

labor commissioner should have, through the petition for judicial review effort -- sorry, through the initial efforts to have this reviewed that led to this petition for judicial review effort, should have interpreted the law differently and should have determined that this matter, again, was a unit of a project that could not be separated from the total project and ultimately that the prevailing wage was not paid and was not appropriate in this case.

There probably are other things I could articulate more specifically about that, but I do ultimately find persuasive and compelling the arguments in the petitioner's memorandum of points and authorities. And it is on that basis I'm granting this. And, as I said, I did spend more time to look at both the standing issue and ultimately the issue with regard to calling something maintenance, but ultimately whether or not is or is not truly that. And ultimately whether or not this is, the Department of Aviation, is a public works, does public works projects. I think all of those things line up in favor of the Petitioner in this case.

I appreciate that this is likely to be challenged. In fact, I would embrace it if it was so there is potentially further clarity on this point. Although we do have some, again, coming from this recent Bombardier

decision for these types of things, but I would ask that the prevailing party here, Mr. James, prepare the findings of fact, conclusions of law and order on the granting of the petition for judicial review, which will ultimately then mandate the, I guess, technically -- actually, my first thought was we'd be remanding it to the labor commissioner to correct the decision, then ultimately have the wages corrected. I'm not sure we need to go that additional step back to the labor commissioner, based on the Court's ruling.

Mr. James, do you have any input on that.

MR. JAMES: Thank you for your ruling. I appreciate it.

The issue with regard to going back to the labor commissioner, there does need to be an analysis of who needs to be paid what. That's something.

THE COURT: That would make sense. We haven't had that factual determination here. So the remand would be to the labor commissioner -- I'll hear from you, I promise, Deputy, in just a minute.

The remand will be to the labor commissioner for the review and ultimate determination of, as Mr. James very simply put it, who should be paid what.

Deputy, did you want to --

MS. HUCK: Your Honor, so I understand that you

made a decision that is subject to prevailing wage, but your decision then is two-fold. You're also saying the maintenance exemption would not apply and is going to be considered in its entirety subject to prevailing wage.

THE COURT: That is, I believe, what the case law would direct us to find. That based on when these materials were purchased, what the circumstance of the project is, that just having these materials and then using them at a later date does not somehow turn it into maintenance. So it would make that project, in its entirety --

MS. HUCK: I'm fine with that. Bombardier, our office did have a hearing once it was found it was subject to prevailing wage, they determined what portion was maintenance and what portion --

THE COURT: I think the labor commissioner should still have the right to do that. I think the determination here was faulty because it found entirely that it was maintenance. So I don't think there's a preclusion. I don't think I'm in a position to find today that it's -- there's not some portion of it that's maintenance. But it does appear to me that the determination it was all maintenance is faulty.

MR. JAMES: May I address that.

THE COURT: Go ahead.

MR. JAMES: So, under the Administrative Procedures Act, the remand can take place to the agency, is if the Petitioner's rights have been violated. We don't get to send something back to the agency to redo the case or redo the hearing.

I think that ruling to send it back and try to decide if part of it was maintenance and part of it wasn't maintenance actually is outside the authority of the Administrative Procedures Act. Because I believe it 233(b)135, Subparagraph 3, that indicates that the remand can go back for the Petitioner's benefit, not the Respondent's benefit. And that's exactly what would be happening if it went back for the Respondent's benefit. It would be going back for them to try to argue maintenance, and that's a determination that was never actually something that -- well, you made a decision on it today.

So that's my concern about sending it back for that type of hearing, is we're going back to redo something that's disallowed by statute.

THE COURT: Let me hear from the deputy again.

MS. HUCK: So our office is very neutral. We are happy to take it back however you send it back. We never went and considered if it was going to be subject to prevailing wage or if it was not because of the

maintenance, because Clark County asserted it's not public money, so we just closed it. So we would want to really clarify it for everyone, if it's just being sent back to calculate wages and what time frame wages, or it's being sent back saying, yes, it was a prevailing wage project, but it's not going to be because of maintenance. Just what our authority or the scope of it would be. I would be happy if you could just clarify that.

THE COURT: It's a fair question to clarify.

MS. WALKER: Your Honor, just to add onto that. Like my co-counsel was saying, essentially Clark County Department of Aviation, we never waived the maintenance issue as we argued prior too So to the extent it's being remanded back to the office of labor commissioner, we do want to be able to say that it doesn't exceed the scope of what the Administrative Procedure Act is saying in order to remand it to the office of the labor commissioner to consider alternative arguments. Aside from the public money issue.

THE COURT: I think what it boils down to, I still perceive it -- I don't perceive it was waived, but I think the fair ask today is the scope of the Court's ruling. We have determined that the labor commissioner erred in -- was arbitrary and capricious and erred in applying the law the way it found, first and foremost,

that this was not a public agency and it wasn't public money. I think that is belied by the prevailing case law. So ultimately the primary aspect of the decision is this is public works, public money, you know, project, or at least the Department of Aviation is subject to those laws.

Then, the issue becomes, you know, was this -- and I thought because the labor commissioner, I perceived, had made some determination that this was maintenance and not something subject to a work project subject to prevailing wage, my perception was that determination had an underpinning of a determination of the labor commissioner that that was in error. That this was not maintenance. That this was project.

It didn't occur to the Court, in all candor, until this argument was raised for clarification, that there still could be a determination that some portion of it was maintenance and some portion of it was not. It appeared it was an error that was determined to all be maintenance and that that determination had been made.

I think in fairness, and I don't perceive it, Mr. James, as being sent back to the benefit of the Aviation Department, or being sent back to the benefit of the Petitioner. I see it being sent back for the labor commissioner to do a complete job. And based on the

argument that's being made here today and perhaps the Court's, you know, not cottoning, so to speak, to the extent of what the labor commissioner's determination was, it's fair that it go back to the labor commissioner for the labor commissioner to be neutral and do their job and determine if any portion of this is properly maintenance or not.

I hear you saying, well, that maybe does a disservice to the Petitioner because the court should, perhaps, more properly determine that this is all project and not maintenance and it should just be who gets paid what. When you initially said that that sounded right, but in light of the argument that really the labor commissioner had not undertaken that determination and needs to do that and mainly was deciding what it was deciding based on the initial opinion about it or the argument about it being not public money, not public works project, I think the labor commissioner needs to do their job. I trust them to be neutral to do their job.

I'm going to give the clarification that it is being sent back for the determination to be made if any portion of the project is maintenance versus project.

The Bombardier decision is now known to the labor commissioner so it should be taken into account. I think ultimately there will be a fair outcome that, of course,

could still be subject to petition for judicial review But I think it would be improper for me to determine at this point that the labor commissioner is without discretion to undertake that full review and that must only just decide who gets paid what.

I am going to decline, Mr. James, to go that far.

MR. JAMES: One more argument for the record.

THE COURT: Of course, please.

MR. JAMES: Thank you.

The potential error I see in that analysis, I'm not saying you did error. I'm smart enough not to tell the Judge you're wrong.

THE COURT: You wouldn't be the first, and I am very readily able to admit when I'm wrong.

