

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY
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 OFFICE OF THE
LABOR COMMISSIONER
(Respondent Below),

Respondent.

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SUPREME COURT CASE NO.:
83252

District Court Case No.:
A-18-781866-J

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are the persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Appellant, Clark County Department of Aviation (“CCDOA”), is represented in this proceeding, and was represented in the case below, by the law firm of Fisher & Phillips, LLP. The CCDOA is a political subdivision of Clark County, State of Nevada.

Dated this 7th day of March, 2022.

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1 *Travelers Indem. Co. v. Bailey,*
2 129 S. Ct. 2195, 557 U.S. 137 (2009) 23, 24

3 *Westside Charter Service, Inc. v. Gray Line Tours of S. Nev.*
4 99 Nev. 456, 664 P.2d 351 (1983) 20, 23, 24, 25

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Appellant, Clark County Department of Aviation (“CCDOA”) hereby respectfully submits this Reply Brief in response to the arguments raised in the Answering Briefs of Respondents, Southern Nevada Labor Management Cooperation Committee (“LMCC”), Doc. 2022-01973, and the Office of the Labor Commissioner (“OLC”), Doc. 2021-35900.

INTRODUCTION

The LMCC spends the first eight pages of its Answering Brief regurgitating arguments regarding the OLC’s finding that the carpet work was not paid for with “public money.” Doc. 2022-01973, pp. 4-11. However, if the District Court had limited its Decision solely to reversing and remanding to the OLC on the “public money” issue alone, the parties would not be before the Court today.

The Decision of the District Court (“Decision”) exceeded the court’s authority when it went beyond the OLC’s August 30, 2018 Determination (“Determination”) and held — without citing to any evidence in the Record — that the “project did not constitute maintenance.” APP. 007-008, Vol. 1; APP. 397:10-11, Vol. 2. In reaching its Decision, the District Court erroneously concluded the OLC had considered the issue of whether the work at issue was maintenance. APP. 478:16-23, Vol. 2.

As set forth in the OLC’s Answering Brief, “the OLC Decision did not address the issue of ‘normal maintenance.’” Doc. 2021-35900, p. 1

(emphasis added). This is consistent with the position the OLC previously presented to the District Court on August 27, 2019, wherein Deputy Labor Commissioner, Mary Huck stated “we [the OLC] 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.” APP. 376:11-18, Vol. 2.

Notably, the LMCC’s opposition does not cite to anywhere in the administrative record where the OLC considered or ruled upon whether the work was considered maintenance. As a result, the CCDOA was not afforded the opportunity to present evidence to the OLC on the issue of whether the carpet work should be considered “normal maintenance” and, therefore, not subject to the payment of prevailing wages. Instead, the OLC stopped its analysis after determining whether the project was funded with “public money,” ruling in favor of the CCDOA, and dismissing the LMCC’s Complaint. APP. 373:23-374:6, Vol. 2.

A. The Decision Of The District Court Deprives The CCDOA’s Right To Due Process By Prohibiting The OLC From Considering The “Normal Maintenance” Exemption

Presently, the Decision arguably prevents the OLC from considering evidence and/or making a determination regarding the coverage issue of whether or not the carpet work is exempt “normal maintenance” work. APP. 389-399; 475-480, Vol. 2. The Decision also arguably precludes the

1 OLC from holding a hearing, receiving evidence and/or making a
2 determination on any other coverage issue or defense the CCDOA has
3
4 arguing that the carpet work is not subject to the payment of prevailing
5 wages. Stated differently, the Decision divested the investigation and
6 determination from the OLC (where it statutorily belongs) and summarily
7
8 concluded the carpet work was subject to prevailing wage laws, and in
9 doing so, precluded the consideration of any evidence to the contrary.
10 APP. 500, Vol. 3.

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12 Nothing illustrates the prejudicial impact of this Decision more than
13 the fact that since the Supreme Court lifted the Stay (Doc. 2021-24557) on
14 August 23, 2021, the OLC has received and considered over 750 pages of
15 additional records from NCC for purposes of calculating liability, despite
16 the fact that there has never been a hearing related to multiple disputed
17 issues of fact related to whether the work is covered, all of which are
18 separate and distinct from the public money issue. Contrary to the
19 LMCC’s assertions, the CCDOA is not seeking to litigate or “re-litigate”
20 the issue of “normal maintenance” before this Court. Doc. 2022-01973,
21 pp. 11-12.¹ Rather, the CCDOA is simply seeking to assert its right to due
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26 ¹ The LMCC cites to APP. 403:9-12 as standing for the proposition that the
27 “DOA asserted, for the first time, in its motion to reconsider before the
28 trial court, that it should be allowed to present evidence to the Labor
Commissioner that separate and individual units of the contract – the

1 process and to present evidence to the OLC on this issue for the first time,
2 as the preliminary and primary, finder of fact. Doc. No. 2021-33444, p.
3 31.
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5 **B. The CCDOA Was Not Afforded The Opportunity To**
6 **Present Evidence To The OLC As The Determination**
7 **Terminated the OLC’s Investigation**

