IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 731; John Beck, Joshua Bell, James Biddle, Michael Brewer, Matae Castillo, Jason Eastman, Benjamin England, Jordan Harris, Tacy Kelly, Matthew Lujetic, Kenneth McLellan, Shawn Price, George Searcy, Sonny Snodgrass, Travis Bertrand, Wesley Boatman, Richard Canaday, Walter Cordova, Justin Galli, John Gerbatz, Nathan Goins, Trevor Hall, Sean O'Brien, Jesse Washington, Jeremy Berninski, Marshall Brin, Albert Corea, Jacob Lightfoot, Leonard Muoz, Tegg Orduno, Christopher Pearson, James Schmidt, individually, and Does I-5,

Plaintiffs,

vs.

CITY OF RENO,

Defendant.
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Case No. CV14-01138

Dept. No. 8

ORDER

On May 29, 2014, Plaintiffs INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 731, et. al ("the Firefighters") filed a complaint in this court alleging a breach of contract by defendant the CITY OF RENO ("the City") and seeking both declaratory and injunctive relief. The Firefighters alleged that

the impending layoff of 32 firefighters scheduled for June 30, 2014, was a breach of the collective bargaining agreement between the Firefighters and the City, and would negatively impact the safety of the remaining members of the Reno Fire Department. Following a hearing, this court concluded that temporary injunctive relief was both appropriate and within the jurisdiction of this court. Accordingly, the court granted a preliminary injunction enjoining the City from effectuating the layoffs during the impending legal process.

Currently before the court is the City of Reno's *Motion to Dismiss*, *Motion to Stay Injunction Pending Immediate Appeal*, and *Motion to Stay Arbitration*. The City argues that dismissal is appropriate because the Firefighters have not yet exhausted their administrative remedies, and because the issues presented in the Firefighters' complaint are not justiciable under the political question doctrine. The City also argues that the injunction granted by this court violates the political question doctrine, and should be stayed pending appeal. Finally, the City requests that this court stay the pending arbitration between the parties.

Because the Firefighters have not yet exhausted their administrative remedies, the court concludes that their claims for breach of contract and declaratory relief are not yet ripe for review before this court. Accordingly, those claims are properly dismissed. However, as discussed in the prior order of this court, injunctive relief to temporarily prevent the impending layoff is appropriate at this point. This court further concludes that imposition of the injunction does not violate the political question doctrine. Further, ordering a stay of the preliminary injunction would frustrate the very purpose of the injunction, and is not warranted. Finally, this court concludes that the parties raise claims that are appropriately presented in both private arbitration proceedings and before the Employee Management Relations Board, and declines to stay the arbitration proceedings.

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DISCUSSION

The City's motion to dismiss the Firefighters' claims for breach of contract and declaratory relief

Generally, before a claim is ripe for review by the district court, a plaintiff must first exhaust any available administrative remedies. *City of Henderson v. Kilgore*, 122 Nev. 331, 336, 131 P.3d 11, 14-15 (2006) (concluding that a matter is not "justiciable in the district court" until administrative remedies are exhausted). Administrative remedies may include both private arbitration pursuant to contractual clauses, and in the case of public workers, the filing of a grievance with the Employee Management Relations Board ("EMRB") under the Nevada Local Government Employee Relations Act, NRS 288, *et. seq. Id.*

With respect to contractual arbitration provisions, the Nevada Supreme Court has consistently recognized that "[t]here is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism. Consequently, when there is an agreement to arbitrate we have said that there is a 'presumption of arbitrability.'" *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (citing *Int'l Assoc. Firefighters v. City of Las Vegas*, 104 Nev. 615, 620, 764 P.2d 478, 481 (1998)). Therefore, when parties have agreed to a contractual arbitration clause, plaintiffs must generally pursue contractual arbitration provisions before filing a complaint with the EMRB regarding any violations of NRS chapter 288.[1] *See generally City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 896, 59 P.3d 1212, 1217 (2002) (adopting principles for the EMRB to apply in determining whether to defer to the findings of a private arbitrator).

In this case, the Collective Bargaining Agreement ("CBA") contains specific grievance procedures regarding contractual disputes, including the submission of the dispute to private arbitration in the event of an alleged breach. The Firefighters do not dispute the validity of these procedures. Rather, as required by the CBA, the Firefighters have filed Grievance 2014-09 with the City, and appear to

[1]See infra at 9-10 for a more detailed discussion of the roles of private arbitration and the EMRB.

be actively pursuing their administrative remedies. Nonetheless, these administrative proceedings are not yet complete. Before the Firefighters' general claims for breach of contract and declaratory judgment are justiciable before this court, they must exhaust any remedies available pursuant to the CBA and before the EMRB. Because the Firefighters have yet to do so, these claims are properly dismissed, without prejudice.