MR. JAMES: I think that's helpful for all of Hut here's the potential error on the argument. Really that allows the party through the administrative process to sand bag the administrative process and hold back an argument from petition for judicial review requirement under 233(b).130, Sub-part 2(d).

If they disagreed with the labor commissioner's determination, they had an obligation to within 10 days of my filing this petition for judicial review to actually file their own petition for judicial review to challenge how the labor commissioner made her determination. That

was not done. So what's happening today, and my concern is this, we're sending something back that really is to the benefit of the Respondent, but not only to the benefit of the Respondent, to the detriment of the Petitioner. Cause now we have to go through the administrative process again, a process that should have been completed, but as we've all discussed here wasn't.

So it allows parties in the administrative process to get two bites of the apple. I don't think that's the intent of an appear to this court or an appeal to the Supreme Court. Our judicial process is established on taking a final determination to what we have and the labor commissioner discussing that. If there's errors, we go back and deal with those errors. So I think that is the potential error in the decision.

THE COURT: I appreciate that. I can see that view. I respectfully, as you said, will agree to disagree on that point. Because I think it is not uncommon for remands to go back and ultimately as a redo verse, okay, this is the prevailing party. Go back and fix it for them. I think that's too narrow a reading of the administrative practices, requirements. Whether it's proper in this case, based on the law or not, that can be where the error lies. I'm not finding that at this points.

I think the labor commissioner needs to look at it. I don't suspect that it can be abused, or would be abused the way the speculation is that it could happen based on a ruling such as this. I think it is the proper scope of this particular remand to allow the discovery commissioner to understand the Court has ruled this is susceptible to public works project because it is public money, based on the case law. Then ultimately make a determination which aspect of it, if not all of it -- again, we have now the Bombardier decision to impart to be something that gives guidance to the labor commissioner that they didn't have benefit of before. Then they can make their determination of the circumstances of what occurred and whether or not, you know, what portion of it is project versus what portion of it is maintenance, if any. And decide who to pay what. So I think that's the proper scope for it to go back.

MR. JAMES: Thank you.

THE COURT: I do need somebody to prepare me an order.

MR. JAMES: I'm happy to do that. I'll run it by Ms. Walker.

THE COURT: Thank you.

THE COURT: Ms. Nichols, do you want to see the order from Mr. James.

MS. NICHOLS: That would be great.

THE COURT: We'll have Mr. James serve his draft on everybody. I still would like to see it back within 10 days. Please no undo delays messing around with it. Mr. James has a very solid handle on what it is, even if we agree to disagree on some of the scope issue, but go ahead and get it submitted.

If there are any disputes you can provide competing orders or a letter of what your basis is.

MR. JAMES: Thank you so much.

MS. WALKER: Thank you.

MS. HUCK: Thank you.

MS. NICHOLS: Thank you, your Honor.

THE COURT: Thank you. Have a good day.

* * * * *

CERTIFICATE

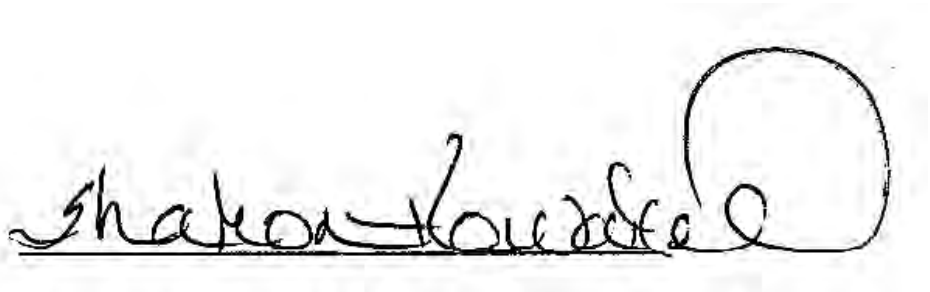
OF

CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth; that the testimony and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.



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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 **NOTICE OF ENTRY OF ORDER**

Please take notice that the attached order was entered on February 4, 2020.

DATED this 7th day of February 2020.

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*
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CERTIFICATE OF SERVICE

On February 7, 2020, I caused a true and correct copy of the foregoing notice 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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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.

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[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: January 28, 2020.

District Court Judge Kathleen Delaney

Submitted by:

CHRISTENSEN JAMES & MARTIN

By: */s/ Evan L. James*

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Reviewed as to form and content:

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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 Department No.: 25 **MOTION FOR RECONSIDERATION** **HEARING REQUESTED (Pursuant to NRS 233B.133)**

Respondent, Clark County Department of Aviation, ("Respondent" or the "DOA"), by and through its counsel, Fisher & Phillips, LLP, hereby asks the Court to reconsider the Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial Review signed by Judge Kathleen Delaney on January 28, 2020 and filed with the Court by Notice of Entry on February 7, 2020 (hereinafter the "Order").

/ / /

/ / /

MEMORANDUM OF POINTS AND AUTHORITIES

The Order issued by the Court contains several legal errors and internally contradictory findings which render the Order unenforceable, and which deprive Respondent of its right to due process. Paragraph 4 of the Order purports to remand the matter back to the Office of the Labor Commissioner ("OLC"), the administrative agency issuing the final decision. Order ¶ 4. This paragraph also suggests that this Order is intended to be a final disposition of this matter with no further proceedings to occur before the District Court. However, in direct contrast to this remand instruction, Paragraph 7 of the Order states:

> 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.

Order ¶ 7. Paragraph 7 purports to retain jurisdiction over future proceedings while simultaneously ceding jurisdiction to the OLC. The Nevada Supreme Court in *Westside Charter* made it clear that the District Court cannot remand a matter to the agency and retain jurisdiction at the same time. *See Westside Charter Service, Inc. v. Gray Line Tours of S. Nev.*, 99 Nev. 456, 459-460, 664 P.2d 351, 353 (1983); *see also SFPP, L.P. v. Second Jud. Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (Nev. 2007). Doing so deprives the OLC of the power to hear the matter and any findings or enforcement measures taken by the OLC on the basis of this Order would frustrate and contradict the jurisdiction of the Court. *Id.* Similar language in an order drafted by Petitioner in another case was struck down in an unpublished order of affirmance by the Nevada Supreme Court citing *SFPP* and finding the district court's attempt to "retain jurisdiction over the matter, in the event that the parties seek relief from the labor commissioner and thereafter desire judicial review" to be improper. *See Southern Nevada Labor Management Cooperation Committee, by and through its Trustees Terry Mayfield and John Smirk, et al v. City of Boulder City & MMI Tank, Inc.*, Case No. 68060, Doc. 16-14802, at *5 fn.1

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(May 11, 2016 Order of Affirmance)(unpublished).[1] The Nevada Supreme Court stated clearly "**[t]his the court cannot do**." *Id.* (emphasis added). The Court should correct the Order to remove the improper retention of jurisdiction.