8 The CCDOA was not given the opportunity to argue other coverage
9 issues before the OLC as the matter was concluded and the complaint
10 dismissed at the time the OLC issued its Determination. The Court should
11 disregard the LMCC’s arguments that the CCDOA “never submitted
12 discreet and separate work area evidence to the Labor Commissioner for
13 consideration,” and “The Labor Commissioner specifically requested
14 information and evidence regarding DOA’s maintenance argument on
15 August 18, 2017,” but “. . . the DOA has, for years, ignored the Labor
16 Commissioner’s request for worker and wage records.” Doc. 2022-01973,
17 pp. 16, 18 and 21 (emphasis in original).
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21 Contrary to the LMCC’s arguments, the CCDOA could not logically
22 have submitted evidence to the OLC in 2017 and 2018, for work that was
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24 contract that arose from the DOA’s single request for bids covering the
25 entire project – were in fact separate maintenance units. APP. 403:9-12.”
26 However, this cited portion of the Appendix asserts no such thing. Rather,
27 this cited section only argued that the District Court lacked the necessary
28 factual record to reach any conclusion about whether the work was
maintenance. *See* APP. 403:9-12, Vol. 2.

1 not performed until 2019, after the OLC’s August 30, 2018 Determination,
2 dismissing the Complaint and finding that the carpet contract was not
3 subject to the payment of prevailing wages. APP. 007-008, Vol. 1.
4

5 **C. The CCDOA, As The Prevailing Party Before The OLC,**
6 **Had No Obligation To Produce Additional Records Or**
7 **Seek Leave Of The Court To Supplement The Record**

8 The LMCC also illogically argues that the CCDOA — after
9 prevailing on its threshold public money argument, which resulted in the
10 OLC’s dismissal of the Complaint — should have petitioned the District
11 Court for an opportunity to submit additional evidence to the OLC on other
12 issues that were not previously addressed² by the OLC. Doc. 2022-01973,
13 p. 16. However, it would be highly unusual for a prevailing party
14 defending against a petition for judicial review to have a reason to request
15 the District Court to amend the administrative record on which the decision
16 below is based. Such could be viewed as tantamount to arguing that the
17 Record was incomplete and the agency determination below improper or
18 equivalent to asking for an advisory opinion.³ By contrast, if the court
19 remanded the matter to the OLC, the remand order would necessarily
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24 _____
25 ² LMCC confirms that no evidence was presented to the OLC on the
26 “normal maintenance” exemption issue. Doc. 2022-01973, pp. 16-17.

27 ³ Such a request would be the equivalent of asking a court to make findings
28 on the merits of claim for a statutory violation after the court had
dismissed the case for being beyond the applicable statute of limitations.

1 reopen the administrative record to receive additional evidence. The
2 timeline of events also shows that no request for records remained pending
3 after the Complaint was closed on August 30, 2018. APP. 007-008, Vol. 1.
4

5 Based on the foregoing, the CCDOA respectfully submits that this
6 Court must consider the OLC's Determination anew, correct the Decision's
7 misstatements of the Record and reverse the erroneous Decision based
8 upon such improper findings. For these reasons, the CCDOA requests that
9 the Decision be reversed and set aside, and the District Court be ordered to
10 remand the issue back to the OLC to hold a full and complete (unlimited)
11 evidentiary hearing, including, but not limited to, making an initial
12 determination regarding whether the carpet work was "normal
13 maintenance" or otherwise exempt from prevailing wage.
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17 LEGAL ARGUMENT

18 **A. The District Court Erred By Making Factual And Legal** 19 **Findings That Went Beyond The OLC's Sole "Public** 20 **Money" Determination**

21 1. The Decision Of The District Court Was An Abuse Of 22 Discretion

23 The Decision is replete with improper, internally inconsistent, and
24 unsupported findings, that show that the District Court exceeded its
25 authority in deciding the Petition for Judicial Review. This Court is not
26 bound by the District Court's Decision and must review the OLC's
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1 Determination for an abuse of discretion or prejudicial legal error. *State*
2 *Tax Comm’n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385, 254
3 P.3d 601, 603 (2011). The OLC’s Determination that prevailing wages did
4 not apply to the carpet work was based solely on its determination that the
5 work was not funded with “public money.” APP. 007-008, Vol. 1.
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8 However, the District Court went beyond simply reversing the
9 OLC’s Determination on this issue and remanding the matter back to the
10 OLC and exceeded its statutory authority by making additional findings
11 beyond the sole “public money” findings set forth in the final agency
12 Determination of the OLC. *See Revert v. Ray*, 95 Nev. 782, 603 P.2d 262
13 (Nev. 1979); *see also DMV v. Jones-West Ford, Inc.*, 114 Nev. 766, 772-
14 773, 962 P.2d 624, 628-629 (1998) (Agency determinations regarding
15 factual issues or mixed issues of law and fact are entitled to great
16 deference). For example, the Decision affirmatively found that the project
17 “did not constitute maintenance.” APP. 398; APP. 478, Vol. 2. Factual
18 findings about the scope and nature of the work which might or might not
19 result in the work being classified as “normal maintenance” cannot be
20 implied from the Record. APP. 009-249, Vols. 1 and 2. Because the OLC
21 only reached a Determination on the first threshold public money issue, the
22 OLC never had an opportunity to receive evidence or consider the “normal
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1 maintenance” exemption issue, and the CCDOA was never afforded the
2 opportunity for a hearing or given the opportunity to introduce evidence on
3 the maintenance exemption.⁴ APP. 009-249, Vols. 1 and 2. The CCDOA
4 is now being denied the opportunity to introduce evidence on the normal
5 maintenance exemption, in denial of its right to due process.
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7

