

**Carson City
Agenda Report**

Date Submitted: Sept. 9, 2014

Agenda Date Requested: Sept. 18, 2014

Time Requested: 5 minutes

To: Mayor and Board of Supervisors

From: Randal Munn, Chief Deputy District Attorney

Subject Title: For Possible Action: To approve pursuant to Section 3.070(3) of the City Charter approval of Carson City's joinder at the discretion of the Carson City District Attorney's Office in the Amicus Curiae Brief to be drafted and filed jointly by the Henderson City Attorney's Office, the North Las Vegas City Attorney's Office and the Clark County District Attorney's Office, and thus duly appoint the author(s) of such amicus brief to act as special deputies district attorney for the Carson City District Attorney's Office in filing an amicus brief and representing the amicus curiae interests of Carson City before the Nevada Supreme Court in the case City of Reno v. International Association of Firefighters, Local 731, et al., Case No. 65934 before the Nevada Supreme Court. *(Randal Munn)*

Staff Summary: The District Attorney's Office does not have the staff time it can devote to separately drafting an amicus brief on this important subject and it is common practice to join in the work product of other government attorneys arguing interests that are in common with Carson City's interests in a legal dispute.

Type of Action Requested:

Resolution

Ordinance- First Reading

Formal Action/Motion

Other (Specify)

Does This Action Require A Business Impact Statement: Yes No

Recommended Board Action: I move to approve pursuant to Section 3.070(3) of the City Charter, Carson City's joinder at the discretion of the Carson City District Attorney in the Amicus Curiae Brief to be drafted and filed jointly by the Henderson City Attorney's Office, the North Las Vegas City Attorney's Office and the Clark County District Attorney's Office, and thus duly appoint the author(s) of such amicus brief to act as special deputies district attorney for the Carson City District Attorney in filing an amicus brief and representing the amicus curiae interests of Carson City before the Nevada Supreme Court in the case City of Reno v. International Association of Firefighters, Local 731, et al., Case No. 65934 before the Nevada Supreme Court.

Explanation for Recommended Board Action: The outcome of the litigation has direct ramifications on the amici parties. All amici parties risk losing explicit management powers under the collective bargaining statute NRS chapter 288 with respect to the power to lay-off employees in a collective bargaining unit. The District Court in Washoe County did not consider the merits of the City of Reno's motion to dismiss and entered an injunction preventing the lay-off of firefighters whose positions were funded under a SAFER grant from the federal government which was not continued by the federal government.

Applicable Statute, Code, Policy, Rule or Regulation: Professional Legal Services contracts are exempt from competitive public bidding. NRS 332.115(1)(b).

CC Charter section 3.070(3): "The district attorney may, subject to the approval of the board, contract for the services of special deputy district attorneys."

Fiscal Impact: No fiscal impact.

Explanation of Impact: N/A.

Funding Source: District Attorney's Office operations

Alternatives: 1) Refer back to District Attorney's office
2) Do not approve

Supporting Material:

- 1) City of Reno's, Appellant's Opening Brief
- 2) Email of Tracy Chase, Chief Deputy City Attorney, Reno

Prepared By: Randal Munn, Chief Deputy District Attorney, Civil Division

Reviewed By: n/a Date: _____
(Public Works)
Nicholas Mariano Date: 9/9/14
(City Manager)
Randal Munn Date: 9/9/14
(District Attorney)
Dawn Paulera Date: 9/9/14
(Finance Director)

Board Action Taken:

Motion: _____ 1) _____ Aye/Nay
2) _____ _____

(Vote Recorded By)

Randy Munn

From: Tracy Chase <chaset@reno.gov>
Sent: Monday, September 08, 2014 4:12 PM
To: Lipparelli, Paul A.; Randy Munn; Adams, Chet; cgood@cityoffernley.org; bjensen@cityoffernley.org; Brian Kunzi; Olsen, Dave; Brad Jerbic; efretwell@lasvegasnevada.gov; Wes Henderson; Jeff Fontaine; Brett Kandt; Jackson, Mark; Auer, Bob; Brown, Kelly; escadaoffice@gmail.com; alanger@storeycounty.org; bmaddox@storeycounty.org; NARombardo; Mallory, Art; Angie Elquist; Hooge, Daniel; rsweetin@mesquitenv.org; Macdonald, Michael; kmcqueary@elkocountynv.net
Cc: Mark Dunagan; Mark Ricciardi; Ann Wilkinson; John Kadlic
Subject: Amicus Support for City of Reno vs. International Association of Firefighters
Attachments: City v IAFF Appellant Opening Brief (file-stamped).pdf; Order - Amicus extension of time.pdf

Good afternoon colleagues,

The City of Reno has filed its opening brief in an Appeal from the temporary injunction issued by Department 8 of the Second Judicial District Court which precluded the City from laying off 21 fire fighters. The City's brief is attached. This is an important issue for local governments located in the State of Nevada as the City of Reno is asserting that the right to lay off is a management right reserved to the City Council and that the District Court erred in granting injunctive relief.

The City is seeking amicus curiae briefs or joinders from local governments. When contacted, certain local governments expressed concerns about staff resources that could be applied to assist. Accordingly, we reached out to some of the larger agencies in Nevada. The City of Henderson, City of North Las Vegas and Clark County have indicated they will draft the Amicus Brief. Further, these agencies have received an Order granting an extensions until September 19, 2014 to file the Amicus. This order is attached.

We anticipate having the draft Amicus Brief prior to the filing deadline which will be circulated to those government agencies who express an interest in joining. Please feel free to pass this email on to any local government agency in Nevada for consideration and the agency is welcome to contact me.

Thank you so much for your consideration of this important matter. Please e-mail me if you are interested in joining the Amicus brief. Also, please call me on my direct line of 334-2073 if you have any questions.

Regards,

Tracy L. Chase
Chief Civil Deputy
Reno City Attorney's Office
P.O. Box 1900
Reno, Nevada 89505
Phone: 775.334.2050
Fax: 775.334.2420

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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 CITY OF RENO,
3 Appellant,

4 vs.

5 INTERNATIONAL ASSOCIATION OF
6 FIREFIGHTERS, LOCAL 731; *et. al.*,

7 Respondents.

Case No. 65934

Electronically Filed
Sep 03 2014 09:26 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

8 Appeal from

9 International Association of Firefighters Local 731, John Beck, Joshua Bell,
10 James Biddle, Michael Brewer, Matae Castillo, Jason Eastman, Benjamin
11 England, Jordan Harris, Tacy Kelly, Matthew Lujetic, Kenneth McLellan, Shawn
12 Price, George Searcy, Sonny Snodgrass, Travis Bertrand, Wesley Boatman,
13 Richard Canaday, Walter Cordova, Justin Galli, John Gerbatz, Nathan Goins,
14 Trevor Hall, Sean O'Brien, Jesse Washington, Jeremy Berninski, Marshall Brin,
15 Albert Corea, Jacob Lightfoot, Leonard Munoz, Tegg Orduno, Christopher
16 Pearson, James Schmidt

17 vs.

18 City of Reno
19 Second Judicial District Court
20 The Honorable Judge Lidia Stiglich presiding
21 Case No. CV14-01138

22 APPELLANT'S OPENING BRIEF

23 JOHN J. KADLIC
Reno City Attorney
MARK W. DUNAGAN
Deputy City Attorney
Nevada State Bar No. 10574
P.O. Box 1900
Reno, Nevada 89505
(775) 334-2050

MARK J. RICCIARDI
Nevada State Bar No. 3141
WHITNEY J. SELERT
Nevada State Bar No. 5492
Fisher & Phillips LLP
3800 Howard Hughes Pkwy, Ste. 950
Las Vegas, Nevada 89169
(702) 252-3131

Attorneys for City of Reno

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JURISDICTIONAL STATEMENT

The court's appellate jurisdiction over this matter lies in NRAP 3A(b)(3), because this appeal challenges a district court order granting an injunction.

The appealed order was entered June 24, 2014. Notice of Entry of Order was served electronically on June 25, 2014. Defendant City of Reno (the "City") timely filed its Notice of Appeal on June 25, 2014.