Alternatively, if the Court is not willing to reconsider its Order in this matter, the Respondent requests that the Court declare that the Order is a "final order" from which Respondent may file an appeal as a matter of right. The District Court can only retain jurisdiction until a final judgement has been entered. *SFPP*, 123 Nev. at 612, 173 P.3d at 718 (upon filing of the signed order "the district court lost jurisdiction . . . and lacked jurisdiction to conduct any further proceedings with respect to the matters resolved in the judgment unless it was first properly set aside or vacated"). The District Court only retains jurisdiction to deal with matters ancillary to the final order (e.g. taxation of costs, etc.). *Westside Charter*, 99 Nev. at 458-459, 664 P.2d at 352-353. Without declaring the Order to be a "final order," Respondent is denied its due process right to appeal and is left in legal limbo whereby none of the parties can take further action without potentially violating the law.[2] The Court should reconsider the Order as written,[3] or in the alternative clarify that the Order is a "final order" subject to an automatic appeal right.

The Order further improperly concludes that the "the Project did not constitute maintenance within the meaning of NRS 388 et seq.," a conclusion which the next paragraph of the Order then concedes is not supported by the Record as it orders the case remanded to the OLC to determine how much of the work might or might not be maintenance. *See* Order ¶ ¶ 3 & 4.

It is the duty of the administrative agency to state findings of fact and conclusions of law in the final agency decision. NRS § 233B.125[4]. In a Petition for Judicial Review,

[1] A copy is attached as **Exhibit A**.

[2] The OLC cannot determine the matter on remand because it has not been given full jurisdiction to act; the District Court cannot hold a factual hearing or order the parties to take further action because it has purportedly ceded jurisdiction to the OLC; the Petitioner cannot seek enforcement before either the Court or the OLC; and the Respondent cannot appeal because it is not a final order. Respondent also cannot file any tolling motions without determining if the Order is a "final order."

[3] For ease of reference, Respondent's proposed order is attached as **Exhibit B**.

[4] ". . . Except as provided in subsection 5 of NRS 233B.121, a final decision must include findings of fact and conclusions of law, separately stated. Findings of fact and decisions must be based upon a

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the District Court has the limited statutory power to do one of the following: (1) remand, (2) affirm the final agency decision, or (3) "set it aside in whole or in part . . . because the final decision of the agency is: . . . Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. . ." NRS § 233B.135(3)(e). The Court appears to have chosen to remand the matter to the OLC, recognizing that the OLC must determine "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." Order ¶ 4.

The Court does not have before it the necessary factual record to determine whether, all, some or none of the work is considered maintenance work. The factual findings of the OLC are limited to the public money issue and the Court does not have jurisdiction to make a determination beyond these factual findings.

The Order improperly makes new factual findings on the maintenance issue, despite the agency ***deliberately*** not expressing any findings on this issue in its decision. Cf. Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (Nev. 1979). The Order erroneously states that the Labor Commissioner **previously** found that "the Project did not constitute maintenance" — a finding the Labor Commissioner NEVER made. The Petitioner even agreed with the Respondent that any such finding from the Court would constitute reversible error.[5] Finding insufficient evidence in the Record to support the maintenance exception is not the same as affirmatively finding the project "did not constitute maintenance." Such factual findings cannot simply be implied from the Record, particularly when Petitioner claimed it was denied the opportunity to introduce rebuttal evidence on the maintenance issue. *Cf. Griffin v. Westergard*, 96 Nev. 627, 632 (1980). Respondent therefore implores the Court to reconsider its Order and correct this error.

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preponderance of the evidence. Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . ."

[5] In its April 16, 2019 Reply Brief, Petitioner expressly argued the reverse, asserting that **"any ruling on the maintenance issue** would be error as the Labor Commissioner made no factual findings or legal conclusions related to issue." Reply, p. 1 (emphasis added).

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The Court also is prohibited from limiting the manner in which the administrative agency makes its determinations. *See Westside Charter*, 99 Nev. at 459. The District Court is not an appellate court reviewing the decision of a lower court, it is a separate branch of government, and to purport the ability to limit the agency's scope of review, or control the content and breath of information presented to the OLC would infringe upon the powers of the administrative agency and the Labor Commissioner's rulemaking authority. Thus, the portion of Paragraph 4 of the Order which reads: "in making such a determination, the OLC must not separate the Project into smaller units as doing so is in violation of Nevada law" is akin to issuing an advisory opinion stating the law before a violation has occurred. *See* Order ¶ 4. In this case, the Court must remand the case and if the OLC were to separate the Project into smaller units and the Petitioner felt that doing so was improper, then the Petitioner would need to wait for the OLC to issue a new final agency decision and then file a new petition for judicial review with a different case number and (potentially) a different assigned judge to hear the case. There is no precedent under which the Case can be remanded and returned back to the same Judge and Court under the same case and docket number.

CONCLUSION

For the reasons set forth above, the Court should reconsider its Order to avoid reversible error. Or, in the alternative, the Court should declare the Order a "final order" from which Respondent has an automatic right to appeal.

Dated this 21st day of February, 2020.

FISHER & PHILLIPS LLP

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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of February 2020, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **MOTION FOR RECONSIDERATION**, via the Court's e-file and e-service system on those case participants who are registers users.

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By: */s/ Stacey L. Grata*
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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, BY AND THROUGH ITS TRUSTEES TERRY MAYFIELD AND JOHN SMIRK, FOR ITSELF AND ON BEHALF OF KEN DUNAWAY AND INJURED SIGNATORIES; AND THE PAINTING AND DECORATING CONTRACTORS OF AMERICA, SOUTHERN NEVADA CHAPTER, FOR AND ON BEHALF OF ITSELF AND ITS INJURED MEMBERS,
Appellants,
vs.
CITY OF BOULDER CITY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND MMI TANK, INC., AN ARIZONA CORPORATION,
Respondents.

No. 68060

FILED

MAY 11 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a complaint for declaratory and injunctive relief concerning an alleged public works project. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Below, appellants Southern Nevada Labor Management Cooperation Committee (LMCC) and the Painting and Decorating Contractors of America, Southern Nevada Chapter, sued respondent City

of Boulder City, alleging that the City had improperly awarded a public works contract in connection with work on a water tank to respondent MMI Tank, Inc., through a faulty bid solicitation. In particular, appellants contended that the bid solicitation wrongly advertised the water tank work as "normal maintenance" and thus excluded it, under NRS 338.011, from statutory public works requirements like paying prevailing wages. As a result, appellants asserted, their members, who are either employers required by collective bargaining agreements to pay their workers certain minimum wages or the workers themselves, were unable to fairly compete with companies that were not restricted by similar wage requirements. After motions to dismiss were filed, the district court determined that appellants had standing as representatives of injured parties and that, although the case was factually different from that in *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008), the Nevada Labor Commissioner nevertheless had jurisdiction to determine the issues, and the court dismissed the case. Appellants then appealed.

The district court properly dismissed for failure to first seek relief with the labor commissioner. *Malecon Tobacco, LLC v. State*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies."); *see Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008) (noting that this court reviews orders granting motions to dismiss de novo). The labor commissioner is charged with enforcing prevailing wage requirements for public work projects under NRS 338.010 – NRS 338.130,

which charge necessarily includes determining whether a project is a public work. NRS 338.015(1); *see* NRS 338.010(17) (defining "public work"); NRS 338.011 (describing contracts excluded from NRS Chapter 338). To that end, a number of statutes and regulations allow parties to bring matters before the labor commissioner. For instance, NRS 607.205 and NRS 607.207 provide for notice and hearings on labor law enforcement questions under the labor commissioner's authority. And NAC 338.107 authorizes the filing of a complaint concerning violations of the public works statutes enforceable by the labor commissioner, while NAC 607.650 and NAC 607.670 govern, generally, petitions for advisory and declaratory orders. As whether a project is subject to NRS Chapter 338 is governed by the statutory definitions enforceable by the labor commissioner, the labor commissioner has authority over the issues raised by appellants.