8 2. Denying The CCDOA An Opportunity To Present
9 Evidence On All Exemption And Coverage Issues Is A
10 Denial Of The CCDOA’s Right To Due Process

11 The CCDOA has a due process right to present all evidence of
12 exemption and coverage issues before the OLC. *Nevada Tax Comm’n v.*
13 *Hicks*, 73 Nev. 115, 310 P.2d 852 (1957). The District Court on a petition
14 for judicial review, should not re-weigh evidence or consider new evidence
15 outside of the administrative record. *Cf. Nassiri v. Chiropractic*
16 *Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014);
17 *Construction Indus. Workers’ Comp. Grp. ex rel. Mojave Elec. v. Chalue*,
18 119 Nev. 348, 352, 74 P.3d 595, 598-99 (2003). This is consistent with the
19 agency’s role as the initial finder of fact and the level of deference courts
20 give to the agency’s findings of fact. *Hicks*, 73 Nev. 115, 310 P.2d 852
21 (1957); *City of Reno*, 127 Nev. 114, 119, 251 P. 3d 718, 721 (2011).
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26 ⁴ Even the LMCC originally claimed that it was denied the opportunity to
27 introduce rebuttal evidence on the maintenance issue. APP. 335:21-24,
28 Vol. 2. *Cf. Griffin v. Westergard*, 96 Nev. 627, 632 (1980).

1 In *Bombardier*, the Nevada Supreme Court held that the prevailing
2 wage statute intentionally does not contain a definition of “public money”
3 or “normal maintenance” work because such determinations are highly
4 dependent on the unique and specific facts of each case, and it is up to the
5 administrative agency to be the initial finder of facts. *Bombardier Transp.*
6 *v. Nevada Labor Comr.*, 433 P.3d 248, 253-256 (2019). For example, in
7 *Bombardier*, the Court upheld the OLC’s determination that 80% of the
8 work was “normal maintenance” and only 20% of the work was major
9 repairs subject to prevailing wage. *Id.* Therefore, it is incumbent upon the
10 OLC to determine what factual evidence is sufficient to determine whether
11 the work in question met the definitions above. *Id.*

12 The LMCC continues to argue that a determination that the work is
13 not “normal maintenance” can be made solely from the square yardage set
14 forth in the bid document, without considering the size and scope of the
15 work in the context⁵ of the airport’s regular operations and maintenance.
16 Doc. No. 2022-01973, pp. 14-16. However, the original Complaint filed
17 with the OLC contained the bid documents, and the OLC did not
18 summarily make a finding based on the bid document alone (and in fact
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26 ⁵ A recent social media meme further illustrates this concept by responding
27 to the question “Is 4 a lot?” with the answer “Depends on the context.
28 Dollars, no. Murders, yes.” See Meme, available at,
<https://www.instagram.com/p/Bx8p0Pih6qs/>

1 made no finding related to the maintenance issue), strongly suggesting that
2 the OLC felt the need to consider additional evidence before making a
3 determination on the meaning of “normal maintenance.” APP. 014-162,
4 Vol. 1; Doc. No. 2021-35900, p. 1. The District Court cannot usurp the
5 OLC’s role as finder of fact and doing so constitutes reversible error.
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8 *Nevada Tax Comm’n v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957).

9 **B. The LMCC’s Argument Regarding The Definition Of**
10 **Public Money Misapprehends The Focus Of This Appeal**

11 The CCDOA maintains that the OLC correctly determined that the
12 carpet work was not funded by “public money” and was thus exempt from
13 the prevailing wage requirements of NRS Chapter 338. However, the
14 CCDOA acknowledged in its Opening Brief that this Court’s decision in
15 *Bombardier* concluded that determinations such as the definition of “public
16 money” or “normal maintenance work” are “highly dependent on the
17 unique and specific facts of each case,” and that the findings in
18 *Bombardier* may have raised additional issues that call into question
19 whether the OLC’s original determination in this matter was complete or
20 whether the OLC might potentially need to receive and consider additional
21 evidence on the “public money” issue. Doc No. 2021-33444, p. 29; *see*
22 *also Bombardier*, 433 P.3d at 248, 255. The OLC’s Answering Brief
23 acknowledges the same, stating: “The OLC acknowledges that its Decision
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1 may have reached a different conclusion if it had been issued after this
2 Court issued its decision in the *Bombardier* case.” Doc. No. 2021-35900,
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4 p. 4. Ultimately, had the District Court simply reversed the finding of the
5 OLC on the “public money” issue and remanded the matter to the OLC for
6 further investigation and findings, this appeal would not be pending and
7 the OLC could have proceeded with an investigation and unrestricted
8 hearing.
9