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STATEMENT OF THE ISSUES

In this case, the district court granted a preliminary injunction preventing the City from moving forward with the scheduled layoff of 32 employees. The City raises the following issues on appeal:

1. **This Dispute is Non-Justiciable:** Did the district court err by exercising jurisdiction over a dispute arising over the interpretation of the provisions of NRS 288 where Plaintiffs had not yet exhausted their administrative remedies?

2. **There is No Adequate Legal Basis For Injunctive Relief:** Did the district court err in granting a preliminary injunction against the City where there was no likelihood of success and the nonmoving party's conduct would not cause irreparable harm if it continued?

3. **The Political Question Doctrine Bars Judicial Review:** Did the district court err in failing to dismiss the case pursuant to the political question doctrine, which, absent any arbitrary and capricious government

1 action, precludes judicial review of controversies arising from policy choices
2 and value determinations of another branch of government.

3 **4. The District Court Erred in Finding a Basis for Injunctive**
4 **Relief Under NRS 38:** Did the district court err in applying the provisions of
5 NRS 38 (the Uniform Arbitration Act of 2000) to a dispute arising under the
6 sole and exclusive jurisdiction of the Local Government Employee-
7 Management Relations Board, and by failing to apply the proper criteria to
8 determine a likelihood of success?

9 **5. The Claim of Failure to Bargain Over Firefighter Safety is**
10 **Non-Justiciable:** Did the district court err by exercising jurisdiction over a
11 dispute arising over a claim of failure to bargain in good faith in violation of
12 the provisions of NRS 288 where Plaintiffs had not yet exhausted their
13 administrative remedies?

14 **6. The Bond Amount is Inadequate:** Did the district court err in
15 setting a bond amount so low as to be inadequate to address the costs incurred
16 by the City in the event that Plaintiffs do not succeed on the merits?

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1 **STATEMENT OF THE CASE**

2 On May 29, 2014, Plaintiffs filed a Complaint against the City alleging
3 four causes of action: 1) anticipatory breach of contract; 2) breach of the
4 implied covenant of good faith and fair dealing; 3) injunctive relief; and 4)
5 declaratory relief. Plaintiffs also filed a motion for judicial relief under NRS
6 38.

7 All of Plaintiffs' claims concern the City's decision to lay off 32 grant-
8 funded firefighters after the expiration of the federal grant that funded the
9 positions. The City moved to dismiss that Complaint on two bases: 1)
10 Plaintiffs never exhausted their requisite administrative or contractual remedies
11 before filing suit; and 2) absent violation of the law or clear evidence of
12 arbitrary and capricious action, the political question doctrine precluded
13 judicial intervention in the inherent budgeting and decision making processes
14 of a coordinate branch of government. The City requested an order shortening
15 time, hoping its motion would obviate the need for a preliminary injunction
16 hearing. The district court denied that request and held the preliminary
17 injunction hearing without ruling on the motion to dismiss.

18 Several witnesses testified at the hearing: four Reno Fire Department
19 employees¹, Plaintiffs' "expert"², the City Manager, and the City's Finance
20

21 ¹ Witness Seth Williams is also Vice President of IAFF Local 731 (2 JA 232:7)
and witness Tom Dunn is also a member of the Executive Board of IAFF Local
22 731. (2 JA 327:16-18.)

23 ² Witness Beth Kohn-Cole has been referred to by an independent arbitrator as
a "so-called expert, a non-actuary who has never written a budget, and who is
contracted only by unions" and who was "found to lack expertise and
neutrality." (1 JA 123, 128.)

1 Director. Plaintiffs alleged that there was no “lack of funds” which would
2 allow employee layoffs pursuant to NRS 288.150(3), and that the layoffs will
3 impair the safety of the firefighters who were not being laid off.

4 The City presented detailed testimony and evidence regarding its
5 significant financial challenges and the budget approval process that drove the
6 City Council’s decision to move forward with layoffs rather than reallocate
7 funds to preserve more positions. The City argued that its right to lay off
8 employees due to “lack of funds” is a protected right of management under
9 NRS 288.150(3) and the CBA. The City also argued that it has an inherent
10 right to create and balance a budget for the well being of the community, and
11 there is no basis to interfere with the lawful, publicly debated and informed
12 decision of the City Council.

13 On June 24, 2014, the district court issued an injunction preventing the
14 City from implementing the layoffs scheduled for July 1, 2014. The court
15 ordered the parties to file regular joint status reports on the progress of
16 administrative proceedings and ordered Plaintiffs to post a \$10,000 bond. On
17 June 25, the City appealed, filed a motion in district court to stay the
18 injunction, and simultaneously filed an emergency motion in this court to stay
19 the injunction. The district court has since granted the City’s motion to dismiss
20 the substantive claims, but refused to dissolve the injunction. After the
21 dismissal, the City renewed its motion to stay with this court.

22 **STATEMENT OF FACTS**

23

1 The City was severely impacted by the Great Recession, suffering
2 crippling loss of revenue. The housing market collapsed. Tourism declined
3 precipitously. Thousands of residents lost their homes and jobs. The City's
4 finances were so dire that it was placed on a "watch list" by the Nevada State
5 Department of Taxation. (2 JA 381:5-6, 430-434.) This unprecedented fiscal
6 emergency exposed multiple structural defects and budget imbalances that
7 continue to threaten the City's future financial integrity, including a
8 dangerously low ending fund balance ("EFB") and a massive unfunded
9 liability for "OPEB" (Other Post-Employment Benefits) which represents
10 future costs related to the City's benefit obligations to its retirees. This
11 liability is projected to create a deficit by 2016. (2 JA 438; 3 JA 657.) The
12 City has drastically cut spending and curtailed services, laying off 34% of its
13 workforce (more than 500 employees) and reorganizing every department to
14 increase efficiency and effectiveness. (2 JA 380-387, 432:9-10; 3 JA 640.)

15 **1. The Plaintiff Firefighters Were Grant-Funded.**

16 Among those laid off during the recession from 2008 to 2012 were 34
17 firefighters. (2 JA 270:17-19; 4 JA 852 ¶ 2.) Subsequent to those layoffs, the
18 Federal Emergency Management Association implemented the Staffing for
19 Adequate Fire & Emergency Response ("SAFER") program, which made
20 grant funds available to eligible municipalities to increase or maintain the
21 number of front line firefighters in their communities. (4 JA 852-858.) The
22 City received SAFER grants in 2010 and 2011, which enabled the City to
23 recall the 34 laid-off firefighters and avoid 30 additional layoffs that would

1 have resulted from deconsolidation of the City's fire operations from Washoe
2 County. (4 JA 849.) These grants provided millions of dollars per year for the
3 City to employ the firefighters. (4 JA 852-858.)

4 The last SAFER grant awarded to the City was scheduled to expire June
5 30, 2014. *Id.* at 852. In anticipation, the City and IAFF representatives jointly
6 prepared an application for a fourth SAFER grant and submitted it on August
7 26, 2013. (*Id.* at 849.) In that application and supporting narrative (4 JA 852-
8 857), the City and IAFF described the significant financial challenges
9 confronting the City, and clearly stated that without additional federal grant
10 funding, the City "will have no alternative other than to lay off 50 career
11 firefighters effective July 1, 2014." (*Id.* at 849 ¶ 1.) The City stated that its
12 most optimistic revenue projections indicated that funding for 50 positions
13 (approximately \$5.6 million dollars per year), was not achievable under the
14 economic circumstances. *Id.*

15 In jointly preparing that application, the City and IAFF detailed the
16 potential impact of those layoffs on public and firefighter safety. (4 JA 849-
17 851, 852 ¶ 3; 2 JA 354-5.) Despite the clear statement of intent to lay off 50
18 firefighters absent additional grant funding, IAFF never sought to negotiate
19 over those layoffs, never filed a complaint with the Employee Management
20 Relations Board ("EMRB") and did not file a grievance until well after the
21 fourth SAFER grant application was denied nine months later. (4 JA 847.)