The City's motion to dismiss the Firefighters' claim for injunctive relief

As discussed in the prior order of this court granting the Firefighters' request for a preliminary injunction, neither a private arbitrator nor the EMRB have the power to impose an injunction. *See Kilgore*, 122 Nev. at 335, 131 P.3d at 11. Accordingly, the Firefighters were not required to exhaust their administrative remedies before pursuing their claim for injunctive relief in this court. *See* NRS 38.222 (stating that the district court has power to impose "provisional remedies to protect the effectiveness of the arbitral proceeding"). Because an injunction was necessary to protect the interests of the parties while they pursued their administrative remedies, this court granted the Firefighters' request for an injunction, reviewable on a 30-day basis.

In its motion to dismiss, the City argues that the Firefighters' entire cause of action, including its claim for injunctive relief, should be dismissed as nonjusticiable under the political question doctrine. This court disagrees. The Nevada Supreme Court recently discussed the political question doctrine in *North Lake Tahoe Fire Protection Dist. v. Washoe County Board of County Commissioners*, 310 P.3d 583, 129 Nev. Adv. Op. 72 (2013). In *North Lake Tahoe*, the Court noted that the political question doctrine generally precludes review of those controversies that revolve around policy choices or value determinations generally reserved for the legislative or executive branches of government. *Id.* at 587. In this, the Court specifically adopted the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962), for use in determining if whether a case is nonjusticiable under the political question doctrine:

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

310 P.3d at 587 (internal citations omitted). Using these factors, the Court concluded that in the absence of the clear violation of a statutory directive, the North Lake Tahoe Fire Protection District could not sue the Washoe County Board of Commissioners regarding a substantial reduction in property tax disbursements.

The facts here are distinguishable from the facts of *North Lake Tahoe*. In this case, the Firefighters have alleged violations of both the CBA and of NRS Chapter 288. Thus, unlike *North Lake Tahoe*, there are both clear statutory directives and contractual language that provide standards to resolve this dispute. Pursuant to NRS 288.150, the City and the Firefighters were permitted to bargain over the conditions under which layoffs may occur. As a result of this bargaining process, Article 2 of the CBA, enumerating the rights of management, reserved for the City "[t]he right to reduce in force or lay off any employee because of lack of work or lack of funds, subject to paragraph (v) of subsection 2, of NRS 288.150." *Complaint*, Ex. 1 at 7. NRS 288.150(v)(2) mandates that any bargaining over workforce reduction must retain the right to lay off for lack of work or funds to the employer. The parties in this case contracted to limit the occurrence of layoffs to these circumstances only. Pursuant to the statutory restrictions of NRS 288.150(v)(2), no greater limitation could have been placed on the City's ability enact layoffs.

To allow the City sole discretion to determine when there is a "lack of work or funds" pursuant to the political question doctrine would render this contractual negotiation virtually meaningless. Certainly, the City has many obligations, and a

finite amount of funds with which to budget.[2] Many of these decisions must be reviewed with the deference due to a coordinate branch of government. However, when interpreting the language of both NRS 288.150 and the CBA, this court must "look to the policy and spirit of the law and . . . seek to avoid an interpretation that leads to an absurd result." *City Plan Development v. Office of Labor Com'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (statutory construction); *see also Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) (interpretation of contracts). Allowing the City unfettered discretion to define "lack of funds" essentially gives the City unfettered discretion to effectuate layoffs. This is an absurd result given the terms of the CBA. Accordingly, the contractual and statutory administrative processes are necessary to determine whether the City's discretionary spending decisions complied with the "lack of funds" provisions of the CBA and NRS 288.150.