10 1. The LMCC’s Argument Regarding Funding Is Based
11 On A Faulty Premise

12 The LMCC’s entire argument that the carpet work is funded by
13 “public money” is premised on the conclusory assertion that “[i]f the
14 DOA’s money in *Bombardier* was public money, then its money in this
15 Case is also public money, because there is no evidence in the record
16 showing that DOA’s flooring contract in this case was funded differently.”
17 Doc. No. 2022-01973, p. 9. However, the LMCC has never shown that the
18 funding sources for the carpet work in this case are identical to the funding
19 sources in *Bombardier*, and the CCDOA was under no obligation to
20 introduce additional evidence before the District Court on a Petition for
21 Judicial Review (“PJR”) to prove the inverse. This is particularly true
22 given the OLC had already ruled in the CCDOA’s favor based upon the
23 evidence of funding contained in the administrative record.
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1 As the *Bombardier* decision was issued after the OLC's
2 Determination, the CCDOA has never been afforded the opportunity to
3 present distinguishing evidence to the OLC regarding the funding sources
4 for major tram repairs (held not to relate to the normal operations of the
5 airport) and the funding sources for the carpet work and materials. APP.
6 396 at n. 1, Vol. 2. The LMCC cannot use the CCDOA's purported failure
7 to present evidence distinguishing the carpet work in this case from the
8 tram work at issue in *Bombardier*, to support a claim of waiver or judicial
9 estoppel (Doc. 2022-01973, pp. 16-20), since at the time of the OLC's
10 Determination in 2018, the evidence presented by the CCDOA was
11 deemed sufficient to show the work was not funded by public money in the
12 eyes of the administrative agency. APP. 373:23-374:6, Vol. 2.

13 The Court should reject the LMCC's attempt to distract the Court
14 from considering the legal errors in the Decision by arguing before this
15 Court fact intensive issues and statutory exemptions (e.g., sources of
16 funding which may constitute "public money") as these are arguments
17 which should be presented, in the first instance, to the OLC. *Nevada Tax*
18 *Comm'n v. Hicks*, 73 Nev. 115, 310 P.2d 852 (1957); *see also Bombardier*
19 433 P.3d at 253-256 (The definition of the phrases "public works project"

1 and “normal maintenance” are not abstract questions of statutory
2 construction, they are fact-based determinations).

3
4 2. The LMCC Mischaracterizes The OLC’s Request For
5 Records As Outstanding Despite The OLC’s Dismissal
6 Of The Complaint On August 30, 2018

7 The LMCC also mischaracterizes the OLC’s July 12, 2021 email
8 correspondence by alleging that the CCDOA failed to respond to a request
9 for records that that “has been pending for several years.” APP. 560, Vol.
10 III; Doc. 2022-01973, p. 3. Again, the simple timeline of events disproves
11 this assertion:

- 13 • The OLC requests records from the CCDOA on August 18,
14 2017. (APP. 172-173, Vol. 1).
- 15 • The CCDOA timely responds and provides records on
16 September 22, 2017. (APP. 174-225, Vol. 1).
- 17 • The OLC’s investigation shifts focus to the “public money”
18 issue between November 21, 2017 and June 27, 2018. (APP.
19 227-247, Vols. 1 and 2).
- 20 • The OLC issues its Determination and dismisses the
21 Complaint on August 30, 2018. No request for records or
22 investigation “remained pending” after dismissal of the
23 Complaint. (APP. 007-008, Vol. 1).
- 24 • Litigation challenging the Determination is before the District
25 Court from September 27, 2018, until the District Court
26 issued its Decision on June 25, 2021 denying the CCDOA’s
27 Motion for Reconsideration. (APP. 001-480, Vol. 1 and 2).

- On July 12, 2021 the CCDOA responds to the OLC's correspondence and notifies the OLC that any collection of records appeared to be premature in light of the CCDOA's intention to file an appeal. (APP. 556, Vol. 3).
- The CCDOA appeals and applies for a stay of the OLC proceedings in the District Court on July 16, 2021; then files an emergency motion for a stay with the Supreme Court on July 23, 2021. (Doc. No. 2021-21393).
- A stay of the proceedings before the OLC was in effect from July 26, 2021 until August 23, 2021, when this Court issued an Order lifting the temporary stay and denying the CCDOA's request for a stay pending appeal. (Doc. No. 2021-24557).
- The OLC sent an additional request for records to the CCDOA on September 13, 2021. The CCDOA timely produced responsive (supplemental) records in response to requests from the OLC on September 24, 2021.⁶

Based on the timeline of these events, the Court cannot conclude that any request for records was outstanding while the matter was pending review in the District Court, and this Court should not draw any inference from the LMCC's unsupported assertions.⁷

⁶ In January 2022 NCC produced time and wage records in response to a subpoena issued by the OLC.

⁷ The CCDOA reserves its right to argue that due to the filing of the present appeal the OLC's request and the CCDOA's response should have remained pending as the OLC was deprived of the authority to issue or renew a request for records. And, no response to the OLC by the CCDOA should be deemed a waiver of any arguments on appeal, including but not limited to arguments that the District Court's denial of the Motion to Stay pending appeal was improper.

1 **C. The LMCC’s Assertions That The OLC Considered The**
2 **Carpet Contract To Be A Maintenance Contract Are**
3 **Unsupported By The Administrative Record And Are**
4 **Contrary To The OLC’s Conclusions**

5 The LMCC repeatedly asserts that the CCDOA *fully argued* the
6 “normal maintenance” exemption to the OLC. Doc. 2022-01973, pp. 12-
7 15.⁸ However, not one citation to the administrative record is provided to
8 support this claim. In fact, the only citations the LMCC proffers to the
9 administrative record are pages 007, 236, 239, 241, and 244⁹ of the
10 Appendix. Doc. 2022-01973, pp. 13-15.