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1 **2. The City Faces Significant And Potentially Crippling**
2 **Financial and Systemic Challenges.**

3 After submitting the fourth SAFER grant application in August, 2013,
4 the City began preparing its 2014-15 budget in accordance with NRS and NAC
5 354 and its publicly identified municipal priorities. (3 JA 561-2; 2 JA 429:15-
6 430:9.) In April, 2014, just prior to formally presenting a proposed budget for
7 fiscal year 2014-2015, the City learned that the fourth SAFER grant
8 application was denied. (*Id.* at 450:12-18.) In response, City staff modified its
9 budget recommendations and freed sufficient funds to preserve and maintain
10 15 firefighters on an ongoing basis, thus reducing the anticipated layoffs from
11 50 to 35. (3 JA 453:4.) A formal presentation of that strategy and the City’s
12 other financial concerns, priorities, and recommended budget allocations was
13 publicly discussed and debated by the Reno City Council on April 23, 2014. (2
14 JA 451; 4 JA 693-695, 697-761.)

15 Among the City’s other important priorities was the “critical” need to
16 raise the City’s EFB from 4% to 7.16%. (4 JA 702, 705-706.) As explained to
17 the district court, NAC 354.650(1) provides for a minimum EFB of 4%, and if
18 the City’s EFB falls below that, it will be placed back on the Department of
19 Taxation’s watch list. (2 JA 430-431.) Such a low EFB creates numerous
20 operational problems for the City, including the serious risk of bouncing
21 checks and a downgrade in credit rating. (3 JA 453.) Indeed, more than six
22 times in the 24 months preceding the hearing, the City’s reserves fell below \$0
23 and the City would have bounced checks but for its temporary ability to access
funds earmarked for another purpose. (*Id.*; 4 JA 706; 3 JA 454-457.)

1 The City has additional significant unfunded liabilities that threaten its
2 financial integrity and long term stability, including an unfunded and ever-
3 increasing \$210M OPEB liability, and a \$17M unfunded worker's
4 compensation liability. (3 JA 571, 612, 657-674; 2 JA 438.)

5 These potentially devastating problems were recently examined and
6 validated by an arbitrator following formal NRS fact finding. In that case, the
7 police officers' union suggested the City was exaggerating its financial
8 problems and argued the City "could afford" benefits the City said it could not.
9 After the union forced a hearing under NRS 288, Arbitrator Levak concluded:

10 The Factfinder finds that the City is still struggling to recover
11 from the 2008 recession; that the general fund has dipped
12 dangerously low because of the loss of revenue; that the City has
13 no way to increase revenue, that the City has taken every
14 reasonable step to "tighten its own belt" before seeking
15 concessions from the Association; that the balanced budget
16 achieved last year [2013] does not provide for items that will
17 minimally guarantee the health, welfare and safety of its citizenry;
18 that the City does not have the funds to rectify the lagging
19 infrastructure; and that the City is under the obligation to increase
20 its ending fund balance to the recognized 8% standard... The
21 Factfinder finds that if the City does not discontinue the post
22 employment health benefit [OPEB] its financial integrity will
23 most certainly become compromised....

Levak Decision at pp. 11-12 (1 JA 128-9.)³

³ On June 25, one day after the injunction was granted, the City received a second factfinding decision, this time with the administrative professionals' union, which echoed Arbitrator Levak's findings regarding the City's dire financial state. The City respectfully requests that the court take judicial notice of the second factfinding decision, which is a public record of the City available in the agenda packet for the July 2, 2014 Reno City Council Meeting. This court may take judicial notice of matters of fact that are generally known or that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' when requested by a party. NRS 47.130; NRS 47.150. Records of other courts are sources whose accuracy cannot reasonably be questioned. *Occhiuto v. Occhiuto*, 97 Nev. 143,

1 The details of those issues were addressed contemporaneously with the
2 formation of the City's 2014-15 budget and necessarily informed the City
3 Council's decisions following denial of the fourth SAFER grant. (2 JA 387-
4 389.) The financial reality, as well as the necessity and impact of employee
5 layoffs, were further discussed and carefully deliberated by the City Council in
6 three separate public meetings. (3 JA 458; 2 JA 387-389; 4 JA 693-695, 762-
7 775, 816-824.) During these meetings, the Council redirected other funds to
8 preserve two more permanent firefighter positions, reducing the number of
9 anticipated layoffs from 35 to 33.⁴ (3 JA 453-4, 460; 4 JA 762-775, 2 JA 390.)
10 At the public meetings, the Fire Chief testified regarding the potential impact
11 of layoffs on public and firefighter safety, and discussed options to mitigate
12 that impact. (4 JA 764, 818, 2 JA 388-390, 394, 3 JA 460, 2 JA 319-20.)

13 On May 20, 2014, having fully considered and debated all of these
14 issues, the City Council voted to finalize its budget, preserving 18 of the 50
15 firefighter positions on a permanent basis⁵ and leaving 32 grant-funded
16 firefighters to be laid off as of July 1.⁶ (3 JA 465, 4 JA 816-824, 2 JA 390-

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18 145, 625 P.2d 568, 569 (1981). This court will take judicial notice of records
19 from other cases if there is a close relationship between the cases, and issues
20 within the case justify taking judicial notice of the prior case. *Id.*

21 ⁴ An additional firefighter retired on or around April 30, 2014, reducing the
22 number of firefighter layoffs from 33 to 32.

23 ⁵ Notably, the City voted to approve the budget despite the unprecedented
objection from the Financial Advisory Board, a citizen budget watchdog group
that stated there was insufficient funds to preserve the positions, that doing so
would be fiscally irresponsible, and retention of firefighters should be funded
with only savings generated by the Fire Department. (3 JA 465, 4 JA 817.)

⁶ All of these issues were fully briefed to the district court by the City prior to
the preliminary injunction hearing and before any order was issued. *See*

1 392.) On May 22, 2014, the City sent formal layoff notices to the 32 affected
2 firefighters. (*See, e.g.*, 4 JA 844-845.) IAFF filed a grievance on May 23, 2014
3 and the lawsuit on May 29, 2014. (*Id.* at 847, 1 JA 1.) Plaintiffs have not filed
4 a complaint with the EMRB. Although the district court recently dismissed
5 Plaintiffs’ substantive claims, it refused to dissolve the injunction. (5 JA 1058.)

6
7 **SUMMARY OF ARGUMENT**

8 NRS 288 governs relations between local government employers and
9 public employee bargaining units. The Employee Management Relations
10 Board (“EMRB”) has exclusive jurisdiction over disputes arising under NRS
11 288. Pursuant to this comprehensive statutory scheme, some issues are subject
12 to mandatory bargaining, while others are not. Relevant here is NRS
13 288.150(3)(b), which states:

14 Those subject matters which are not within the scope of
15 mandatory bargaining and which are reserved to the local
16 government employer without negotiation include... The right to
17 reduce in force or lay off any employee because of lack of work or
18 lack of money, subject to paragraph (v) of subsection 2.

19 That language is repeated nearly verbatim in the “Management Rights”
20 clause of the governing CBA⁷, Article II(a)(2) of which states:

21 Those subject matters which are not within the scope of mandatory
22 bargaining and which are reserved to the local government
23 employer without negotiation include... The 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 N.R.S. 288.150.

22 Motion to Dismiss; Opposition to Motions for Temporary Restraining Order
and Preliminary Injunction (1 JA 106-130, 147-181).

23 ⁷ IAFF Local 731 Vice President Williams acknowledged that Article 2 is
intended to paraphrase and mirror NRS 288. 2 JA 264:20-24.

1 JA 18.

1
2 Thus, under both the statute and CBA, the City's inherent right to lay off
3 employees for lack of funds or lack of work is clearly preserved.⁸ The district
4 court erred by enjoining the City's lawful exercise of these rights.