Nevertheless, appellants assert that any administrative remedy is inadequate, such that they should be allowed to bring their claims directly in the district court. In *Baldonado*, we recognized that "when an administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied." *Baldonado*, 124 Nev. at 961, 194 P.3d at 102. Here, the labor commissioner is charged with enforcing the applicable statutes, and no statute expressly authorizes a party to seek relief from an improperly advertised bid in the district court. When no clear, statutory language authorizes a private right of action, one may be implied only if the legislature so intended. *Baldonado*, 124 Nev. at 958-59, 194 P.3d at 100-01 (explaining that this court looks at three factors to determine the

legislature's intent: "(1) whether the plaintiffs are of the class for whose [e]special benefit the statute was enacted; (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme" (internal quotation marks and citation omitted) (alteration in original)). We conclude that the legislature did not intend to authorize a bid-solicitation challenge in the district court, as appellants are not members of the class the bid-solicitation statute, NRS 338.143, was enacted to benefit, *see Associated Builders & Contractors, Inc. v. S. Nev. Water Auth.*, 115 Nev. 151, 158, 979 P.2d 224, 229 (1999); the statute's legislative history reveals intent to deny a private remedy, *see* Hearing on S.B. 189 Before the Senate Governmental Affairs Comm., 75th Leg., at 23 (Nev., March 18, 2009) ("[T]here is no statutory recognized private cause of action. . . . There is not in NRS 338."); and implying a private cause of action is inconsistent with the underlying purpose of NRS 338.143 to protect the public. *See S. Nev. Labor Mgmt. Cooperation Comm. v. Clark Cty. Sch. Dist.*, Docket No. 65547 (January 28, 2016, Order of Affirmance) (applying the factors set forth in *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958, 194 P.3d 96, 100 (2008), in determining, under similar arguments made by LMCC with respect to a different factual situation, that no private right of action to enforce NRS 338.143 exists).

The labor commissioner has authority to determine whether a project is a public work under NRS Chapter 338. Appellants concede that they did not seek relief from the labor commissioner before filing suit in the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[1]

_____, J.
Hardesty

_____, J.
Saitta

_____, J.
Pickering

cc: Hon. Rob Bare, District Judge
Christensen James & Martin
Ogletree Deakins Nash Smoak & Stewart
Grant Morris Dodds PLLC
Eighth District Court Clerk

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[1]In light of this order, we need not reach the parties' arguments concerning standing.

In addition to dismissing this case by way of final judgment under NRCP 54(b), the district court purported to "stay" and retain jurisdiction over the matter, in the event that the parties seek relief from the labor commissioner and thereafter desire judicial review. This the court cannot do. *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007) ("[O]nce a final judgment is entered, the district court lacks jurisdiction to reopen it. . . ."). Thus, any post-administrative-action district court proceeding must proceed in the normal course.

EXHIBIT B

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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 Department No.: XXV **ORDER GRANTING PETITION FOR JUDICIAL REVIEW**

Petitioner Southern Nevada Labor Management Cooperation Committee's Petition for Judicial Review, having come for hearing on August 13, 2019 and August 27, 2019, at the hour of 10:30 a.m. in Department XXV of the above-entitled Court, the Honorable Kathleen Delaney presiding, the Court hereby orders as follows:

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1) That the Office of the Labor Commissioner's determination that the carpet maintenance contract was not financed with public money, was arbitrary and capricious;

2) That this Court, pursuant to NRS 233B.135, grants the Petition for Judicial Review; and

3) That this Court, remands this matter to the Office of the Labor Commissioner to address the issue of whether the carpet maintenance contract pertains to the normal maintenance of the Clark County Department of Aviation's property and to address any other issues that the Labor Commissioner determines have been properly raised by the parties.

DATED this ___ day of September 2019.

_____
DISTRICT COURT JUDGE

Submitted by:

FISHER & PHILLIPS

_____
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Approved as to form and content:

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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.
7440 WEST SAHARA AVE., LAS VEGAS, NEVADA 89117
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.

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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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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 Department No.: 25 **NOTICE OF APPEAL**

Notice is hereby given that Clark County Department of Aviation, Respondent in the above named matter, hereby appeals to the Supreme Court of Nevada from the

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District Court's Findings of Fact, Conclusions of Law and Order Granting Petition for Judicial Review dated January 28, 2020, attached hereto as **Exhibit A**, with Notice of Entry dated February 7, 2020.

Dated this 9th day of March, 2020.

FISHER & PHILLIPS LLP

/s/ Allison L. Kheel, Esq.
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CERTIFICATE OF SERVICE

This is to certify that on the 9th day of March 2020, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **NOTICE OF APPEAL**, via the Court's e-file and e-service system on those case participants who are registers users.

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By: */s/ Stacey L. Grata*
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EXHIBIT A

NEOJ
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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 **NOTICE OF ENTRY OF ORDER**

Please take notice that the attached order was entered on February 4, 2020.

DATED this 7th day of February 2020.

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CERTIFICATE OF SERVICE

On February 7, 2020, I caused a true and correct copy of the foregoing notice 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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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.

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.

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[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: January 28, 2020.

District Court Judge Kathleen Delaney

Submitted by:

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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 Department No.: 25 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION FOR RECONSIDERATION**

Respondent, Clark County Department of Aviation, ("Respondent" or "CCDOA"), by and through its counsel, Fisher & Phillips, LLP, hereby files this Reply Memorandum of Points and Authorities in support of Respondent's Motion for Reconsideration (the "Motion").[1]

/ / /

[1] Respondent's Motion for Reconsideration was filed on a Motion for an Order Shortening Time ("OST") on February 21, 2020. The OST was effectively denied when set for hearing on March 31, 2020, a date after the expiration of the 30-day deadline to appeal.

MEMORANDUM OF POINTS AND AUTHORITIES

As a preliminary matter, the CCDOA timely filed its Notice of Appeal of the Order on March 9, 2020.[2] "Indeed, a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark County School Dist*., 747 P.2d 1380, 1382, 103 Nev. 686, 688 (Nev. 1987) (*citing Wilmurth v. District Court*, 80 Nev. 337, 393 P.2d 302 (1964)). Therefore, the District Court is presently without jurisdiction to hear or rule upon the Motion for Reconsideration of the Order.