17 ⁸ Sections 2(c) and 2(d) of the LMCC’s Answering Brief argue (with
18 citations to the record) the exact opposite, i.e. that no evidence was
19 presented to the OLC. Doc. 2022-01973, pp. 16-20.

20 ⁹ Doc. 2022-01973, p. 13 states:

21 Specifically, NRS 338.011 provides [contracts relating to
22 normal maintenance are excluded.]” (App. 236); “Here the
23 contract at issue is for carpet maintenance” (App. 239); “The
24 DOA uses airline revenues to finance its operations, including
25 the carpet maintenance that is presently at issue before the
26 Labor Commissioner” (App. 244); “More specifically with
27 regard the carpet work in question, all of the work performed as
28 part of that bid was budgeted for as a part of the CCDOA
 operations and maintenance budget.” (App. 241) The Labor
 Commissioner’s determination specifically accepts the DOA’s
 arguments that the contract is for “maintenance.” To wit, “DOA
 asserted carpet maintenance work. . .” App. 007.

1 1. The LMCC’s Purported Citations To The Record
2 Cannot Be Considered Substantial Evidence Of
3 Consideration Of The “Normal Maintenance”
4 Exemption

5 Pages 236 and 239 are from correspondence from counsel for the
6 CCDOA in response to the OLC’s request to identify the specific
7 provisions of NRS 332 demonstrating that no prevailing wage is required
8 for contracts under NRS Chapter 332. APP. 236, Vol. 1. While this letter
9 does raise the legal defense that the work is exempt as maintenance under
10 NRS Chapter 332, no additional evidence regarding the scope of work as
11 falling within the definition of “normal maintenance” was ever requested
12 as part of this investigation. APP. 236-247, Vols. 1 and 2. As discussed
13 above, the focus of the investigation shifted (following this letter and the
14 additional exemption issue raised on page 239 of the Appendix) to the
15 definitions of “public work” and “public money” under NRS 338.010(16).
16 APP. 239, Vol. 1. Following this letter, the OLC focused on requesting
17 evidence of maintenance budgets for the CCDOA and ruling on the
18 threshold issue of public money. APP. 236-247, Vols. 1 and 2.

19 Reading the text of the CCDOA’s letter in context, the CCDOA
20 stated that “the contract at issue is for carpet maintenance, i.e., worn
21 carpeting will be replaced with new carpeting of a similar style” for the
22 express purpose of distinguishing it from any kind of “operating cost-
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1 saving measure[]” (because it is a one to one exchange). APP. 239, Vol. 1.
2 This cannot constitute a full presentation of evidence and argument on this
3 exemption. Rather, the CCDOA’s initial responses to the OLC merely
4 identified several arguments regarding why the CCDOA believed the
5 carpet work was not subject to the payment of prevailing wages, in order to
6 identify the issues and arguments the CCDOA might later raise at a
7 hearing. APP. 174-225, 229-240, Vol. 1. This is typical procedure in the
8 preliminary stages of an administrative agency’s investigation.
9

12 The next purported citations to the record are pages 241 and 244 of
13 the Appendix. Page 241 of the Appendix contains an e-mail sent on June
14 4, 2018 in response to the OLC’s request for a meeting. APP. 241, Vol. 1.
15 This e-mail reiterates the shift in focus of the OLC’s investigation to the
16 threshold argument that the carpet work was not financed by “public
17 money.” APP. 241, Vol. 1. Similarly, Page 244 is an additional response
18 to the OLC providing the CCDOA’s budget reflecting the financing of the
19 carpet work under the line item for “Repairs and Maintenance” under the
20 “Operating and Maintenance Expenses” section. APP. 244-245, Vol. 2.
21

24 Finally, LMCC’s last purported citation to the Record is from page
25 007, the Determination of the OLC. APP. 007, Vol. 1. The mere fact that
26 the OLC used the phrase “carpet maintenance work” in the Determination
27

1 does not show that the issue of the “normal maintenance” exemption was
2 fully considered. APP. 007, Vol. 1. Rather, when viewed in the context of
3 the Record as a whole and the surrounding text in the Determination, it is
4 clear that the phrase “carpet maintenance work” is used in reference to the
5 “maintenance” budget as the funding source submitted by the CCDOA and
6 a general layperson’s understanding of maintenance. APP. 007, Vol. 1.
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9 The LMCC argues that the mere fact that the CCDOA discussed a
10 line item in the budget containing the word “maintenance” means that the
11 CCDOA fully argued the “normal maintenance” exemption before the
12 OLC. Doc. No. 2022-01973, p. 13. However, this strained argument does
13 not constitute “substantial evidence” in the administrative record. *See*
14 *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487,
15 489 (2014); *Construction Indus. Workers’ Comp. Grp. ex rel. Mojave Elec.*
16 *v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595, 598-99 (2003); *State*
17 *Employment Security Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729
18 P.2d 497, 498-499, n.1 (1986).
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23 2. The OLC Has Repeatedly Stated That The OLC Did
24 Not Consider The “Normal Maintenance” Argument Or
Make A Determination On This Issue

25 Moreover, even assuming *arguendo* that the above citations to the
26 Record could be considered sufficient evidence to show the CCDOA fully
27 argued the “normal maintenance” issue before the OLC (which it is not),
28

1 the LMCC’s argument still fails because the OLC has repeatedly admitted
2 that the OLC did not address, consider or base its Determination on the
3 CCDOA’s “normal maintenance” argument. Doc. 2021-35900, p. 1; APP.
4 373:23-374:6, Vol. 2; APP. 376:11-18, Vol. 2. The LMCC cannot insert
5 evidence into the administrative record that simply does not exist. Thus,
6 the Court should find that the Decision is not supported by substantial
7 evidence in the record and should reverse the Decision of the District
8 Court.