5 First, because Plaintiffs failed to exhaust their administrative remedies
6 before the EMRB, their underlying claims were non-justiciable and it was error
7 not to dismiss them as a matter of law. Second, injunctive relief was improper
8 because the non-justiciable claims enjoyed no likelihood of success and there
9 was no showing of irreparable harm. The district court erred again in its
10 August 8 Order by failing to dissolve its injunction even after dismissing the
11 underlying claims as required by law. Third, the political question doctrine
12 required the district court to defer to the City Council's inherent authority to
13 lay off employees for lack of funds. Absent any statutory violation by the City
14 or clear evidence of arbitrary and capricious conduct, the district court had no
15 basis to issue an injunction. Fourth, the district court erred by relying on NRS
16 38 and *City of Henderson v. Kilgore* for a basis for injunctive relief where none
17 exists. Fifth, the district court improperly concluded that the City failed to
18 bargain over firefighter safety when a failure to bargain presents another claim
19 that is within the exclusive jurisdiction of the EMRB. Even if a court could

20
21 ⁸ NRS 288.150(2)(v) only requires the parties to negotiate over the "procedure"
22 for implementing work force reductions. The parties satisfied that obligation
23 by negotiating Articles 25, 35 and 46, which describe that force reductions,
when implemented, will occur according to seniority. (1 JA 40, 50, 52-55; 2 JA
278:22-280:5.) See also *SEIU Local 1107 v. Clark County*, No. A1-045965,
Item No. 713A (EMRB Oct. 5, 2010) (discussing scope of layoff "procedures"
under NRS 288.150).

1 consider such a claim in the first instance, a request for bargaining was
2 Plaintiffs' statutory responsibility and failure. Finally, the district court erred
3 by requiring only a \$10,000 bond despite undisputed evidence that the actual
4 cost of this injunction to the City is nearly \$4 million per year, not including
5 the attorney fees and expenses incurred to dissolve this wrongful injunction.

6 **ARGUMENT**

7 **1. The District Court Abused its Discretion By Issuing Relief in a**
8 **Non-Justiciable Dispute.**

9 Review of the grant or denial of a preliminary injunction on appeal is
10 limited to the record. *Univ. & Cmty. College Sys. of Nev. v. Nevadans for*
11 *Sound Gov't*, 120 Nev. 712 (2004). The district court's decision will not be
12 disturbed absent an abuse of discretion or unless it is based on an erroneous
13 legal standard. *Id.* Questions of law are reviewed *de novo*. *Id.* "Subject matter
14 jurisdiction is a question of law subject to *de novo* review." *Ogawa v. Ogawa*,
15 125 Nev. 660 (2009). A plaintiff generally must first exhaust all of his
16 administrative remedies before filing a lawsuit, and the failure to do so renders
17 a controversy non-justiciable. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571,
18 170 P.3d 989, 993 (2007). Where administrative remedies have not been
19 exhausted, dismissal for lack of subject matter jurisdiction is proper. *Malecon*
20 *Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 842, 59 P.3d
21 474, 477 (2002).

22 In both their Complaint and motion for judicial relief and motion for
23 preliminary injunction, Plaintiffs conflated the difference between an employee

1 termination and a layoff.⁹ The distinction is important. A termination is
2 governed by the CBA, requires “just cause” on the part of the employer, and is
3 subject to the CBA’s grievance arbitration process. (1 JA 36-8.) By contrast,
4 the layoffs at issue here are governed by NRS 288.150(3), and “exclusive
5 jurisdiction” to resolve disputes under that statute is reserved to the EMRB.
6 *Rosequist v. Int’l Ass’n of Firefighters Local 1908*, 118 Nev. at 448, 49 P.3d at
7 655 (2002); *see also*, NRS 288.110(2).

8 In its various orders, the district court struggled with and
9 misapprehended the distinction between these very different procedural
10 mechanisms, alternately referring to both as contractual and administrative and
11 confusing the difference between a grievance and an unfair labor practice
12 claim.¹⁰ Still, in granting the City’s motion to dismiss, the court held:

13 Before the Firefighters’ general claims for breach of contract
14 and declaratory judgment are justiciable before this court, they
15 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.

16 5 JA 1051:2-6.

17 That conclusion, albeit belated, was substantively correct. The City
18 cited the extant legal authority in its June 2 Motion to Dismiss. (1 JA 113-4)
19 (citing *Rosequist, supra*, and *City of Henderson v. Kilgore*, 122 Nev. 331, 131
20 P.3d 11 (2006)). In issuing an injunction when dismissal was required, the

21 _____
22 ⁹ Plaintiffs routinely blurred this distinction at the hearing. (*See, e.g.*, 2 JA
247:22, 248:4, 256:20, 315:7, 317:20, 330:3; 3 JA 503:1, 505:9.)

23 ¹⁰ *See e.g.*, 5 JA 937:4-7 (erroneously holding that grievance under CBA is
predicate to complaint before EMRB); 5 JA 1050:7 (“administrative remedies”
under Act include filing grievance under CBA).

1 district court abused its discretion by exercising jurisdiction over the dispute.
2 Lack of subject matter jurisdiction and justiciability are threshold
3 considerations.¹¹ Lacking either, the Complaint should have been dismissed,
4 no hearing held, and no injunction issued. The district court's injunction was
5 void *ab initio*. Still, the City has abided by the injunction pending this appeal.

6 Even after dismissing the underlying substantive claims, the district
7 court erred again by refusing to dissolve the injunction. The only "claim" the
8 district court did not dismiss was Plaintiffs' claim for injunctive relief. 5 JA
9 1058. However, injunctive relief is a remedy, not a substantive claim. *See*,
10 *First 100, Inc. v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 97029 *9,
11 2013 WL 3678111 (D. Nev. July 9, 2013) (citing *Jensen v. Quality Loan*
12 *Service Corp.*, 702 F.Supp.2d 1183, 1201 (E.D. Cal. 2010) ("An injunction is a
13 remedy, not a separate claim or cause of action.") A separate cause of action
14 must exist before injunctive relief may be granted. *See Curtis v. Option One*
15 *Mortgage*, 2010 U.S. Dist. Lexis 20995 (citing *Tapia v. Aurora Loan Services,*
16 *LLC*, 2009 U.S. Dist. LEXIS 82063, 2009 WL 2705853 at *3 (E.D. Cal. 2009).
17 Lacking an underlying substantive claim, injunctive relief was improper.

18
19
20
21 ¹¹ In *City of Henderson v. Kilgore*, the Nevada Supreme Court provided in a
22 footnote that the exhaustion requirement concerns justiciability rather than
23 subject matter jurisdiction. 122 Nev. 331, 336, 131 P.3d 11, 15, n. 10 (2006).
In *Allstate Ins. Co. v. Thorpe*, the Nevada Supreme Court acknowledged the
Kilgore footnote but emphasized the lack of any practical difference caused by
the distinction, by stating that whether the exhaustion requirement is couched
in terms of subject matter jurisdiction or ripeness, the result is the same: the
complaint is non-justiciable. 123 Nev. 565, 571, 170 P.3d 989, 993.

1 **2. The Legal Elements Required for a Preliminary Injunction Have**
2 **Not Been Satisfied.**

3 “For a preliminary injunction to issue, the moving party must show that
4 there is a likelihood of success on the merits and that the nonmoving party’s
5 conduct, should it continue, would cause irreparable harm for which there is
6 no adequate remedy at law.” *Dep’t. of Conservation & Natural Res. v. Foley*,
7 121 Nev. 77, 80, 109 P.3d 760, 762 (2005) (citations omitted). As discussed
8 above, it is undisputed that Plaintiffs’ Complaint is non-justiciable. Indeed,
9 Plaintiffs’ substantive claims have actually been dismissed. (5 JA 1058:3-6.)
10 Where a complaint must be dismissed as a matter of law, there exists no
11 likelihood of success. *See, e.g., United States Ass’n of Imps. of Textiles &*
12 *Apparel v. United States*, 413 F.3d 1344 (Fed. Cir. 2005) (Plaintiffs seeking
13 injunction unlikely to succeed where claim is not ripe for review); *Montgomery*
14 *v. Brown*, 2014 U.S. Dist. LEXIS 16249 (W.D.N.C. Feb. 7, 2014) (“Plaintiff
15 has no likelihood of success on the merits because this Court has no subject
16 matter jurisdiction over this case.”)