Petitioner, Southern Nevada Labor Management Cooperation Committee ("Petitioner" or "LMCC"), incorrectly argues that the Motion is one for clarification and not reconsideration. The CCDOA argued that the District Court misinterpreted the law concerning the scope of review of the administrative record permitted on a petition for judicial review, by making findings (e.g. that the "Project did not constitute maintenance") beyond the scope of the Office of the Labor Commissioner's ("OLC") Determination (i.e. "public money" issue). The CCDOA also argued that the District Court misinterpreted the law regarding the scope of its authority to retain jurisdiction while simultaneously remanding the matter back to the OLC. However, the distinction between clarification and reconsideration is irrelevant because the filing of the Notice of Appeal divested the District Court of jurisdiction to consider either type of motion.

Moreover, if the District Court believes that it has not issued a final judicial order fully disposing of the issues raised in the Petition for Judicial Review ("PJR") and remanding this matter fully back to the OLC, such would highlight the OLC's inability to take any action. *See Westside Charter Service, Inc. v. Gray Line Tours of S. Nev*., 99 Nev. 456, 459-460, 664 P.2d 351, 353 (1983). Conversely, if the District Court views its Order as a final judicial order, then the CCDOA properly filed a timely appeal challenging the Order as exceeding the District Court's authority to review and reach conclusions unsupported by the administrative record.

[2] EDCR 2.24(b) states "A motion for reconsideration **does not toll** the 30-day period for filing a notice of appeal from a final order or judgment." (emphasis added).

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The only finding that the OLC made in its determination was that the carpet maintenance work was not subject to prevailing wages because it was not paid for with "public money." Thus, this was the extent of the issue before the District Court on the PJR and the only finding overturned by the District Court. Once the matter has been remanded to the OLC, the OLC has the authority to consider all other issues besides the public money issue. Upon remand, it is the OLC, and the OLC alone, who may determine what *information must be collected* to further develop the administrative record in order for the OLC to determine *whether or not* the carpet maintenance at issue was "normal maintenance" and thus exempt from prevailing wages and/or to determine if some portion of the work should have been paid at prevailing wage.[3] *See Id*. The Labor Commissioner's administrative powers already provide for the procedure for requesting information (NAC 338.094 and NAC 338.110), issuing subpoenas (NRS § 607.210), and enforcing those subpoenas in court (NRS § 338.1381(5); NRS § 607.160; etc.), and the Order should not allow Petitioner to bypass these procedures. The District Court lacks the authority to direct the OLC regarding "collection of information," therefore, because the Order purports to retain jurisdiction "over any subsequent proceedings that may be necessary for the collection of information," the Order exceeds the authority of the District Court and encroaches upon the jurisdiction of the OLC.

It is undisputed that the District Court retains the power to enforce its own orders. However, any "further review . . . as may be sought by the parties" that would not fall

[3] Petitioner also appears to be misunderstanding the holding of *Wells Fargo Bank, N.A. v. O'Brian*, 129 Nev. 679, 680-81, 310 P.3d 581 (2013) — which found a remand order was "not appealable . . . unless the order constitutes a final judgment on the merits and remands merely for collateral tasks, such as calculating benefits found due" — and the implications in the context of this case. This is not a situation, as Petitioner suggests, where all the legal issues have been decided on the merits and all that remains is to sum up the total number of hours worked or perform some basic calculations. Rather, the OLC must determine (1) if the Project is or is not a maintenance project, and (2) if not a maintenance project, must some portion of the work performed be excluded from prevailing wage. But assuming arguendo that Petitioner's interpretation of the Order was correct, then the Order would be a final appealable judgment, which the CCDOA has timely and properly appealed.

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within the category of "enforcement of this Order" would require the OLC to first make a new determination and then require a party to file a new petition for judicial review (with a new case number and assignment to a potentially different judicial department).

Contrary to Petitioner's argument, Paragraph 7 of the Order is not limited to clarification of Paragraph 6. *See* Opp. p. 3:20-22. But, even if it was so limited (which it is not), the scenario described in Petitioner's Opposition concerning the LMCC's access to information on remand would be beyond the scope of an enforcement proceeding before the District Court and would require the filing of a separate petition for judicial review.

CONCLUSION

For the reasons set forth above, the Court has been divested of jurisdiction to hear the Motion and should Order the Hearing on the Motion vacated and administratively close the case pending appellate review by the Supreme Court of Nevada.

Dated this 27th day of March, 2020.

FISHER & PHILLIPS LLP

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of March 2020, the undersigned, an employee of Fisher & Phillips LLP, electronically filed the foregoing **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION FOR RECONSIDERATION**, via the Court's e-file and e-service system on those case participants who are registers users.

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By: */s/ Sarah Griffin*
An employee of Fisher & Phillips LLP

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TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SOUTHERN NEVADA LABOR MANAGEMENT CORPORATION COMMITTEE,	)	
Petitioner,	)	
vs.	)	Case No. A-18-781866
CLARK COUNTY NEVADA DEPARTMENT OF AVIATION,	)	
Respondent,	)	Dept. No. 25

HEARING

Before the Honorable Kathleen Delaney
Tuesday, March 31, 2020, 9:00 a.m.

Reporter's Transcript of Proceedings

REPORTED BY ROBERT A. CANGEMI, CCR 888

APPEARANCES:

FOR THE PETITIONER: Evan James, Esq.

FOR THE RESPONDENT: Andrea Nichols, Esq.
Allison Kheel, Esq.

Las Vegas, Nevada, Tuesday, March 31, 2020

* * * * *

THE COURT: Southern Nevada Labor Management Cooperation Committee versus Clark County Nevada Department of Aviation, the Labor Commissioner matter.

So this is on, of course, for your motion for reconsideration.

I did note that, and I want to sort of maybe -- I am sorry, another housekeeping, forgive me.

I found that in having these telephonics, as we are doing more and more of these telephonic appearances, that there is this interesting dynamic of that when people can't get the social cues of being able to see each other, or see me, that folks just keep talking.

And I had -- my civil calendar last week was just 3 matters, and it took us 2 and a half hours to get through them, so I am trying to get a handle on that this week, so I am asking for any argument that is made for the highlighting of the motion for reconsideration, or anything in opposition, that that be no more than 10 minutes.

If you can kind of keep an eye on a clock

nearby, and I know that we are probably on our phone, so if that's the only clock, then I will just watch it as well.

I am not the Supreme Court here. I don't have buzzers or lights, or anything like that. I am just trying to keep it on time for the other matters.

And, of course, if there is any rebuttal, 5 minutes or so for that I think seems fair, so we will try that this morning.

But let me give you some initial thoughts that I have in my mind, which is, it really doesn't seem like there is a lot of dispute here that perhaps the order needs to be clarified, or could be more pointed in some of issues that it handles.

I wouldn't have signed off on the order, if I didn't think it accurately reflected the Court's determination, and thought that it had what it needed to have, and it wasn't going to be of concern.

Ms. Kheel has, of course, pointed out some potential ways in which it could be read to be inconsistent, and some indications of findings that maybe need to be clarified, that were the Court's findings, and not the Labor Commissioner's findings

as to whether this was maintenance.

But at the end of the day, it doesn't really seem to be disputed, other than in one respect, and I think the one main respect that it seems to be disputed is whether or not this is a motion for reconsideration, and whether or not the Court would still have jurisdiction to hear it in light of the appeal, or whether or not this is just a motion for clarification, and the Court should somehow consider this not for us to be divested of jurisdiction, and not be able to hear the matter.

