

1026, 1029 (2005) (explaining that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law).

CONCLUSION

We adopt the Restatement (Second) of Torts section 592A and hold that one who is required by law to publish defamatory matter is absolutely privileged to publish it when (1) the communication is made pursuant to a lawful process, and (2) the communication is made to a qualified person. Deloitte's statement to GCA's Audit Committee is therefore absolutely privileged as a matter of law because Deloitte communicated information about alleged illegal acts in accordance with federal securities law. We therefore affirm the district court's summary judgment, albeit for different reasons. *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012).

GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, and SAITTA, JJ., concur.

LAURIE BISCH, APPELLANT, v. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, A LOCAL GOVERNMENT EMPLOYER; AND LAS VEGAS POLICE PROTECTIVE ASSOCIATION, INC., RESPONDENTS.

No. 58810

May 30, 2013

302 P.3d 1108

Appeal from a district court order denying a petition for judicial review and denying declaratory and injunctive relief in an employment matter. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

Following written reprimand for misrepresenting minor patient's identity to hospital, police officer filed a complaint with the Employee Management Relations Board (EMRB) against both the Police Protective Association (PPA) and Police Department, alleging that the PPA had breached its duty of fair representation when it refused to represent her at her internal affairs interview. The EMRB denied officer's claims in their entirety, and officer appealed. The district court denied officer's appeal, and she appealed. The supreme court, PARRAGUIRRE, J., held that: (1) as matter of first impression, statute, providing that peace officer who is the subject of an investigation may have two representatives present during interrogation, does not impose an additional duty of fair representation on PPA; (2) conduct for which police officer was

disciplined was sufficiently related to the performance of her duties as a peace officer; and (3) employee did not establish that Department's reason for reprimanding her was pretextual and that she was disciplined for political reasons.

Affirmed.

Law Office of Daniel Marks and Adam Levine and Daniel Marks, Las Vegas, for Appellant.

Marquis Aurbach Coffing and Nicholas D. Crosby and Micah S. Echols, Las Vegas, for Respondent Las Vegas Metropolitan Police Department.

Kathryn Werner Collins, Las Vegas, for Respondent Las Vegas Police Protective Association, Inc.

1. LABOR AND EMPLOYMENT.

The supreme court, like the district court, gives considerable deference to rulings by the Employee Management Relations Board.

2. LABOR AND EMPLOYMENT.

The supreme court reviews pure questions of law de novo but will affirm the decision of Employee Management Relations Board concerning a question of fact if it is supported by substantial evidence.

3. ADMINISTRATIVE LAW AND PROCEDURE.

Substantial evidence to support agency decision is evidence that a reasonable person would accept as adequate to support a conclusion.

4. LABOR AND EMPLOYMENT.

In determining whether substantial evidence exists, the supreme court is limited to the record as it was presented before the Employee Management Relations Board.

5. LABOR AND EMPLOYMENT.

If the decision of the Employee Management Relations Board lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious.

6. LABOR AND EMPLOYMENT.

Despite the apparent removal of discipline from police officer's employee file, police officer's appeal from adverse decision of Employee Management Relations Board was not moot; the alleged political motivation of the reprimand and the potential effect it could have on officer's political ambitions demonstrated that an actual controversy still existed.

7. ACTION.

Moot case is one that seeks to determine an abstract question that does not rest upon existing facts or rights.

8. ACTION.

Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events.

9. APPEAL AND ERROR.

Even if case is now moot, the supreme court may still consider case as a matter of widespread importance capable of repetition, yet evading review, and if so, then appellant must demonstrate that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important.

10. APPEAL AND ERROR.

The supreme court reviews questions of law, such as statutory interpretation, de novo.

11. STATUTES.

When interpreting a statute, the court applies the plain meaning of the statute and gives the words their ordinary meaning where the statute is plain and unambiguous.

12. STATUTES.

Where the statute is ambiguous, the court looks beyond the plain language of the statute to determine its meaning.

13. STATUTES.

In order to give effect to the Legislature's intent, the court has a duty to consider the statute within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes.