17 Plaintiffs also cannot show that irreparable harm would result from the
18 layoffs. The U.S. Supreme Court has observed that “the temporary loss of
19 income, ultimately to be recovered, does not constitute irreparable injury.”
20 *Sampson v. Murray*, 415 U.S. 61, 90 (1974). As the *Sampson* court stated:

21 The key word in this consideration is *irreparable*. Mere injuries,
22 however substantial, in terms of money, time and energy... are not
23 enough. The possibility that adequate compensatory or other
corrective relief will be available at a later date, in the ordinary
course of litigation, weighs heavily against a claim of irreparable
harm.

Id. (emphasis in original).

1 The district court relied on *Nelson v. NASA*, 530 F.3d 882 (9th Cir.
2 2008), and *Ottenheimer v. Real Estate Div. of Nev. Dep't of Commerce*, 91
3 Nev. 338 (1975) as precedent that layoffs can cause irreparable harm. (5 JA
4 991.) However, these cases do not hold that every layoff necessarily involves
5 irreparable harm. In both cases, irreparable harm was linked to the deprivation
6 of constitutional rights. 530 F.3d at 885; 91 Nev. at 342. No such violation is
7 alleged here, and the above cases are outliers to the general rule espoused by
8 the U.S. Supreme Court in *Sampson*. Moreover, neither *Ottenheimer* nor
9 *Nelson* speak to the plaintiffs having administrative remedies available, or the
10 protection of a CBA, both of which provide adequate remedies at law.

11 In a layoff context, the benefit of which employees are deprived is
12 continued employment. *SEIU, Local 1107 v. Clark County*, No. A1-045965,
13 Item No. 713A at 11 (EMRB Oct. 5, 2010) “An appropriate remedy is for [the
14 employer] to reinstate the laid off employees, and to make each employee
15 whole by compensating each laid off employee with the salary and benefits due
16 to them” from the time of layoff to the time of reinstatement. *Id.* The EMRB is
17 vested with the power to award such remedies, and therefore provides adequate
18 remedies in wrongful layoff cases arising under NRS 288. *See Nev. Serv.*
19 *Emples. Union v. Orr*, 121 Nev. 675, 119 P.3d 1259 (2005). Rather than
20 reading NRS 288 as deficient in its core purpose of redressing employees’
21 claims, this court should hold that laying off firefighters does not constitute
22 irreparable harm and is not a proper subject of injunctive relief.¹²

23 ¹² The Supreme Court of Michigan, in a case with nearly identical issues to this
one, held that laid off firefighters’ administrative remedies of backpay and

1 At the hearing, Plaintiffs for the first time raised the issue of the effects
2 of the layoffs on the safety of the firefighters not being laid off. 2 JA 250:22-
3 251:2. The district court premised the injunction partly on that issue. (5 JA
4 994:21:25.) As discussed in more depth in Section 5, *infra*, the City was not
5 required to initiate bargaining over safety, but even if it were, Plaintiffs'
6 arguments demonstrated no irreparable harm and therefore provided no basis
7 for injunctive relief. The Michigan Supreme Court considered nearly identical
8 arguments in the context of an injunction prohibiting layoffs:

9 [T]he [lower] court found that the layoffs would deplete the
10 number of available firefighters, which would increase the
11 remaining firefighters' workload and lengthen their response time,
12 which in turn would require firefighters to fight larger, more
13 intense, and more dangerous fires. Thus, firefighter safety would
14 be jeopardized.

15 *City of Pontiac*, 753 N.W. at 601.

16 The Michigan Supreme Court held that these arguments, however
17 appealing, alleged "nothing more than an apprehension of future injury." *Id.*
18 To support injunctive relief, the court reasoned, the remaining firefighters
19 needed to show "a real and imminent danger from the layoffs rather than
20 future, speculative harm" and could not do so. *Id.*

21 Plaintiffs here cannot show real and imminent danger. Any evidence of
22 an impact on firefighter safety is speculative and superficial. The anticipated
23 layoffs would reduce the number of regular firefighters by 32, which is fewer
than the number of layoffs that occurred in 2008-2010. (2 JA 278:3.) Plaintiffs

reinstatement were adequate to make them whole and that extraordinary
equitable relief was unnecessary and inappropriate. *Pontiac Fire Fighters
Union Local 376 v. City of Pontiac*, 753 N.W.2d 595, 600 (Mich. 2008).

1 conducted no studies and presented no evidence that those prior layoffs
2 tangibly impacted firefighter safety. (2 JA 278:9-13.)

3 The record reflects that more than 70% of firefighter calls are medical in
4 nature and unrelated to firefighting. (2 JA 312:1, 323:4.) The Fire Department
5 has the flexibility to allocate resources away from medical response and to
6 staff fires if the need arises to ensure firefighter safety. (2 JA 312:13-15,
7 317:11-15.) While testimony indicated response times may increase after these
8 layoffs, nothing in the record quantified that potential increase with any hard
9 data, and there is no evidence that response times will exceed established
10 response standards even after these layoffs. (2 JA 312:23, 313:14.)

11 Moreover, there is an important distinction between “staffing levels” and
12 total department staff. As explained by IAFF Vice President Williams, Article
13 46 of the CBA provides daily staffing per unit as a matter of safety for units
14 responding to calls. (2 JA 241:17, 284:9) Layoffs, however, concern total
15 manpower available to the Fire Department and are the subject of the City’s
16 inherent Management Rights under Article 2.¹³ (2 JA 241:16, 283:17-284:13.)

17 There is no evidence that the safety-based staffing levels required by
18 Article 46 for those firefighters responding to calls will be affected by these
19 layoffs. (2 JA 267:5-269:10) (Q: --is there anything about this layoff that’s
20 going to prevent you or the fire department from sending the number of folks
21 along with that truck that is required by the staffing model? A: No); *see also* 2

22
23 ¹³ Plaintiffs claimed the layoffs represented a 31% force reduction. (2 JA
285:7, 319:21-22.) However, a reduction to 183 firefighters after the layoffs is
actually a 15% decrease. (2 JA 319:13.)

1 JA 286:3-19, 290:22-293:5 (describing flexible staffing model). There is no
2 requirement in the CBA, statute or City Charter that the City employ any
3 specific number of firefighters. (2 JA 263:3-6.) There is no evidence that 183
4 firefighters will be inadequate to staff any call as Article 46 requires. Thus,
5 there was no basis to conclude these layoffs would negatively affect the safety
6 of the remaining firefighters, and thus no showing of irreparable harm to
7 support injunctive relief.

8 **3. The District Court Violated the Political Question Doctrine.**

9 The political question doctrine was recently articulated by this court in
10 *North Lake Tahoe Fire Protection Dist. v. Washoe County Bd. of County*
11 *Comm'rs*, 310 P.3d 583, 129 Nev. Adv. Op. 72 (2013). The application of this
12 doctrine is a question of law subject to *de novo* review. *Stuart v. United States*,
13 813 F.2d 243 (9th Cir. 1987), *rev'd on other grounds*, 489 U.S. 353 (1989). In
14 several respects, the district court's review was improper under the doctrine.

15 **a. The City's Decision to Lay Off Firefighters Was Within its**
16 **Policymaking Discretion and Not Subject to Judicial Review.**

17 Absent evidence of arbitrary and capricious governmental action, the
18 political question doctrine precludes judicial review of policy choices and
19 value determinations constitutionally committed for resolution to the
20 legislative and executive branch. 310 P.3d at 587, 129 Nev. Adv. Op. 72 at 6.
21 "A municipality's good faith exercise of its lawmaking power ordinarily will
22 not be restrained or interfered with by a court of equity, and therefore, the
23 passage of an ordinance or resolution within the scope of the corporate powers

1 will not be judicially questioned or restrained by injunction.” 17 *McQuillin*
2 *Mun. Corp.* § 49:60 (3d ed. 2014).

