IN THE SUPREME COURT OF THE STATE OF NEVADA

EDUCATION SUPPORT EMPLOYEES ASSOCIATION, A NEVADA NONPROFIT CORPORATION,
Appellant,
vs.
STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF NEVADA; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, AN EMPLOYEE ORGANIZATION; AND CLARK COUNTY SCHOOL DISTRICT, A COUNTY SCHOOL DISTRICT,
Respondents.

No. 42315

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 14, AFL-CIO, AN EMPLOYEE ORGANIZATION,
Appellant,
vs.
EDUCATION SUPPORT EMPLOYEES ASSOCIATION, A NEVADA NONPROFIT CORPORATION; STATE OF NEVADA, LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD, AN AGENCY OF THE STATE OF NEVADA; AND CLARK COUNTY SCHOOL DISTRICT, A COUNTY SCHOOL DISTRICT,
Respondents.

No. 42338

FILED

DEC 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court order denying a petition and a cross-petition for judicial review in a labor

05-24885

relations action. Eighth Judicial District Court, Clark County; David Wall, Judge.

In its appeal, Education Support Employees Association (ESEA) argues that (1) the State of Nevada, Local Government Employee-Management Relations Board (EMRB) lacked jurisdiction to hear the majority status challenge of International Brotherhood of Teamsters, Local 14 (Local 14), (2) EMRB erroneously interpreted the verified membership list requirement of NRS 288.160, (3) EMRB's good faith doubt determination was not supported by substantial evidence in the record, and (4) EMRB's September 24, 2002, order should be modified in light of a prospective future problem. In its appeal, Local 14 argues that the EMRB erred in interpreting NRS 288.160 and NAC 288.110 as stating that a majority status election is won by a majority of all members in the bargaining unit instead of a majority of members who vote. We disagree with both ESEA and Local 14.

Standard of review

"The function of this court in reviewing an administrative decision is identical to the district court's."[1] Typically, courts are free to decide pure legal questions without deference to the agency.[2] In reviewing questions of fact, however, we are prohibited from substituting our judgment for that of the agency.[3] We review questions of fact to determine whether the agency's decision was clearly erroneous or an arbitrary abuse

---

[1]Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025, 1029, 944 P.2d 819, 822 (1997).

[2]Schepcoff v. SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

[3]NRS 233B.135(3).

of discretion.[4] Accordingly, an agency's conclusions of law, which are closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence.[5]

Additionally, we defer "to an agency's interpretation of a statute that the agency is charged with enforcing."[6] Substantial evidence exists if a reasonable person could find adequate evidence to support the agency's conclusion.[7] In making this determination, the reviewing court is confined to the record before the agency.[8] Therefore, this court's review is limited to determining whether there was "substantial evidence in the record to support the agency determination" or statutory interpretation.[9]

---

[4]NRS 233B.135(3)(e) – (f); Local Gov't Emp. v. General Sales, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982).

[5]Schepcoff, 109 Nev. at 325, 849 P.2d at 273; see also Elliot v. Resnick, 114 Nev. 25, 32 n.1, 952 P.2d 961, 966 n.1 (1998) (stating that an agency's interpretation of a statute, which it has the duty to administer, is entitled to deference).

[6]State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

[7]State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

[8]SIIS v. Christensen, 106 Nev. 85, 87-88, 787 P.2d 408, 409 (1990).

[9]Id. at 787 P.2d at 409; see State Farm, 116 Nev. at 293, 995 P.2d at 485.

ESEA appeal

"Contract bar" doctrine

Typically, the "contract bar" doctrine prohibits a rival employee organization[10] from challenging the recognition of an incumbent employee organization where a collective bargaining agreement exists between the local government employer[11] and the incumbent employee organization.[12] The "contract bar" doctrine, however, is temporarily lifted during "window periods" as provided by NAC 288.146(2). At the time the EMRB initially heard this case, NAC 288.146(2) stated:

> An employee organization may challenge recognition of another employee organization or request a hearing to determine whether a recognized employee organization has ceased to be supported by a majority of the local government employees in a bargaining unit only during the period:
>
> (a) Beginning upon the filing of notice by the recognized employee organization pursuant to NRS 288.180 of its desire to negotiate a successor agreement and ending upon the commencement of negotiations for such an agreement; or

---

[10]An employee organization is "an organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees." NRS 288.040. This is also referred to as a union.