14. LABOR AND EMPLOYMENT.

Statute, providing that peace officer who is the subject of an investigation may upon request have two representatives of the peace officer's choosing present with the peace officer during any phase of an interrogation or hearing relating to the investigation, does not impose any duty for any entity to provide a representative. NRS 289.080.

15. LABOR AND EMPLOYMENT.

Protection provided by statute, providing that peace officer who is the subject of an investigation may have two representatives present during interrogation, is only in regard to police officer's employer. NRS 289.080.

16. LABOR AND EMPLOYMENT.

Statute, providing that peace officer who is the subject of an investigation may upon request have two representatives of the peace officer's choosing present with the peace officer during any phase of an interrogation or hearing relating to the investigation, does not impose an additional duty of fair representation on Police Protective Association (PPA); nothing in statute or the rest of the Peace Officer Bill of Rights governs a PPA's responsibility toward its members. NRS 289.080.

17. MUNICIPAL CORPORATIONS.

Conduct for which police officer was disciplined was sufficiently related to the performance of her duties as a peace officer; while she was off duty, police officer misrepresented minor patient's identity to hospital in order to circumvent a perceived parental-consent law, officer's act of lying could plausibly bear directly upon her fitness to be an officer, and officer's untruthfulness could be used to impeach her credibility if she were called as a witness to testify at a trial.

18. MUNICIPAL CORPORATIONS.

Although language of civil service rule, authorizing discipline for misconduct tending to bring police department into public discredit, was relatively broad in terms of the types of conduct that could be disciplined, such language was not unconstitutionally vague where the disciplinary criterion was applied to conduct that directly bore upon police employee's fitness to perform the profession.

19. LABOR AND EMPLOYMENT.

In order for plaintiff to establish a prima facie case of discrimination and shift the burden to the employer in state prohibited-labor-practice claims, it is not enough for the employee to simply put forth evidence that is capable of being believed, and instead, this evidence must actually be believed by the fact-finder, and only upon meeting this burden of persuasion does the burden of proof shift to the employer.

20. MUNICIPAL CORPORATIONS.

Police officer, who was disciplined for misrepresenting minor patient's identity to hospital, established prima facie case that her discipline was politically motivated for purposes of her claim under statute, providing that discrimination against an employee by a local government employer or the employer's designated representative for political or personal reasons or affiliations constitutes a prohibited practice; it was widely known throughout police department that officer had run for sheriff and was planning to run again, and supervisor's attempts to give officer a verbal warning were repeatedly met with resistance by those higher in the chain of command. NRS 288.270(1)(f).

21. MUNICIPAL CORPORATIONS.

Police department articulated legitimate nondiscriminatory justification for reprimand of employee, who misrepresented minor patient's identity to hospital, and employee did not establish that Department's reason was pretextual and that she was disciplined for political reasons; complaint against officer was initiated by a third party, namely minor's mother, rather than police department, internal affairs investigator properly investigated and dropped insurance fraud allegation once it became apparent that officer did not commit insurance fraud, and there was no indication that police department officials actually directed the complaint to be given special attention. NRS 288.270(1)(f).

22. ADMINISTRATIVE LAW AND PROCEDURE.

The supreme court reviews an administrative decision for substantial evidence and will not reweigh evidence or witness credibility, nor will the court substitute its judgment for the administrative judge's.

Before the Court EN BANC.¹

OPINION

By the Court, PARRAGUIRRE, J.:

The Las Vegas Metropolitan Police Department (LVMPD) initiated an internal investigation of appellant Laurie Bisch regarding allegations of insurance fraud after Bisch's dog bit her daughter's 17-year-old friend, and Bisch represented to medical staff that the girl was her own daughter but did not use her employer-provided health insurance. Bisch was not provided a Police Protective Association (PPA) representative during an internal investigation meeting because she had retained a private attorney. At issue here is whether Bisch was entitled to have PPA representation present during an internal investigation meeting. We hold that she was not. NRS 289.080 did not impose a duty on the PPA to provide representation to Bisch.