11
12 **D. The Decision Manifests Errors Of Law By Making Extra-**
13 **Judicial Findings And Improperly Limiting The OLC’s**
14 **Scope Of Review On Remand**

15 The Decision also improperly limits the scope of the OLC’s review
16 on remand by explicitly ordering that the OLC may not consider the issue
17 of maintenance and “must not separate the Project into smaller units as
18 doing so is in violation of Nevada law.” APP. 398:15-16, Vol. 2. Rather,
19 the Decision limits the OLC’s review on remand to ministerial
20 determinations of wages due, thereby preventing the CCDOA from
21 presenting any evidence showing the carpet work is not subject to
22 prevailing wage. APP. 398:12-15, Vol. 2; APP. 478:25-479:2, Vol. 2.

25 This holding is contrary to established precedent, which provides
26 that the District Court is prohibited from limiting the manner in which an
27 administrative agency makes its determinations, and only the OLC may
28

1 make the initial determination regarding fact-based determinations. *See*
2 *Westside Charter Service, Inc. v. Gray Line Tours of S. Nev.* 99 Nev. 456,
3 459-460, 664 P.2d 351, 353 (1983) Thus, the Court should reverse the
4 decision of the District Court and remand the matter to the OLC without
5 placing any limitations on the scope of the evidence or issues the OLC can
6 consider on remand.
7
8

9 1. The LMCC Misstates The CCDOA's Arguments
10 Regarding Threshold Issues Of Coverage And The
11 Source Of Materials

12 The extra-judicial findings in the Decision improperly limit the
13 CCDOA's right to raise arguments before the OLC. The LMCC repeatedly
14 accuses the CCDOA of arguing that "the Labor Commissioner must look
15 at the discrete individual project units to determine if that unit constitutes
16 maintenance." Doc. 2022-01973, p. 14. But such assertions misapprehend
17 the regular operations and bidding procedures for the regular maintenance
18 and operations of the airport. In asserting these arguments, the LMCC
19 conflates two separate issues: (1) separating material costs from labor
20 costs; and (2) separating "jobs" into separate invoices or units under the
21 overarching bid. Doc. 2022-01973, pp. 13-16. Both practices are standard
22 and proper, and do not violate the law.
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26 The CCDOA bids the carpet tile materials separately from the cost
27 of the carpet installation labor, because the need to replace a larger area of
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1 carpet such as an entire hold room (gate area) only arises sporadically, and
2 most of the carpet maintenance work is completed by the CCDOA's
3 internal maintenance employees. APP. 231, Vol. 1. An outside contractor
4 is only used when the worn or damaged carpet is located in a high traffic
5 area, necessitating the job to be completed in a single night. APP. 231,
6 Vol. 1. This is evident in the fact that no NCC labor was used during the
7 first two years of the work (2017 or 2018) because the need did not arise.
8 APP. 174, Vol. 1. The sporadic nature of this work is simply a function of
9 the airport's regular operations and is not, as the LMCC asserts, structured
10 to avoid the requirements of prevailing wage.
11

12 The CCDOA has not waived its right to raise these arguments before
13 the OLC, and the Decision directing the OLC to proceed directly to a
14 determination of wages due, deprives the CCDOA of its due process right
15 to make these arguments before the OLC. Ultimately, prevailing on either
16 argument could result in the carpet work being deemed exempt from
17 prevailing wage, thus, these issues should be remanded to the OLC to
18 receive evidence and make factual findings in the first instance.
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24 2. The Decision Improperly Reached Conclusions On The
25 "Cost-Saving" Intent Of The Work

26 The Decision further concludes — without any factual support —
27 that "the intent of the bid and Project execution was clearly an effort to
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1 manage costs.”¹⁰ APP. 397:13-14, Vol. 2. Such unsupported findings are
2 prejudicial to the CCDOA as such findings could potentially support the
3 OLC imposing additional penalties against the CCDOA and/or subject the
4 CCDOA to other prevailing wage requirements imposed on “cost-saving
5 projects.” APP. 237, Vol. 1; APP. 398:17-18, Vol. 2. As only the OLC
6 has the ability to make a determination regarding whether the carpet work
7 constituted exempt normal maintenance work in the first instance, the
8 Court must reverse the Decision to avoid denying the CCDOA its right to
9 due process, and order the District Court to remand the matter to the OLC
10 to hold an unlimited hearing and make an original determination on the
11 issue of the “normal maintenance” exemption, among other issues.