[11]A local government employer means "any political subdivision of this State or any public or quasi-public corporation organized under the laws of this State and includes, without limitation, counties, cities, unincorporated towns, school districts, charter schools, hospital districts, irrigation districts and other special districts." NRS 288.060.

[12]NAC 288.146(2).

> (b) Beginning 242 days before the expiration date of the existing labor agreement and ending 212 days before the expiration of the labor agreement.

NAC 288.146(2) plainly and unambiguously states that for the EMRB to have jurisdiction to consider a majority status dispute, an employee organization, within the "window period," must either make a challenge or request a hearing.[13] All the parties agree that Local 14 requested a hearing within the "window period." Consequently, the issue at stake is whether Local 14's November 15, 2001, letter constituted a challenge pursuant to NAC 288.146(2).

In determining whether the letter constituted a challenge, the EMRB turned to the plain meaning of the word "challenge." As defined, "challenge" means a formal questioning of "legal qualifications of a person, action, or thing."[14] Using this definition as a guide, the EMRB determined that by requesting recognition, Local 14 was questioning ESEA's legal qualifications or status. As a result, the EMRB concluded that the letter constituted a challenge. Since NAC 288.146(2) is plain and unambiguous, no further review is necessary.[15] Further, the EMRB's interpretation that Local 14's letter represented a challenge is entitled to great deference since it is charged with enforcing this regulation.[16] It is also not necessary to review the EMRB's interpretation in light of recent amendments to

---

[13]Id.

[14]Black's Law Dictionary 223 (7th ed. 1999).

[15]State Farm, 116 Nev. at 293, 995 P.2d at 485.

[16]Id.

NAC 288.146(2).[17] Therefore, we conclude that the EMRB had jurisdiction to hear Local 14's request since the letter constituted a sufficient challenge within the "window period."

NRS 288.160

Typically, a local government employer's bargaining unit[18] is represented by only one employee organization.[19] To become the exclusive bargaining unit representative, the employee organization must gain recognition[20] from the local government employer.[21] Difficulties may arise, however, when two or more employee organizations desire recognition. To resolve this dilemma, the State of Nevada enacted NRS 288.160, which establishes the requirements that an employee organization must meet before a local government employer will recognize it.

---

[17]Town of Eureka v. State Engineer, 108 Nev. 163, 167, 826 P.2d 948, 951 (1992) (stating that "absent clear legislative intent to make a statute retroactive, this court will interpret it as having only a prospective effect").

[18]A bargaining unit means "a group of local government employees recognized by the local government employer as having sufficient community of interest appropriate for representation by an employee organization for the purpose of collective bargaining." NRS 288.028.

[19]NRS 288.027; NRS 288.160(2).

[20]Recognition requires "the formal acknowledgement by the local government employer that a particular employee organization has the right to represent the local government employees within a particular bargaining unit." NRS 288.067.

[21]NRS 288.160(2).

NRS 288.160(2) pertains to situations where only one employee organization requests recognition. Without any competitors, the employee organization may become the exclusive bargaining representative without the involvement of the EMRB. To become the exclusive bargaining representative, the employee organization must merely (1) present "a verified membership list showing that it represents a majority of the employees" and (2) gain recognition from the local government employer.[22] The presentation of the verified membership list, however, may be made at or after the submission of the application for recognition.[23]

When more than one employee organization requests recognition, NRS 288.160(4) establishes a method of determining which organization is supported by a majority of the bargaining unit. NRS 288.160(4) also allows a competing employee organization to appeal to the EMRB. If, in assessing the parties' interests, the EMRB determines that there is a "good faith doubt[ ] whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit, it may conduct an election by secret ballot upon the question."[24]

Verified membership lists

The requirement of NRS 288.160(2) for a verified membership list pertains only to an unchallenged employee organization gaining recognition. There is no mention in NRS 288.160(2) or (4) that an

---

[22]NRS 288.160(2).