Although the charges of insurance fraud were ultimately dropped, the LVMPD issued Bisch a formal written reprimand for

¹THE HONORABLE KRISTINA PICKERING, Chief Justice, voluntarily recused herself from participation in the decision of this matter.

a violation of “[c]onduct unbecoming an employee” under LVMPD Civil Service Rule 510.2(G)(1). Also at issue is whether Bisch’s discipline was based on overly broad criteria or was politically motivated. We conclude that her discipline was proper because the discipline bore directly on her fitness to perform her profession. Further, despite the fact that she established a prima facie case of political motivation, substantial evidence was presented to rebut the presumption of discrimination. We therefore affirm the district court’s decision.

FACTS

Bisch is a seasoned veteran of the LVMPD. In 2006, she ran unsuccessfully for Clark County Sheriff, and it was well known that she planned to run again in 2010.

In 2008, while Bisch was off duty, her dog bit her daughter’s 17-year-old friend. Bisch took the girl to an urgent care facility for treatment. Unable to contact the girl’s mother and concerned that the urgent care would not provide treatment without a legal guardian present, Bisch represented to the urgent care staff that the girl was actually her own daughter, using both her daughter’s name and birthday. Bisch paid for the treatment with her own funds and did not use her employer-provided health insurance.

Upon learning of the dog bite and ensuing medical treatment, the girl’s mother filed a complaint with the LVMPD, alleging that Bisch had committed insurance fraud by misrepresenting the girl’s identity to the hospital.

This complaint generated an Internal Affairs (IA) investigation into Bisch’s conduct. Although the IA investigator confirmed that Bisch had not used her insurance to pay for the treatment, IA nonetheless scheduled an interview with Bisch. In preparation for this interview, Bisch informed her PPA representative that she would bring her private attorney to the interview, but requested that a PPA representative also be present. Bisch’s PPA representative responded that, per the PPA bylaws, the PPA provided representation only when the member did not procure his or her own attorney. The interview proceeded without PPA representation.

Approximately one week later, the IA investigator determined that Bisch had not committed insurance fraud but still inquired to both the LVMPD and the district attorney’s office as to whether Bisch had violated any laws. After hearing a cursory description of Bisch’s conduct over the phone, a deputy district attorney informed the IA investigator that Bisch *may* have committed identity theft, a felony under NRS 205.463.

The IA investigator concluded his investigation by generating a report that recommended sustaining the initial complaint lodged against Bisch on the ground that she had committed identity theft, which, as a felony, was a terminable offense. Pursuant to LVMPD policy, the IA investigator’s report was sent to Sergeant Ken Ro-

mane for approval. Having received mixed signals from his own supervisor regarding the nature of the complaint against Bisch, Romane spoke with Bisch and the IA investigator directly, and decided that he could not in good faith issue any formal discipline to Bisch. Romane then contacted LVMPD's labor relations office and stated that the report needed to be "pulled back" and reconsidered, as he felt the identity theft charge was unsubstantiated.

A few months later, LVMPD informed Romane that the complaint against Bisch would be sustained, but because Bisch could not be found to have committed identity theft under NRS 205.463, the complaint would be sustained for the lesser violation of LVMPD Civil Service Rule 510.2(G)(1), which forbids "[c]onduct unbecoming an employee."

Although Romane again sought permission to simply give Bisch a verbal warning, his supervisor instructed him to give Bisch a formal written reprimand—the lowest form of official discipline. Eighteen months later, the written reprimand was removed from Bisch's employee file as required by LVMPD policy.

Following the written reprimand in 2009, Bisch filed a complaint with the Employee Management Relations Board (EMRB) against both the PPA and LVMPD. Bisch alleged that the PPA had breached its duty of fair representation when it refused to represent her at her IA interview. According to Bisch, the PPA's refusal was discriminatory because it was politically motivated by its endorsement of a different candidate for sheriff in the 2006 election. Bisch also contended that NRS 289.080, which governs peace officers' rights during an investigation, granted her the right to have two representatives of her choosing at her IA interview and that the PPA's violation of this statute constituted a separate breach of the duty of fair representation.