So, given that that was raised as an issue, as far as whether or not we have any ability to actually hear the matter, I think we should address that first.

So I can start with Ms. Kheel on that.

MS. KHEEL: Thank you, Your Honor.

Basically the Clark County Department of Aviation's position is that it is a motion that goes to the merit of the ultimate resolution of the issue.

And it is unclear whether or not it was a final order, but it appears that that was everyone's intent, and it appears that it was seeking to fully remand.

So when we filed the appeal, we believed that the District Court no longer maintains jurisdiction to hear the motion for reconsideration, because it would not toll the appeal deadline.

And therefore, upon filing the notice of appeal, the District Court got to the jurisdiction.

THE COURT: Well, I understand the idea that in the local rules, it makes it very clear that if you are going to file a motion for reconsideration and do so within a certain time frame, that it does not toll the time frame that also would be ticking for an appeal.

But I have also had a number of cases that have been brought before the Court, where it raises the issue.

Certainly there are any number of things that the Court can still have jurisdiction over post-judgment, post final judgment, the most obvious of which would be things related to motions for attorneys' fees, motions for costs.

You know, things that, like you said, that are maybe not related to the merits of the decision.

But I have also had cases that have come back that have indicated that if the Court is going to change its position on anything, if the Court is

going to have something that is going to scrutinized on appeal, and if we are really just looking for some form of clarification of that, that that would benefit everyone.

Because I don't think, and I think what the Department of Aviation -- I am sorry -- I think what the petitioner and what the Labor Commissioner would agree with maybe -- and I am not trying to put words in anybody's mouth -- is that we are not changing our opinion.

The outcome is the outcome. The Court is finding that it wasn't maintenance. The Court is finding that it should be remanded to the Labor Commissioner to proceed as directed.

And the only issue was, you know, should this Court have retained any of its own jurisdiction following that remand, and where exactly was the finding with regard to the maintenance, and that ultimately it is a final order.

And if we make all of those clarifications in the order, the outcome is still the same. The appeal is unchanged, but I believe it at least clarifies the Court's intent with those pieces of the final order.

So, in that since, you still would believe

that the Court should not undertake that action, Ms. Kheel?

MS. KHEEL: Well, yes. This is Ms. Kheel.

So here is our position, it is not that we wouldn't have loved the Court to do it, but I believe that the case law is distinct that once that notice of appeal is filed, the District Court doesn't have the power to correct its order, because then what does the Supreme Court do with it, because then we are going to -- it would be filing a new appeal, and it would be -- it has been a tolling motion, and the statute doesn't intend, the rule doesn't intend that it is a tolling motion.

THE COURT: I don't know. Respectfully, that's just not how we have addressed these matters before. I can't say that I have addressed exactly anything like this, mind you.

But like what you would do with it, I think, is you would advice the Supreme Court that there was a clarifying order that did not change the outcome, that there is no new appeal needed, because nothing is different.

I mean, I guess if your appeal focused on the fact that my order was bad because it said that I retained jurisdiction, then it has to be an

argument over whether I actually said that, and whether that's actually inconsistent or not, or whether we just retain the right so that there would be any -- I forget how it was phrased in the opposition better than I am articulating it here today, so let me look it up, that ultimately what we were doing was retaining jurisdiction to enforce our own order versus what has been portrayed.

I mean, if that is the whole substance of the appeal, then maybe, okay, I would agree with you that clarification isn't necessary.

But I thought that the point was that we are appealing, because you think that the outcome itself is wrong, not the procedure by which we did it.

So why wouldn't that just be something that is supplemented in your appeal so that the Supreme Court knows what it is looking at?

MS. KHEEL: Well -- sorry.

In our opinion, the Department of Aviation's opinion is, we are not challenging the public money finding on appeal.

We respect your decision on that. What we are challenging is whether or not the Court found it to be maintenance or not, or whether that issue should go back to the Labor Commissioner, because it

is our position that there really wasn't really a full record developed below.

And in reviewing the transcript from the prior hearing, when you announced your findings, we feel that that is consistent with the position that you were intending to take, and that the order doesn't accurately reflect that that decision, that determination is going back to the Labor Commissioner.

And I believe, and the Department of Aviation believes that it could be interpreted beyond simply enforcing its own order as retaining jurisdiction over matters such as discovery, and what type of documents the Labor Commissioner could be permitted to look at or consider, and that those were really the main issues that were challenged on appeal.

THE COURT: Mr. James, do you want to respond?

MR. JAMES: Sure, I would love to.

First, to address your issue on whether or not you can amend the order or change the order, here is my understanding on how it works.

Since the matter has been appealed, the Court has lost jurisdiction, and so it doesn't have

the ability to change its order.

What the Court can do, in my understanding, is it can enter what I would call an advisory order for the Supreme Court to review, and to look at.

So your order wouldn't actually change, but you can say something to the extent, if I had authority over this order here is how I would decide it.

That's my understanding of how the process works.

So, you can enter an order that might clarify your order. It might say, well, this is what I meant. But to actually change the substance of your order, I don't think it is proper, because of the jurisdictional issue.

But I do agree, and I think that this is where you were going with your explanation, is that you have the ability to express your view on the order, and I think that's something that you can do. At least that's my understanding.

But when it goes to the substance of what the Department of Aviation is arguing, what they are essentially arguing is you got it wrong.

And in order to do that on a motion for reconsideration, they have to present new evidence,

or they have to point out how you misinterpreted the law, which they do neither.

So, the motion that they filed is somewhat deficient in that I can't really argue a point when that point isn't made.

So, that's one of my first issues with regard to the motion for reconsideration, and why it shouldn't be granted, because they never actually addressed the appropriate issues.

When it comes to the substance of this maintenance issue, I would like to point out to the Court that the Department of Aviation in its reply brief to our petition for judicial review, on page 8, lines 8 through 21, they specifically tell this Court, what you need to do is you need to consider the entirety of the record before the Labor Commissioner.

And let me read just 2 sentences from what they write.

This first sentence on page 8 starts at line 16. They write, at no time did the DOA abandon or waive this argument, which may be found in the entirety of the administrative record, and then they cite to the record.

They continue, the DOA reiterates this

argument here and summarized below.

The argument that they are reiterating, and the argument they made to the Labor Commissioner about this being maintenance, and the contract not being maintenance -- excuse me, the contract being a maintenance contract.

And then, the Department of Aviation continues down on line 20 through 21, the Labor Commissioner's determination must still be affirmed on the basis of the contract pertains to normal maintenance of the DOA's property.

So, for the DOA to now come back before you on a motion to reconsider and say, well, you didn't have the right to do that, that's completely inconsistent and opposite with what they argued to you before.

And, so, this idea that you didn't have the ability to go in and make a determination based upon their argument, I don't see how that squares with their position -- and excuse me -- so those main 2 points right there, I think that the motion fails -- excuse me. Allow me to reiterate.

I think that you can enter an order that tries to clarify what you meant, and I think it is paragraph 7 of your order that really is the big

issue.

I think that you can enter an order trying to clarify that. It is not a binding order, it is more of an advisory order.