[23]Id.

[24]NRS 288.160(4).

employee organization must provide a verified membership list prior to an election. In fact, as stated in the EMRB's order, "NRS 288.160(4) is silent as to the issue of a verified membership list." Rather, when the majority status of an incumbent employee organization is challenged, NRS 288.160(4) requires only that the EMRB find a good faith doubt prior to ordering an election. Notably, if submitting a verified membership list were a prerequisite, there would be no need to hold an election since majority status would be evident.

On September 19, 2002, Gary Mauger, Local 14's Secretary/Treasurer, testified that CCSD never requested a verified membership list. Taking NRS 288.160 and Mauger's testimony into consideration, the EMRB concluded that Local 14 was not required to submit a verified membership list prior to holding an election. The EMRB's interpretation of NRS 288.160 is entitled to great deference. Thus, we conclude that the EMRB appropriately determined that the submission of a verified membership list is not a prerequisite for an election.

Good faith doubt

There is substantial evidence to support the EMRB's determination that a good faith doubt existed as to whether ESEA or Local 14 was supported by a majority of CCSD's bargaining unit employees. Contrary to ESEA's contentions, NRS 288.160(4) does not require a challenging employee organization to provide substantial evidence that it is supported by the majority of the bargaining unit. Rather, NRS 288.160(4) merely states that the EMRB may order an election if there are "good faith doubts whether any employee organization is supported by a majority of the local government employees in a particular bargaining unit." (Emphasis added.) Consequently, the

requirement is whether substantial evidence exists to support the EMRB's good faith doubt that either ESEA or Local 14 had majority status.

Here, the bargaining unit employees' statements of dissatisfaction with ESEA are admissible to support the EMRB's determination that a good faith doubt existed. Further, the collective testimonies of Mauger, Lamar Leavitt, and Joseph Furtado suggest that there was sufficient uncertainty as to whether ESEA or Local 14 had majority status. Considering this testimony, the EMRB determined that a good faith doubt existed as to whether Local 14 or ESEA had majority status. There is no evidence that the EMRB's decision was clearly erroneous or an arbitrary abuse of discretion.[25] Substantial evidence supports the EMRB's decision that a good faith doubt existed and an election was justified.

Order modification

"'Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.'"[26] Accordingly, "the issue involved in the controversy must be ripe for judicial determination"[27] and

---

[25]NRS 233B.135(3)(e) – (f); Local Gov't Emp. v. General Sales, 98 Nev. 94, 98, 641 P.2d 478, 480-81 (1982).

[26]Resnick v. Nevada Gaming Commission, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988) (quoting Doe v. Bryan, 102 Nev. 523, 525, 729 P.2d 443, 444 (1986)).

[27]Kress v. Corey, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948), quoted in Resnick, 104 Nev. at 66, 752 P.2d at 233.

"'not merely the prospect of a future problem.'"[28] To prove ripeness, the "party must show that it is probable [that] future harm will occur."[29]

Here, ESEA claims that if an election occurs, it may have to undergo a recertification by the EMRB. Yet, the EMRB's order does not address the decertification process. The EMRB's order of January 23, 2003, merely sets forth the guidelines for an election. Further, the order states that the EMRB will require either ESEA or Local 14 to obtain a majority of the bargaining unit employee votes before it will recognize it as CCSD's exclusive bargaining unit representative. ESEA has not carried its burden of proving that "it is probable [that] future harm will occur."[30] Accordingly, we hold that ESEA's objections concerning the EMRB's January 23, 2003, order are not ripe for review.

Local 14's appeal

Plain and unambiguous language

NRS 288.160(4) sets forth the criteria of resolving a majority status dispute between two employee organizations contending to become a local government employer's exclusive bargaining unit agent. NRS 288.160(4) states that an election shall be held if there is a good faith doubt as to "whether any employee organization is supported by a majority of the local government employees in a particular bargaining

---

[28]Resnick, 104 Nev. at 66, 752 P.2d at 233 (quoting Doe, 102 Nev. at 525, 729 P.2d at 444).