3 The record demonstrates the City carefully considered these layoffs in
4 conjunction with other municipal decisions and the long term well-being and
5 financial stability of the City. That consideration necessarily included the
6 earlier layoff of firefighters, the City’s subsequent efforts to rehire and retain
7 them through SAFER grants, and the implications of losing that grant and
8 laying firefighters off again. The City carefully considered the potential
9 impact on public and firefighter safety as detailed in the fourth SAFER grant
10 application (*see* 4 JA 849-857) and as discussed between the Fire Chief and
11 City Council during public meetings. (2 JA 388-389.) It is clear that such
12 difficult considerations present choices of a political nature committed to the
13 discretion of the elected City Council. NRS 288.150(5)¹⁴; NRS 354.472 (Local
14 Government Budget and Finance Act).

15 The district court acknowledged that “the City has many obligations, and
16 a finite amount of funds. Many of these decisions must be reviewed with the
17 deference due to a coordinate branch of government.” (5 JA 1052:28- 1053:2)
18 Yet the district court gave no such deference to the City. It purported not to
19 violate the political question doctrine even as it second-guessed the City’s
20 decisions to leave \$1.9 million in toll money in the street fund and raise its

21 _____
22 ¹⁴ “The provisions of this chapter, including without limitation the provisions
23 of this section, recognize and declare the ultimate right and responsibility of
the local government employer to manage its operation in the most efficient
manner consistent with the best interests of all its citizens, its taxpayers and its
employees.”

1 ending fund balance from 4% to 7.3%. (5 JA 943:12-15.)¹⁵ At the hearing, the
2 district court even questioned the City Manager directly about the EFB. (3 JA
3 487-488.) Ultimately, the issuance of an injunction forces the City to un-fund
4 obligations that it had already funded after lengthy deliberation. Meanwhile,
5 there is no evidence that the City’s decision to raise its EFB to 7.3%, leave
6 money in its street fund, or any other budgetary allocation, was arbitrary or
7 capricious, or violated any clear statutory or contractual directive.

8 **b. There is No Clear Statutory Directive With Regard to the City’s**
9 **Discretion to Determine Lack of Funds.**

10 The district court dispensed with the political question doctrine because
11 *North Lake Tahoe* does not preclude judicial review in cases where a clear
12 statutory directive has been violated. (5 JA 1052:12.) However, the mere fact
13 that Plaintiffs have alleged a statutory violation (and a contractual violation of
14 the same statutory provision) does not situate them any differently from the
15 appellants in *North Lake Tahoe*, nor does it provide a basis for injunction.

16 In that case, the Nevada Supreme Court considered whether judicial
17 interference in a county’s decision to withhold taxes from the fire protection
18 district (the “FPD”) was precluded by the political question doctrine. 310 P.3d
19 at 585. Like Plaintiffs in this case, the FPD argued that the doctrine did not
20 apply because the applicable statute—in that case, NRS 474.200—contains a

21 ¹⁵ In fact, Reno Municipal Code Section 5.18.010(b) requires that toll moneys
22 be placed in the street fund. With regard to the ending fund balance, NAC
23 354.660 provides that a balance of 8.3% or less of total budgeted expenditures
is not subject to negotiation with employee organizations. In other words,
unions cannot lay claim to any dollar in the EFB below 8.3%, yet the district
court questioned whether there could be a lack of funds where any balance
above 4% could have been used to employ firefighters.

1 clear funding mandate: the taxes collected on behalf of a fire district must be
2 credited to the district's funds. *Id.* at 588. The court noted that "Plainly,
3 funding FPD through its portion of the collected taxes is not discretionary...
4 However, this statute does not contemplate or provide guidance when a refund
5 is due of overpaid, unconstitutionally collected taxes," which was the issue the
6 county faced. *Id.*

7 It is similarly plain in this case that local government employers may
8 only lay off represented employees when there is a lack of funds or lack of
9 work. NRS 288.150(3). That limitation itself is not discretionary. However,
10 NRS 288 does *not* contemplate or provide guidance as to how the
11 determination of a lack of funds is to be made for purposes of deciding whether
12 to lay off employees.

13 In *North Lake Tahoe*, the court looked to another statute, NRS 354.220,
14 and noted that the county had general authority over refunds and withholding.
15 NRS 474.200 was not a "clear mandate" because it did not govern or impact
16 the refund process, and the FPD could point to no other authority compelling a
17 different manner of funding. *Id.* at 589. Thus, no clear statutory directive had
18 been violated. *Id.*

19 In this case, where there is no clear directive as to how the determination
20 of lack of funds shall be made, the court need look no further than NRS
21 288.150(5)¹⁶, to find the policy declaration that the local government employer
22 has the ultimate right and responsibility to manage its operation. Furthermore,

23 _____
¹⁶ See fn 15, *supra*.

1 the Local Government Budget and Finance Act, which vests the City with
2 budgetary authority, includes the following in its express purposes:

3 (b) To enable local governments to make financial plans...and
4 formulate fiscal policies... (c) To provide for estimation and
5 determination of revenues, expenditures and tax levies... (d) To
6 provide for the control of revenues and expenses in order to
7 promote prudence and efficiency... 2. For the accomplishment of
8 these purposes, the provisions of NRS 354.470 to 354.626,
9 inclusive, must be broadly and liberally construed.

10 NRS 354.472.

11 Thus, the City's position is analogous to the county's in *North Lake*
12 *Tahoe*. Under the two statutes cited immediately above, the City has *broad*
13 and *liberal* authority over these issues. Just as NRS 474.200 does not govern
14 or impact refunding and withholding, NRS 288.150(3) does not govern or
15 impact budgeting or determining revenues. Just as the FPD pointed to no other
16 authority compelling a different manner of funding, Plaintiffs here have
17 pointed to no other authority compelling a different manner of allocating
18 revenues. Where the court in that case concluded that "nothing in NRS
19 474.200 precludes the withholding method followed by the County," this court
20 should likewise conclude here that nothing in NRS 288.150(3) precludes the
21 City's method of determining that there is a lack of funds to employ the
22 firefighters. Such methods are well established in the public record.

23 **c. The District Court Erred in its Interpretation of NRS 288.150.**

Rather than observing the lack of a clear statutory directive, the district
court engaged in an erroneous analysis of NRS 288.150. The court reasoned
that because these parties were *permitted* to bargain over layoffs pursuant to

1 NRS 288.150(3), it would be “absurd” to conclude that the City has “unfettered
2 discretion” to determine “lack of funds.” (5 JA 1053:7-9.) Such “unfettered
3 discretion,” the court believed, would somehow undermine “the contractual
4 and statutory administrative processes [that] are necessary to determine
5 whether the City’s discretionary spending decisions complied with the ‘lack of
6 funds’ provisions of the CBA and NRS 288.150.” (5 JA 1053:7-12.)

7 The court’s analysis misapprehends that NRS 288.150(3) describes a
8 non-mandatory subject of bargaining and that Article 2 of the CBA describes a
9 “Management Right.” While the City could choose to negotiate over non-
10 mandatory subjects, by law it is not required to do so. Absent any provision to
11 the contrary, the rights reserved to the City in the statute and contract clearly
12 include the discretion to determine when a “lack of funds” warrants layoff.
13 The court simply disagreed with the statutory and contractual language that
14 reserves these rights to the City without qualification, and incorrectly reasoned
15 that unfettered discretion to define lack of funds equals unfettered discretion to
16 effectuate layoffs. 5 JA 1053:7-8. This concern with an abuse of the City’s
17 discretion is overstated and misplaced. To the extent an employee or union
18 perceived abuse of such discretion by the City, it could file a complaint with
19 the EMRB, which has full remedial power. *See Rosequist*, 118 Nev. at 450-51.