12 **E. The LMCC’s Claim That The District Court’s Purported**
13 **Clarification That It Retained Jurisdiction “Only to**
14 **Enforce Its Own Order” Would Still Constitute A**
15 **Manifest Error Of Law And Would Be Inconsistent With**
16 **An Order To Remand**

17 Contrary to the assertions of the LMCC, the District Court’s June
18 Order purportedly clarifying ambiguity in the February Order, did not
19 resolve the issues, and if anything, only made the Decision more
20

21 ¹⁰ The Decision’s conclusion about cost saving intent is inflammatory and
22 unfairly prejudicial to the CCDOA, in addition to being simply wrong. It
23 is far cheaper for CCDOA to use its already existing maintenance staff
24 (who are exempt from prevailing wage and present no additional cost to
25 the CCDOA) for completion of this work.
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1 confusing. The LMCC argues that the District Court’s June Order clarified
2 that “paragraph 7 on page 8 of the February Order was intended to allow
3 the Court to enforce and interpret the February Order, *See Travelers*
4 *Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205, 557 U.S. 137, 151 (2009), and
5 not to interfere with the Labor Commissioner in the performance of her
6 duties.” Doc. No. 2022-01973, p. 21; APP. 478:9-14, Vol. 2. However,
7 this clarification only served to confirm that the District Court truly
8 intended to retain jurisdiction. Doc. No. 2022-01973, pp. 21-24; APP. 478-
9 479, Vol. 2. The fact that the District Court did not intend to “meddle in
10 the Labor Commissioner’s activities” or interfere with the OLC’s
11 proceedings is irrelevant, as the retention of jurisdiction is improper on the
12 face of the Decision. *Westside Charter*, 99 Nev. at 458-459, 664 P.2d at
13 352-353.

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18 The Nevada Supreme Court in *Westside Charter* made it clear that
19 the District Court cannot remand a matter to the agency and retain
20 jurisdiction at the same time. *See Westside Charter*, 99 Nev. at 459-460,
21 664 P.2d at 353; *see also SFPP, L.P. v. Second Jud. Dist. Court*, 123 Nev.
22 608, 612, 173 P.3d 715, 717 (Nev. 2007). The District Court is only
23 permitted to retain jurisdiction until a final judgement has been entered.
24 *SFPP*, 123 Nev. at 612, 173 P.3d at 718 (upon filing of the signed order
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1 “the district court lost jurisdiction . . . and lacked jurisdiction to conduct
2 any further proceedings with respect to the matters resolved in the
3 judgment . . .”). The District Court only retains jurisdiction to deal with
4 matters ancillary to the final order (e.g., taxation of costs, etc.). *Westside*
5 *Charter*, 99 Nev. at 458-459, 664 P.2d at 352-353.
6

7
8 Additionally, as argued in CCDOA’s Opening Brief, this case is
9 readily distinguishable from the *Bailey* case cited in the June Order, and
10 the LMCC’s Answering Brief, and the LMCC does not even attempt to
11 respond to the CCDOA’s discussion showing the *Bailey* case (a bankruptcy
12 case) is inapplicable to the facts in this case. Doc. No. 2022-01973, p. 21;
13 Doc No. 2021-33444, p. 33; *see also Bailey*, 129 S. Ct. at 2205, 557 US at
14 151; APP. 478:11-12, Vol. 2. The LMCC does cite the case of *Las Vegas*
15 *Metropolitan Police Department v. Eighth Judicial District Court in and*
16 *for County of Clark*, 2018 WL 6264749, at *3 (Nev., 2018) as standing for
17 the proposition that “the District Court retains jurisdiction to enter orders
18 on matters that are collateral to and independent from the appealed order.”
19 Doc. No. 2022-01973, p. 21. However, this argument overlooks the
20 distinction between an “ancillary” or “collateral” matter such as attorneys’
21 fees, and enforcement of the order itself, on the merits (as the LMCC is
22 advocating for in this case). Doc. No. 2022-0197 p. 21.
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1 This Court's decision in *Westside Charter* controls and prohibits
2 simultaneously retaining jurisdiction and remanding a matter to the
3 administrative agency. Thus, the Court should set aside the Decision and
4 order the District Court to remand the case to the OLC for an unrestricted
5 hearing and determination.
6

7
8 **F. The District Court Erred By Denying The CCDOA's**
9 **Request For A Stay Pending Appeal, And The Resulting**
10 **Prejudice To CCDOA Is Ongoing**

11 The CCDOA has already suffered and continues to suffer prejudice
12 from the District Court's Order denying the CCDOA's request to stay the
13 proceedings before the OLC pending appeal. APP. 595-600, Vol. 3. Since
14 this Court's Order lifting the stay, issued August 23, 2021, the CCDOA
15 has expended a great deal of time and resources participating in
16 proceedings before the OLC, without any certainty¹¹ regarding the extent
17 of the OLC's scope of review (or even what issues the CCDOA present
18
19

20 ¹¹ For example, the Decision also prevents the CCDOA from arguing that
21 the cost of the materials were properly procured as part of its routine
22 maintenance budget and the CCDOA's need to maintain a stockpile or
23 reserve of materials that frequently break and/or are regularly used by the
24 CCDOA's internal maintenance staff to perform routine maintenance (e.g.
25 screws; fuses; window panes; paint; door handles; caulk; glue; etc.).
26 Without the LMCC's grand, sweeping assertion that the carpet work (i.e.
27 labor costs) can "never" be separated from the cost of the materials (i.e.
28 the CCDOA can "never" use materials from its own inventory), the
CCDOA will be able to show that the total cost of the carpet work was
\$88,345.58, and thus well below the \$250,000.00 threshold for a
prevailing wage project under NRS § 338.