Further, in addition to the Firefighters' claims regarding "lack of funds," the Firefighters also argue that the City's decision to lay off the 32 firefighters negatively impacts the safety of the remaining union members.[3] Firefighter safety is subject to collective bargaining pursuant to NRS 288.150(2)(r). Article 12 of the CBA specifically delineates procedures to ensure that the City adequately protects firefighter safety. At the hearing on the injunction, the Firefighters presented testimony from multiple witnesses to support their position that the layoffs would force station closures and increase response times, at the expense of firefighter safety. While the City Manager testified that firefighter safety would not be impacted by the layoffs, prior statements by the City in a federal SAFER grant application indicated that a reduction in the firefighter force could lead to inadequate support for ventilation and water supply, and that the increase in

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[2]In this case, testimony at the hearing on the preliminary injunction established that after losing a federal grant that originally funded the Firefighters at issue, rather than diverting funds to pay the Firefighters, the City chose to use $1,900,000 in toll money for the street fund, and to raise the City's Ending Fund Balance from 4% to 8%, at a cost of over $3,000,000.00.

[3]The suit was filed by both the named members of the firefighters facing layoff, as well as the members of the International Association of Firefighters, Local 731, generally.

response times would increase the risk for structural damage and collapse during firefighting efforts. Reply to Opposition to Preliminary Injunction, Ex. 2, at 3.

Firefighters perform hazardous work. As a result, NRS 288.150 clearly allows firefighters to bargain for sufficient procedures to protect their safety. The Firefighters bargained for the inclusion of these procedures in the CBA. Accordingly, to the extent any decision by the City may have violated these specifically bargained-for contractual provisions, this was not a "policy decision" or "political question." Therefore, as with the Firefighters' claims regarding "lack of funds," these claims that the City breached contractual provisions regarding Firefighter safety must proceed through the appropriate contractual and statutory administrative processes.

The City's motion to stay the preliminary injunction

In the alternative to dismissing the Firefighters' claims, the City requests that this court stay the preliminary injunction pending appeal to the Nevada Supreme Court. This court declines to do so.

First, to stay the injunction would essentially render this court's prior order to be meaningless. This court previously concluded that the Firefighters had demonstrated a reasonable likelihood of success on the merits of their case, and that an injunction was necessary to prevent imminent and irreparable harm to the Firefighters. June 24, 2012 Order; *see also Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters.*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (noting that a "preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits"); *see also Ottenheimer v. Real Estate Division*, 91 Nev. 338, 342, 535 P.2d 1284, 1285 (1975) (holding that irreparable injury may occur if a plaintiff is forced to leave established, intrinsically lawful employment).

In weighing the likelihood of success the Firefighters enjoyed on the merits of this case, this court carefully examined all evidence presented in both the pleadings

and at the evidentiary hearing on June 17, 2014. At that hearing, both parties presented testimony regarding whether or not there was a "lack of funds" necessitating the layoff. However, in addition to the testimony regarding financial matters, the Firefighters also introduced testimony from multiple witnesses, including a fire captain, fire division chief, and a firefighter to establish that the layoffs and subsequent station closures would lead to an increase in response times, which would ultimately jeopardize firefighter safety. As discussed above, the City's own statements in its federal SAFER grant application indicated that losing firefighter positions would negatively impact firefighter safety. The only testimony offered by the City to rebut this evidence were statements by the City Manager, which this court found to be largely conclusory. Given the combined weight of the evidence regarding both "lack of funds" and firefighter safety, this court concluded that the Firefighters' enjoyed a reasonable likelihood of success on the merits of this case. The City has presented no new evidence regarding the underlying merits of the injunction at this point.[4]

Second, for the reasons stated above, this court rejects the City's argument that imposition of the injunction violates the political question doctrine. The Firefighters have alleged that the impending layoffs will breach the CBA and the statutory provisions of NRS Chapter 288. This is a clear suit for a breach of contract and violation of agreed upon statutory labor practices, not a disagreement with a general policy decision made by the City. Accordingly, the political question doctrine does not apply in this case.[5]

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[4]Pursuant to the terms of the injunction, the parties are required to file status reports every thirty days. If, as the parties continue through the contractual and statutory processes, it appears that the likelihood of success on the merits no longer weighs in favor of the Firefighters, the City is free to argue that injunctive relief is no longer warranted.

[5]To the extent the City also argues that *City of Henderson v. Kilgore* stands for the proposition this Court may only grant an injunction after the EMRB has found a complaint to be "well taken," the court finds this argument to be misplaced. *Kilgore* merely states that if an order of the EMRB is not obeyed, the aggrieved party may seek an injunction from the district court. It does not limit the power of the district court to grant preliminary injunctive relief. 122 Nev. at 335, 131 P.3d at 14.