20 The district court never explained how the City’s decision violated NRS
21 288.150(3) or the CBA. It did not cite any other provision of NRS 288 or the
22 CBA requiring the City to reallocate funds and forego discretionary spending
23 on other legitimate priorities before it can cite “lack of funds” as a basis for

1 layoff. None exists because that decision is not subject to mandatory
2 bargaining and is an inherent right of the City. Thus, the opinion of Plaintiffs'
3 financial "expert" that the City could have chosen to reallocate funds to
4 preserve these jobs is of no import. Similarly, whether the City chose to
5 allocate discretionary funds to increase its EFB, allocate money to its street
6 fund, or to any other legitimate priority is irrelevant, as such is the function and
7 purpose of the City Council, and well within its inherent discretion. Such
8 delicate balancing of myriad priorities is precisely the type of decision that lack
9 judicially discoverable and manageable standards for resolving, and is
10 impossible to decide "without an initial policy determination of a kind clearly
11 for non-judicial discretion." *See North Lake Tahoe* at 587. Lacking any
12 evidence that the City violated a clear statutory directive or acted arbitrarily
13 and capriciously in refusing to reallocate funds to the exclusion of other
14 priorities, the district court violated the political question doctrine.

15 **4. The District Court Erred in its Application of NRS 38.**

16 In granting the injunction, the district court cited *Kilgore* for the
17 proposition that the Nevada Supreme Court specifically contemplated district
18 courts' injunctive powers in this context. (5 JA 989:11-13.) Ironically, the
19 district court overlooked *Kilgore's* explicit observation that the plain language
20 of NRS 288.110 conferring the EMRB's authority "compels the conclusion
21 that the EMRB must hear and decide the complaint before any basis will exist
22 for injunctive relief." 122 Nev. at 335. Thus, the district court's reliance on

23

1 *Kilgore* as a basis for injunctive relief was error. Its reliance on NRS 38 was
2 similarly erroneous.

3 Statutory interpretation is a question of law subject to *de novo* review.
4 *Id.* at 334. In exercising injunctive authority in contravention of *Kilgore*, the
5 district court incorrectly held that NRS 38 justifies injunctive relief as a
6 “provisional remedy” to protect the EMRB proceedings. (5 JA 989:8-9.)
7 Again, the district court misapprehended the difference between the grievance
8 and arbitration provisions of the governing CBA and the administrative
9 procedures provided by NRS 288.¹⁷

10 In fact, EMRB proceedings are not arbitration proceedings subject to
11 NRS 38. The EMRB is created by NRS 288, which vests it with the authority
12 to create its own rules and procedures. *See* NRS §§ 288.080, 288.110.
13 Nowhere in NRS 288 is Chapter 38 referenced. Likewise, NRS 38 on its face
14 has no applicability to administrative proceedings.

15 Even if this dispute did not arise over the interpretation of NRS 288.150
16 and was therefore not under the exclusive jurisdiction of the EMRB, the
17 district court incorrectly applied NRS 38.222(1). Under that subsection, any
18 provisional remedy may only be awarded “under the same conditions as if the
19 controversy were the subject of a civil action.” As discussed above, injunctive
20 relief may only be entered in a civil action where the claimant can show a

21 ¹⁷ The district court cited NRS 288.215(3) as authority that EMRB constitute
22 arbitration proceedings. (5 JA 989:10-11.) This subsection has no relationship
23 to EMRB proceedings or unfair labor practices. Rather, it is a section of NRS
288 that provides procedures for fact finding and interest arbitration between
local governments and employee organizations when bargaining negotiations
cannot be resolved between the parties—procedures **not** before the EMRB.

1 likelihood of success on the merits and irreparable harm. *Foley*, 121 Nev. at
2 80.

3 The criteria for resolving disputes between employee organizations and
4 local government employers are set forth in NRS 288.200 *et. seq.* Here, in to
5 succeed, Plaintiffs would have to prove the City has the “ability to pay” for the
6 positions. *See, e.g.*, NRS 288.200(7). By law, that determination would be
7 made “with due regard for the obligation of the local government employer to
8 provide facilities and services guaranteeing the health, welfare and safety of
9 the people residing within the political subdivision.” *Id.* The district court gave
10 no such due regard to any City obligation other than employing firefighters. In
11 fact, it disregarded the recent factfinding award regarding the City’s finances
12 and obligations, which applied the correct criteria and reached the opposite
13 conclusion of the court. The City plainly demonstrated with this decision that
14 there was no likelihood of success, which the district court ignored.

15 Furthermore, the district court did not address how its injunction would
16 “protect” any proceeding. Rather, it simply stated that it was preserving the
17 status quo to “ultimately allow the EMRB to apply its expertise in labor
18 disputes....” (5 JA 989:20-23.) Standing alone, this is an inadequate basis for
19 injunction. The court did not explain how the EMRB would be hampered from
20 applying its expertise in the absence of an injunction. Accordingly, the district
21 court erred in applying NRS 38 as a basis for injunctive relief.

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1 **5. Injunctive Relief Cannot Be Premised on a Claim that the City**
2 **Failed to Bargain Over Firefighter Safety Where Plaintiffs have**
3 **Failed to Exhaust Their Administrative Remedies and Failed to**
4 **Request Bargaining Over That Issue.**

5 Under NRS 288.270 (1)(e), it is a prohibited practice for an employer to
6 “[r]efuse to bargain collectively in good faith with the exclusive representative
7 as required by NRS 288.150.” As explained in Section 1 above, before suing
8 for a violation of NRS 288, Plaintiffs were required to exhaust their
9 administrative remedies. Plaintiffs have filed no complaint with the EMRB.

10 Even if a court could consider this claim without administrative
11 remedies having been exhausted, there is no violation of NRS 288 because the
12 Plaintiffs have waived bargaining by never even requesting it.

13 NRS 288 provides a specific process for bargaining over the issues
14 subject to mandatory bargaining. Specifically, NRS 288.180 provides:

15 “(1) Whenever an employee organization desires to negotiate
16 concerning any matter which is subject to negotiation pursuant to
17 this chapter, it shall give written notice of that desire to the local
18 government employer. If the subject of negotiation requires the
19 budgeting of money by the local government employer, the
20 employee organization shall give notice on or before February 1...
21 (3) The parties shall promptly commence negotiations. As the
22 first step, the parties shall discuss the procedures to be followed if
23 they are unable to agree on one or more issues.”

 At the hearing, Plaintiffs argued that the layoffs will negatively impact
the safety of the firefighters not being laid off. (2 JA 250:22-251:2.) Plaintiffs
argued that because the City is required to negotiate over firefighter safety, it
should be enjoined from implementing these layoffs without negotiation. 2 JA
254:10-21. The district court incorrectly agreed.¹⁸ (5 JA 1053:13-1054:10.)

¹⁸ The interpretation of NRS 288.150(2) is a question of law subject to *de novo*
review. See *Kilgore*, 122 Nev. at 334.

1 Plaintiffs' Complaint, motions, and grievance were all silent as to this
2 issue. Moreover, there is no evidence that, prior to the preliminary injunction
3 hearing, Plaintiffs ever submitted written notice to the City of its desire to
4 negotiate over firefighter safety issues as NRS 288.180 requires. Instead,
5 Plaintiffs' testimony incorrectly pinned the failure to negotiate on the City:

6 Q: Did the City, prior to sending out the 32 notices of layoffs, sit
7 down with Local 731, in good faith, and negotiate the impact and
8 effect of losing 32 firefighter positions would have on other
9 members of the Reno Fire Department in terms of safety
10 considerations?

A: They did not.

9 2 JA 255:21-256:2.

10 Whether the City attempted to negotiate the safety impact of the layoffs
11 is of no import when NRS 288.180 requires that Plaintiffs notify the City in
12 writing prior to February 1, and commence bargaining. In the event employee
13 safety is at issue, NRS 288 provides an administrative remedy (*i.e.*, bargaining
14 and subsequent procedures) that Plaintiffs failed to exhaust or even observe. (2
15 JA 386:13-18.) The City should not now bear the cost of Plaintiffs' failure to
16 raise this issue at the bargaining table.