And, then, as to the substance of what their issue is with regard to the maintenance, the Department of Aviation argued to you that this was maintenance, and you made a finding based upon their argument.

And that finding I think should stand and is appropriate.

And, if there are any questions, I would be happy to answer.

THE COURT: Thank you.

Ms. Nichols, is there anything that you would like to say before I go back to Ms. Kheel?

MS. NICHOLS: Just to clarify for the record that the Labor Commissioner at the end of the day really is just concerned with whether or not this is a public works project, and whether or not laborers are owed their daily wage.

And, as far as the procedural and jurisdictional argument, the Labor Commissioner is neutral.

THE COURT: Thank you.

Ms. Kheel, any final thoughts?

MS. KHEEL: Yes.

The main point that Mr. James is making is that he is saying we made arguments in our reply brief on the merits.

Well, the Court considered those. In our motion for reconsideration, we argued that the order that was actually entered basically didn't apply that, or could be construed as not applying the law correctly, and that was what we had taken up on appeal.

I wouldn't dispute the more advisory nature of the type of order that you could issue in this proceeding, but I do believe that there has been a divestment of the Court's jurisdiction.

And really it is these issues as to the maintenance. In the transcript, I believe the Court was very clear that that issue of whether or not it is maintenance at all, and if it is maintenance or not maintenance, what percentage of it should have been paid prevailing wage was to be remanded totally back to the Labor Commissioner. And I don't believe that is what the order accomplished.

THE COURT: Okay.

So I think the best course of travel -- I

mean, it would be very easy to say, let's just let things lie. Let's see what the appeal does.

But my fear in doing that is that there may be resolution that comes from the appellate review that is not taking into account what the intent was, and/or is sort of knee jerk on a particular procedural issue, and doesn't really get us substantively where we need to go.

I agree with everyone's assessment at this point with the appeal we are confined with what we can do, and so I think the best course of action, it really was the Court's intent, you know, if the Court's review of the order as it came in, as it was written, was deficient, and the Court did not hand-correct or send back for correction certain things that were perhaps incorrect or inconsistent with its order, that's the Court obligation to have been more on top of things.

And that's the Court's fault, that the Court can at least clarify a couple of things now.

So, on the fact that this was styled as a motion for reconsideration, I believe that really that's not what's being sought.

I agree with Mr. James that it is not really seeking reconsideration, because it is not following

the well settled case law as to what would be necessary to seek reconsideration, meaning a change of outcome, meaning something based on either the Court's misapplication of the law or misapprehension of fact.

I think that this is a motion seeking clarification. On that limited basis, the Court is going to give the clarification that it was not the Court's intention to retain jurisdiction for any Labor Commissioner proceedings.

And to the extent that the order was worded that way, that was not the Court's intent, and would issue the advisory understanding that it was the Court's intent for the jurisdiction only to be retained for purposes of enforcing the order, or other appropriate basis upon which it would have had further jurisdiction.

It was the intent that the decision be final, that all issues before the Court were resolved, and that it was going back to the Labor Commissioner to do their thing.

To the extent that there is the issue with regard to the finding of maintenance, or not maintenance, as the case would be, it was the Court's intention that the order reflect that the

Court found that this was not a maintenance contract, and that not necessarily that the Court was simply reiterating something that had been previously determined, but that the Court was making that determination.

To the extent that that's unclear, that needs to be clarified.

And, so, the work being done in the contract would not be maintenance, and there was some indication in the opposition that I think is accurate that the Court however did recognize that there may have been some workers who performed maintenance outside of the contract work, and that it would be improper to pay prevailing wage on that work.

But it ultimately it was up to the matter being returned, and the Labor Commissioner can do what they needed to do.

So, those clarifications, I think, as far as just an advisory outcome based on what was put before the Court today would be necessary to make that a final and appealable order.

So at this time what I would ask is that Mr. James prepare an order related to the motion for reconsideration that denies the motion for

reconsideration on the basis that this matter really isn't being put forward as a motion for reconsideration, that it is does not provide an order what I think intends seeks to provide new facts or newly discovered evidence, or point to the Court where it misapprehended facts or misapplied law, but really is seeking to be sure that there was clarification on what was intended.

And this is advisory only, because we are with the order that we have, bound to that, but that the advisory that it was this Court's intention to clarify today these things.

And to the extent that's of any value to the Appellate Court.

So, Mr. James, I think you have a good handle on this. I think you know where the parties are at on this, and what is needed.

I would ask you to please prepare the order denying the motion for reconsideration, but granting to the extent that it can be viewed as a motion for clarification, advisory information only, those issues that you identified in your opposition.

I believe that it is persuasive and correct what you have said, and give Ms. Kheel an opportunity to review it, and give Ms. Nichols an

opportunity to review it, who I think is over all neutral, because what we are clarifying doesn't impact their role.

And then we will let the appeal go forward as it is, and if the Court erred in what it did, then the Appellate Courts will tell us, and we will respect that.

And if we did not, so be it. But I think that's how we have to wrap this one up today.

Mr. James, are you aware of the Court's Administrative Order 20-10 that requires any orders to be submitted to the Court to be submitted electrically?

MR. JAMES: I am not.

THE COURT: I will ask all counsel to please avail themselves of all of the administrative orders that have been issued by the Court.

There are 10 total. Not all are relevant to the civil calendar, but many are, including Administrative Order 20-10, the last one issued.

They have available through the District Court's website.

There is a top navigation button that indicates general information, and that when you click on that, about 2 or 3 down, you will see one

that is reflective of the administrative orders. All 10 are listed there.

And in Administrative Order 20-10, it changes very significantly how paper is being handled with the courthouse.

All proposed orders are supposed to be submitted electrically to a particular e-mail address that each department has.

I will give you ours in a minute. And, also, for your knowledge, the Court then will file the order once it is signed, so that there is no issues with regard to directives that attorneys maintain original orders, because obviously you can't maintain something that you don't have.

So the Court will file the order. And, of course, everybody will be noticed of that through the file and serve.

So the e-mail address where you are to submit the order after giving Ms. Nichols and Ms. Kheel an opportunity to review it, and we would like you to please submit it within 10 days is the e-mail address, DC25inbox@ClarkCountyCourts.US.

So any further clarification or record that anybody needs to make, Mr. James?

MR. JAMES: No. I am fine. Thank you so

much.

THE COURT: Ms. Kheel.

MS. KHEEL: Just that we will be permitted to submit a competing order?

THE COURT: The process in terms of competing orders has not changed. It is just how you submit your paper.

So the process is always the same. If you disagree with what Mr. James prepares, and you have a competing order which you wish to submit, do so.

If you just want to identify for the Court what you think is wrong with the order, and ask the Court to make the corrections, you can do that by letter copied to the other side, whatever is easier.

Just make sure you let the Court know what your intentions are.

Or, Mr. James, if you know that there is going to be a competing order that is submitted, so that we are not getting an order thinking we are good to go, and processing it, and then finding out later that there is something in the works.

So, the process has not changed. So, if you have any questions about that, that's also available on the website under our particular District Court page.

MR. JAMES: Sure, Your Honor.

This is Mr. James again.

I would be happy to, if there is a competing order that opposing counsel wants submitted, I would be happy to submit those both at the same time.