Third, this court rejects the City's assertion that the bond required by this court is "woefully inadequate." In this, the City contends that retention of the Firefighters will likely cost the City at least $3,600,000 for the fiscal year. However, for the duration of the injunction, the Firefighters will continue to perform their employment duties, and the City will retain the benefit of that performance. Therefore, the required bond shall remain $10,000.00.

The City's motion to stay arbitration

Finally, the City requests that this Court stay the contractual arbitration proceedings initiated by the Firefighters. In this, the City argues that because the Firefighters allege violations of NRS Chapter 288, the sole appropriate remedy is for the Firefighters to file a complaint with the EMRB, rather than to first pursue private contractual arbitration. This court disagrees.

As the City argues, the EMRB has exclusive jurisdiction to hear any complaints arising from violations of NRS Chapter 288. NRS 228.110; *City of Reno*, 118 Nev. at 895, 59 P.3d at 1217. However, despite the ultimate authority of the EMRB regarding claims under NRS Chapter 288, employers and employee organizations may also agree, pursuant to collective bargaining, to submit any contractual disputes to private arbitration prior to proceeding to the EMRB. *City of Reno*, 118 Nev. at 895, 59 P.3d at 1217. In its own decisions, the EMRB has espoused "a policy favoring grievance arbitration as the preferred method of resolving disputes." *Clark County Education Ass'n v. Clark County School Dist.*, Case No. A1-046025 at 1 (EMRB 2012). To this end, while arbitrating any contractual claims, parties may also agree to arbitrate their NRS 288.150 labor practice claims prior to any submission of the complaint to the EMRB. *See City of Reno*, 118 Nev. at 895, 59 P.3d at 1217.

Recognizing the preference for arbitration as a dispute resolution mechanism, the EMRB has adopted a policy of "limited deferral" in determining whether to defer to the findings of a private arbitrator. Thus, the EMRB will defer to a private arbitration if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not "clearly repugnant" to the purposes and

policies of the Employee Management Relations Act (NRS Chapter 288); (4) the contractual issue was parallel to the unfair labor practice issue; and (5) the arbitrator was presented with the facts relevant to the unfair labor practice claims. *City of Reno*, 118 Nev. at 896, 59 P.3d at 1217 (adopting the criteria set forth in *Garcia v. N.L.R.B.*, 785 F.2d 807, 809 (9th Cir. 1986)).

In this case, the Firefighters' complaint appears to alleged mixed claims of both breach of the CBA and violations of NRS 288.150, especially to the extent that the parties incorporated the language of NRS 288.150 into the CBA. The Firefighters' claims regarding safety violations certainly involve contractual terms outside the language of NRS 288.150 that are subject to the parties' arbitration agreement. Perhaps most importantly, the Firefighters have chosen to pursue private arbitration. Under the terms of the CBA, they are entitled to do so. At this juncture, it is an arbitrator, not this court, that is in the best position to determine the extent to which the parties' dispute is appropriately resolved by the arbitration process.[6] To the extent issues between the parties are left unresolved by arbitration, or the parties feel the private arbitrator has inappropriately or incorrectly interpreted the provisions of NRS 288.150, they may bring these claims before the EMRB. *See U.M.C. Physicians Bargaining Unit v. Nevada Service Employees Union*, 124 Nev. 84, 90, 178 P.3d 709, 713 (2008) (concluding that the EMRB may hear complaints from "local government employers, local government employees, or employee organizations, arising out of NRS Chapter 288's performance or interpretation").

Accordingly, this court concludes that a stay of private arbitration is not appropriate.

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[6]From the parties' pleadings, it would appear that the City has not agreed to the arbitration of claims related to NRS Chapter 288.

CONCLUSION

For the foregoing reasons:

The City's *Motion to Dismiss* is GRANTED with respect to the Firefighters' claims for breach of contract and declaratory relief. These claims are DISMISSED without prejudice. The City's *Motion to Dismiss* is DENIED with respect to the Firefighters' claim for temporary injunctive relief only.

The City's *Motion to Stay Injunction* is DENIED. The preliminary injunction shall remain in effect in accordance with the prior order of this court.

The City's *Motion to Stay Arbitration* is DENIED.

IT IS SO ORDERED.

DATED this 8th day of August, 2014.

Lidia S. Stiglich

LIDIA S. STIGLICH
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 8th day of August, 2014, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Mark Dunagan, Esq.

Whitney Selert, Esq.

Laurence Digesti, Esq.

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Kathryn Rogers
KATHRYN ROGERS
Judicial Assistant