17 The record clearly establishes that Plaintiffs had notice of any safety
18 issues by August, 2013 at the very latest, when such issues were exhaustively
19 described in the SAFER grant application. (*See* 4 JA 849-57.) IAFF provided
20 extensive input into the application, and the parties specifically discussed the
21 loss of the SAFER grant and the necessity of 50 layoffs notwithstanding any
22 potential impact to safety. (2 JA 336:5-17; 341:10-18; 353-55.) A Division
23 Chief testified that firefighter safety was an "ongoing" topic of discussion

1 before the layoffs. (2 JA 319:23-320:5.) IAFF acknowledged that these issues
2 existed when the City laid off firefighters in 2010.¹⁹ (2 JA 269:11-271:3.)
3 IAFF Vice President Williams even testified that he personally advised the
4 City Council regarding his concerns over firefighter safety.²⁰ (2 JA 275:20-
5 277:21.)

6 Plaintiffs never complied with NRS 288 even though they clearly
7 understood the impact of these layoffs. Instead, Plaintiffs waited nine months
8 to raise the issue at a hearing long after their February deadline, where they
9 framed the lack of negotiations as the City's failure. Their tactical decision not
10 to bargain over this issue should not be rewarded at the City's expense. The
11 district court erred by placing the burden to negotiate on the City, ignoring the
12 fact that the Union did not demand further negotiation, and ignoring the fourth
13 SAFER application, which clearly indicates the parties met, discussed and
14 fully understood these issues and the necessity of layoffs.

15 **6. The \$10,000 Bond is Legally Inadequate for the Budget Cuts the City**
16 **Was Forced to Implement.**

17 NRCP 65(c) provides that the purpose of a security bond is:
18 for the payment of such costs and damages as may be incurred or
19 suffered by any party who is found to have been wrongfully
20 enjoined or restrained.

21 ¹⁹ Williams admitted the Union forced the City to factfinding before it "agreed
22 with" those layoffs on advice of counsel due to the City's "lack of funds." (2
23 JA 269:11-271:3.) Williams acknowledged that even then, the City allocated
funds to other municipal priorities. *Id.* Still, he claimed it is the City's decision
to allocate funds to other priorities instead of preserving these jobs that
constitutes a breach of NRS 288 and the CBA. TR at 2 JA 262:21-263:2.

²⁰ City Council minutes do not reflect any testimony from Williams on April
23, May 7, or May 20 (4 JA 693-695, 762-775, 816-824).

1 The district court set Plaintiffs' bond at \$10,000. (5 JA 944:27.) It is
2 undisputed that the cost to the City to keep the individual firefighters on
3 payroll for one year is approximately \$3.7 to \$3.8 million annually. (2 JA
4 366:5, 393:7, 410:11-13.) Recovery for damages against a bond is limited to
5 recovery of the amount of the bond. *Tracy v. Capozzi*, 98 Nev. 120, 642 P.2d
6 591 (1982). The City attempted to protect itself from this massive shortfall by
7 objecting to the bond amount, which is woefully inadequate to protect the City
8 against the cost of continuing to employ the individual Plaintiffs and cutting
9 other programs and services. (5 JA 975.)

10 Moreover, reasonable attorney's fees in obtaining dissolution of an
11 injunction are recoverable under NRCP 65(c). *Artistic Hairdressers v. Levy*, 87
12 Nev. 313 (1971) *rev'd in part*, *Sandy Valley Assocs v. Sky Ranch Estates*
13 *Ownership Ass'n*, 117 Nev. 948 (2001) (clarifying difference between attorney
14 fees as a cost of litigation and attorney fees as an element of damages). In
15 spite of the cost of employing the firefighters and the cost of defeating this
16 meritless action, the bond amount nonetheless remains set at \$10,000.

17 As noted by the Third Circuit:

18 The injunction bond serves not only to compensate a wrongfully
19 enjoined party, but generally to limit the applicant's liability and
inform the applicant of the price of a wrongful injunction.²¹

20 A bond amount is reviewed for abuse of discretion. *See, e.g. Moore v.*
21 *IBEW Local 569*, 1998 U.S. App. LEXIS 2198 (9th Cir. 1998); *Stockslager v.*
22 *Carroll Electric Cooperative Corp.*, 528 F.2d 949 (8th Cir. 1976). Here, the

23 ²¹ At Federal law, the source of authority for injunction bonds is FRCP 65(c),
which is analogous to NRCP 65(c).

1 district court abused its discretion by not tying the bond amount to the costs
2 incurred by the City as a result of the injunction, and by ordering a bond
3 amount insufficient to inform Plaintiffs of the price of a wrongful injunction.

4 **CONCLUSION**

5 The district court erred by exercising jurisdiction over a non-justiciable
6 dispute, granting injunctive relief where it was not legally warranted, violating
7 the political question doctrine by intervening in and overturning the lawful
8 discretionary decision of the City, relying on NRS 38 as a basis for injunctive
9 relief, finding the City had failed to bargain over safety where such a claim
10 was non-justiciable, and setting an inadequate bond. Respectfully, the district
11 court should be reversed and the injunction dissolved.

12 DATED this 2nd day of September, 2014.

13 JOHN J. KADLIC
14 Reno City Attorney

15 By: /s/ Mark Dunagan
16 MARK W. DUNAGAN
17 Deputy City Attorney
18 Nevada State Bar #10574
Post Office Box 1900
Reno, Nevada 89505

19 /s/ Whitney Selert
20 WHITNEY J. SELERT
21 Nevada State Bar No. 5492
22 Fisher & Phillips LLP
3800 Howard Hughes Pkwy, Ste. 950
Las Vegas, Nevada 89169

23 *Attorneys for Appellant City of Reno*

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CERTIFICATE OF COMPLIANCE

1. 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 Office Word 2007 in Times New Roman style with Font size 14.

2. 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 is proportionately spaced, has a typeface of 14 points or more, and contains 8,420 words.

3. I hereby certify that I have read the foregoing appellate brief, and to the best of my knowledge, information, and belief, it 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. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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

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Rules of Appellate Procedure.

DATED this 2nd day of September, 2014.

JOHN J. KADLIC

Reno City Attorney

By: /s/ Mark Dunagan

MARK W. DUNAGAN
Deputy City Attorney
Nevada State Bar #10574
Post Office Box 1900
Reno, Nevada 89505
Attorneys for City of Reno

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CERTIFICATE OF ELECTRONIC SERVICE

This is to certify that on the 27th day of June, 2014, the undersigned, an employee of the Reno City Attorney's Office, electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Supreme Court of the State of Nevada, and a copy was electronically transmitted from the court to the e-mail addresses on file for:

Laurence P. Digesti, Esq.
485 W. Fifth Street
Reno NV 89503
Attorney for Plaintiffs

Sue Matuska, Esq.
Dyer Lawrence, Flaherty, Donaldson & Prunty
2805 Mountain Street
Carson City NV 89703
Attorney for Plaintiffs

FISHER & PHILLIPS LLP
Mark J. Riccardi, Esq.
Whitney J. Selert, Esq.
3800 Howard Hughes Parkway
Suite 950
Las Vegas, NV 89169
Attorneys for Defendant City of Reno

DATED this 2nd day of September, 2014.

By: /s/ Katherine Wellman
An employee of the City of Reno

Reno City Attorney
P.O. Box 1900
Reno, NV 89505

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF RENO,
Appellant,
vs.
INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 731; ET AL.,
Respondents.

No. 65934

FILED

SEP 05 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER GRANTING TELEPHONIC EXTENSION

Pursuant to a telephonic request received on September 3, 2014, amici curiae City of Henderson; City of North Las Vegas; and Clark County, Nevada shall have until September 19, 2014; to file and serve the amicus curiae brief in support of the appellant's opening brief. See NRAP 26(b)(1)(B); NRAP 29(a).

It is so ORDERED.

CLERK OF THE SUPREME COURT
TRACIE K. LINDEMAN

BY: Tracie K. Lindeman

cc: Fisher & Phillips LLP
Reno City Attorney
The Digesti Law Firm, Ltd.
Dyer, Lawrence; Penrose, Flaherty, Donaldson & Prunty
Henderson City Attorney
Clark County District Attorney
North Las Vegas City Attorney