1 evidence to the OLC to review). The LMCC is presently arguing that the
2 Decision prohibits the OLC from holding a hearing on the issue of whether
3 the carpet work falls within the “normal maintenance” exemption (and any
4 other issues or defenses the CCDOA might raise to show that the carpet
5 work is not subject to prevailing wage). Ex. 4 to Ex. A to Doc No. 2021-
6 33444. The LMCC vigorously argues in its Answering Brief that the
7 District Court properly held that it could retain “jurisdiction to ensure
8 compliance with its orders,”¹² which strongly suggests that the LMCC will
9 apply to the District Court for an injunction if the OLC were to schedule a
10 hearing on the maintenance exemption. Doc. No. 2022-01973, p. 21. This
11 creates the very real possibility that the CCDOA could be forced to litigate
12 this matter in three separate forums *simultaneously* (i.e., OLC Hearing,
13 District Court, and Nevada Supreme Court), and impose unnecessary
14 litigation costs on CCDOA in having to defend this matter.
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20 Regardless, as the OLC “expects this matter will be remanded . . .
21 with [] instructions or guidance” the irreparable prejudice to the CCDOA
22 — resulting from being forced to participate in multiple hearings before
23 the OLC and permitting the parties multiple “bites at the apple” to present
24 their case to the OLC — is virtually inevitable absent a stay of the OLC
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26

27 ¹² See Section D, *supra* for discussion showing such retention of
28 jurisdiction upon remand to an administrative agency is improper.

1 proceedings. Doc. No. 2021-35900, p. 5. As the scope of the OLC's
2 review of issues on remand is a critical issue in this appeal, the Court
3 should find that the denial of a stay pending appeal was reversible error,
4 and the Court should grant the CCDOA's renewed motion to stay the
5 hearing, determination and enforcement of proceedings before the OLC
6 pending the Appeal, to prevent any further prejudice to the CCDOA.
7

8 **CONCLUSION**

9
10 Based on the arguments set forth in the CCDOA's Opening Brief
11 and above, the Court should conclude that the Decision of the District
12 Court contained multiple manifest legal errors and must be set aside as
13 arbitrary and capricious, and improperly exceeded the District Court's
14 authority and scope of judicial review. The LMCC confirmed that the
15 Decision improperly ordered the ministerial determinations remanded to
16 the OLC while simultaneously retaining jurisdiction to enforce the
17 Decision. The Decision makes the extrajudicial finding that the carpet
18 work was "not maintenance" (without any evidence in the Record),
19 manifests an arbitrary and capricious disregard for the substantial evidence
20 in the administrative record and is an abuse of the District Court's
21 discretion. The OLC's Answering Brief confirms that the maintenance
22 issue was never reached nor addressed in the OLC's 2018 Determination.
23
24 The Decision's limitations on the OLC's scope of review on remand
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1 violate the CCDOA's right to due process by preventing the CCDOA from
2 introducing evidence showing that the carpet work is not subject to the
3 requirements of prevailing wage. Finally, the CCDOA continues to suffer
4 irreparable harm and prejudice from being forced to participate in
5 simultaneous litigation in multiple forums which creates the threat of
6 inconsistent rulings and will continue to suffer prejudice absent this Court
7 ordering a stay pending resolution of this appeal.
8

9
10 As set forth above, the Court should set aside the Decision of the
11 District Court and order the District Court to remand the case to the OLC
12 for an unrestricted hearing and determination on the scope of the carpet
13 work and whether such work is subject to the prevailing wage
14 requirements or exempt as maintenance work.
15

16
17 Dated this 7th day of March, 2022.

18 Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this
5 brief has been prepared in a proportionally spaced typeface using
6 Microsoft Word 2013 in 14-point Times New Roman font.
7
8

9 2. I further certify that this brief complies with the page or type
10 volume limitations of NRAP 32(a)(7) because, excluding the parts of the
11 brief exempted by NRAP 32(a)(7)(C), it contains 6,070 words, which is
12 less than half the type volume specified for an opening brief under NRAP
13 32(a)(7)(A)(ii).
14
15

16 3. Finally, I hereby certify that I have read this appellate brief,
17 and to the best of my knowledge, information and belief, it is not frivolous
18 or interposed for any improper purpose. I further certify that this brief
19 complies with all applicable Nevada Rules of Appellate Procedure, in
20 particular NRAP 28(e)(1), which requires every assertion in the brief
21 regarding matters in the record to be supported by a reference to the page
22 and volume number, if any, of the transcript or appendix where the matter
23 relied on is to be found. I understand that I may be subject to sanctions in
24
25
26
27
28

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1 the event that the accompanying brief is not in conformity with the
2 requirements of the Nevada Rules of Appellate Procedure.
3

4 Dated this 7th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify service of the foregoing Appellant's Reply In Support Of Its Opening Brief 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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Dated this 7th day of March, 2022.

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