THE COURT: I appreciate it.

And is there anything further, Ms. Nichols?

MS. NICHOLS: No, Your Honor.

Thank you.

THE COURT: All right.

Thank you. And, again, you the have contact information for my reporter so that you can get the transcript.

But I appreciate your time, everybody today, your patience with us doing this telephonically.

Thank you very much.

MR. JAMES: Thank you.

Good bye.

MS. KHEEL: Thank you, Your Honor.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Robert A. Cangemi, a certified court reporter in and for the State of Nevada, hereby certify that pursuant to NRS 239B.030 I have not included the Social Security number of any person within this document.

I further certify that I am not a relative or employee of any party involved in said action, nor a person financially interested in said action.

(signed) /s/ Robert A. Cangemi

_____

ROBERT A. CANGEMI, CCR NO. 888

C E R T I F I C A T E

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, Robert A. Cangemi, CCR 888, do hereby certify that I reported the foregoing proceedings, and that the same is true and accurate as reflected by my original machine shorthand notes taken at said time and place.

(signed) /s/ Robert A. Cangemi

_____

Robert A. Cangemi, CCR 888

Certified Court Reporter

Las Vegas, Nevada

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY NEVADA, DEPARTMENT OF AVIATION, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Appellant,
vs.
SOUTHERN NEVADA LABOR MANAGEMENT COOPERATION COMMITTEE, BY AND THROUGH ITS TRUSTEES TERRY MAYFIELD AND CHRIS CHRISTOPHERSEN; AND OFFICE OF THE LABOR COMMISSIONER,
Respondents.

No. 80798

FILED
JUL 30 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

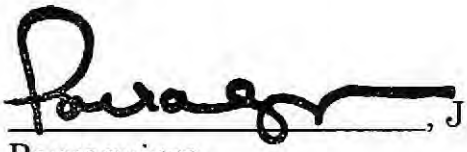
ORDER DISMISSING APPEAL

This is an appeal from a district court order granting a petition for judicial review. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

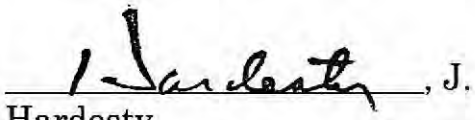
When this court's review of the docketing statement and documents before this court revealed a potential jurisdictional defect, this court ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction. It appeared that the notice of appeal was prematurely filed after the filing of a timely tolling motion for reconsideration but prior to entry of a written order formally resolving that tolling motion. *See* NRAP 4(a)(4); NRAP 4(a)(6); *AA Primo Builders LLC v. Washington*, 126 Nev. 578, 585, 245 P.3d 1190, 1195 (2010). The parties asserted in response that the motion for reconsideration did not actually seek reconsideration and was thus not a tolling motion. This court rejected that contention and again ordered appellant to show cause why the appeal

should not be dismissed for lack of jurisdiction. *Clark Cty. Dep't of Aviation v. S. Nev. Labor Mgmt. Cooperation Comm.*, Docket No. 80798 (Order to Show Cause, June 5, 2009). In its latest response, appellant states it "does not dispute that the notice of appeal was premature." Respondent Southern Nevada Labor Management Cooperation Committee agrees that dismissal of this appeal appears proper. It thus appears that the notice of appeal was prematurely filed and this court lacks jurisdiction. Accordingly, this court

ORDERS this appeal DISMISSED.



_____, J.
Parraguirre



_____, J.
Hardesty

_____, J.
Cadish

cc: Hon. Kathleen E. Delaney, District Judge
Israel Kunin, Settlement Judge
Fisher & Phillips LLP
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Attorney General/Reno
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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 **NOTICE OF ENTRY OF ORDER**

Please take notice that the attached order was entered on June 25, 2021.

Dated June 28, 2021.

CHRISTENSEN JAMES & MARTIN

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CERTIFICATE OF SERVICE

On the date of filing with the Court, I caused a true and correct copy of the foregoing Notice of Entry of Order 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

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 RECONSIDERATION**

CHRISTENSEN JAMES & MARTIN, CHTD.
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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 Cour~~t. At (KED) that time, all parties believed the Respondents' appeal to the Nevada Supreme Court divested the Court of jurisdiction. As such, the Court elected to treat the Motion as one for clarification. The Nevada Supreme Court disagreed and entered an order to show cause on June 5, 2020, compelling DOA to show cause why the appeal should not be dismissed for lack of jurisdiction. The Supreme Court identified the following four substantive allegations asserted by the DOA in its Motion: that the "district court order erroneously

retained jurisdiction, contained an improper conclusion of law regarding whether the project constituted maintenance, incorrectly made new factual findings, and improperly limited the manner in which the administrative agency makes its determination."

The Court hereby enters its order on the Motion. 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 takes this opportunity to clarify its prior Order entered February 4, 2020 ("February Order") and address the issues identified by the Supreme Court.

Retention of jurisdiction.

The Court clarifies that paragraph 7 on page 8 of the February Order was intended to allow the Court to enforce and interpret the February Order, *See Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2205, 557 U.S. 137, 151 (2009), and not to interfere with the Labor Commissioner in the performance of her duties. The Labor Commissioner is free to perform her duties, but ~~she nor the other parties are free~~ the Labor Commissioner and the other parties are not free to disobey this Court's Order. (KED)

Improper conclusion of law regarding maintenance.

The administrative record and argument presented to the Court by the DOA indicated that the Labor Commissioner treated the contract at issue as a maintenance contract paid for with repair and maintenance funds. The Court disagreed ~~and entered its findings~~ , finding that the contract at issue is not a maintenance contract, which findings are consistent with the administrative record, which also addressed ~~the presented argument that~~ whethe the contract at issue was a maintenance contract. (KED)

Incorrectly made new factual findings.

The Court made no new factual findings. The Court's findings were based upon the administrative record as presented and argued to the Court.

Improper limitation on agency's decision making.

In remanding the matter to the Labor Commissioner, the Court intends for the Labor Commissioner to use applicable prevailing wage rates to determine the value of

wages due and ensure that the unpaid wages are properly paid. The Court considers these tasks to be ministerial in nature.

In response to the concern raised by the Labor Commissioner regarding the possible discovery of additional work, the Court recognized that the Labor Commissioner could encounter a situation where work was performed on the project that fell outside the flooring contract. To be clear, if wages were earned for work performed on the project pursuant to the flooring contract and its scope of work, those wages are to be paid at the applicable prevailing wage rate because they were earned pursuant to a public works construction contract. 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 as she sees fit because it is not subject to the contract at issue or these proceedings.

The February Order and this Order shall be construed together for purposes of meeting the Court's stated intent and directives.

~~Dated: September _____, 2020~~.

Dated this 25th day of June, 2021

District Court Judge Kathleen Delaney

369 E30 22B6 7207
Kathleen E. Delaney
District Court Judge

Submitted by:

CHRISTENSEN JAMES & MARTIN

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Southern Nevada Labor Management Cooperation Committee, Petitioner(s) vs. Clark County Nevada Department of Aviation, Respondent(s)	CASE NO: A-18-781866-J DEPT. NO. Department 25

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/25/2021

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