[29]Id., at 66, 752 P.2d at 233.

[30]Id.

unit." (Emphasis added.) In applicable part, former NAC 288.110(9)(d) stated:[31]

> An employee organization will be considered the exclusive bargaining agent for employees within a bargaining unit, pursuant to an election, if:
>
> . . . .
>
> (d) The election demonstrates that the employee organization is supported by a majority of the employees within the particular bargaining unit.

(Emphasis added.)

Contrary to Local 14's contention, neither NRS 288.160 nor NAC 288.110 states that the employee organization seeking exclusive representation must have a majority of the employees who vote. Rather, the statute and administrative code plainly and unambiguously state that to win an election, the employee organization must have "a majority of the employees within the particular bargaining unit."[32] As a result of this clear language, the EMRB held that NRS 288.160(4) and NAC 288.110(9)(d) required a majority of all members within the bargaining unit, not just those who vote. In fact, in the case of an unambiguous statute, the EMRB is required to follow the law "regardless of result."[33] As such, the EMRB appropriately held that the election would be resolved by obtaining a majority vote. In light of this plain and unambiguous

---

[31]On October 30, 2003, NAC 288.110(9) was amended. This unchanged provision is now NAC 288.110(10)(d).

[32]Id.; see NRS 288.160(4).

[33]Randono v. CUNA Mutual Ins. Group, 106 Nev. 371, 374, 793 P.2d 1324, 1326 (1990).

language, we will not disturb the EMRB's interpretation of NRS 288.160 and NAC 288.110.[34] We defer to the Nevada Legislature as to whether the definition of a majority vote should be changed.

Election laws

Local 14 also argues that the EMRB's decision conflicts with election laws contained within the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA). To support this contention, Local 14 turns to 29 U.S.C. § 159(a) and 45 U.S.C. § 152(4). When interpreting statutes, however, administrative agencies are not bound by stare decisis or dissimilar statutes.[35] Nor are agencies compelled to accept any policy arguments "in the face of an unambiguous, controlling statute."[36]

Here, the election provisions contained within NRS 288.160 and NAC 288.110 are different from those contained within the NLRA and the RLA. Thus, the NLRA is not binding on the EMRB.[37]

CONCLUSION

We conclude that the EMRB had jurisdiction to hear Local 14's request since Local 14's November 15, 2001, letter constituted a

---

[34]State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000); State v. Jepsen, 46 Nev. 193, 196, 209 P. 501, 502 (1922).

[35]State, Bus. & Indus. v. Granite Constr., 118 Nev. 83, 88, 40 P.3d 423, 426 (2002) (noting that it is presumed that the state legislature intended to adopt the interpretation of federal acts "'only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent.'" (quoting Sharifi v. Young Bros., Inc., 835 S.W.2d 221, 223 (Tex. App. 1992)); Gray Line Tours v. Public Serv. Comm'n, 97 Nev. 200, 203, 626 P.2d 263, 265 (1981).

[36]Randono, 106 Nev. at 375, 793 P.2d at 1327.

[37]Weiner v. Beatty, 121 Nev. ___, ___, 116 P.3d 829, 832 (2005).

sufficient challenge within the "window period." Further, the EMRB appropriately determined that the submission of a verified membership list is not a prerequisite for an election. The testimony before the EMRB suggests that there was sufficient uncertainty as to whether either ESEA or Local 14 had majority status. Therefore, we further conclude that the EMRB's good faith doubt decision was supported by substantial evidence in the record. In addition, ESEA's objections concerning the EMRB's January 23, 2003, order are not ripe for review. Lastly, since NRS 288.160 and NAC 288.110 are plain and unambiguous, the EMRB properly determined that an employee bargaining organization must have a majority of the total bargaining unit membership's support before it will be considered the exclusive bargaining unit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. David Wall, District Judge
Dyer, Lawrence, Penrose, Flaherty & Donaldson
Attorney General George Chanos/Las Vegas
C. W. Hoffman Jr.
McCracken Stemerman Bowen & Holsberry
Thomas F. Pitaro
Clark County Clerk