With regard to the LVMPD, Bisch contended that it had implemented overly broad disciplinary criteria by disciplining her for off-duty conduct that had no actual effect on her ability to perform her job. Additionally, Bisch argued that her written reprimand was a politically motivated attempt to thwart her 2010 campaign for sheriff. Following a two-day hearing, the EMRB denied Bisch's claims in their entirety. The district court likewise denied Bisch's subsequent petition for judicial review, and this appeal followed.²

DISCUSSION

In this appeal, we first address whether the current matter is moot following the removal of the written reprimand from Bisch's employee file. Concluding that it is not, we then address whether

²The district court also denied declarative and injunctive relief, but since there are no arguments regarding these issues on appeal, we do not address them here. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

the EMRB properly rejected Bisch's duty-of-fair-representation claim and determine that NRS 289.080 does not impose a duty on Bisch's PPA to provide a representative for an investigatory interview by her employer. We then address whether the EMRB properly rejected Bisch's claim that the discipline was politically motivated, concluding that the EMRB applied the correct legal standard and relied on substantial evidence in upholding LVMPD's written reprimand.

Standard of review

[Headnotes 1-5]

This court, like the district court, gives considerable deference to rulings by the Employee Management Relations Board. *City of N. Las Vegas v. State, EMRB*, 127 Nev. 631, 638, 261 P.3d 1071, 1076 (2011); see also NRS 233B.135(3). This court reviews pure questions of law de novo but will affirm the EMRB's decision concerning a question of fact if it is supported by substantial evidence. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002). Substantial evidence is evidence that a reasonable person would accept as adequate to support a conclusion. *Id.* at 899, 59 P.3d 1219. In determining whether substantial evidence exists, this court is limited to the record as it was presented before the EMRB. *Id.* If the decision lacks substantial evidentiary support, the decision is unsustainable as being arbitrary or capricious. *Id.*

Bisch's appeal is not moot

[Headnote 6]

Prior to oral argument, LVMPD notified this court that the issue of removing the written reprimand is potentially moot, as LVMPD policy requires the removal of written reprimands from employee files 18 months after the employee signs the adjudication. LVMPD represented to this court that the 18-month period had passed and that the reprimand is no longer included in Bisch's employee file.

[Headnotes 7-9]

In Nevada, "[a] moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights." *NCAA v. Univ. of Nev.*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). "Cases presenting real controversies at the time of their institution may become moot by the happening of subsequent events." *Id.* Even if this issue is now moot, we may still consider this case as a matter of widespread importance capable of repetition, yet evading review. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). If so, then Bisch must demonstrate that

(1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important. *Id.*

Despite the apparent removal of the discipline from Bisch's employee file, the alleged political motivation of the reprimand and the potential effect it could have on Bisch's political ambitions demonstrate that an actual controversy still exists. We therefore decline LVMPD's request to dismiss this appeal as moot.

The EMRB properly rejected Bisch's duty-of-fair-representation claim

In challenging the EMRB's rejection of her duty-of-fair-representation claim, Bisch contends that the PPA breached its duty by declining to have a PPA representative appear on her behalf at the IA interview even though NRS 289.080(1) grants her the right to have two representatives present. We reject this argument.

Bisch contends that the PPA breached its duty of fair representation to her by refusing to provide her with a PPA representative of her choosing at her IA interview. As detailed above, in discussing her upcoming IA interview with her PPA representative, Bisch indicated that she would be retaining private counsel for the interview but requested that a PPA representative also appear on her behalf. At that time, Bisch was informed that, per PPA policy, if she was represented at the interview by private counsel, a PPA representative would not appear on her behalf.

Bisch maintains that the PPA's policy of not providing a representative to appear on behalf of an officer who has retained counsel and the application of this policy to her in this instance constitute a violation of the representation rights provided to peace officers under NRS 289.080(1). Bisch contends that NRS 289.080 unambiguously granted her a right to have *two* representatives of her choosing at her interview and that her union's refusal to provide her with a second representative constituted a violation of this statute. Therefore, according to Bisch, the union's violation of the statute constituted a breach of its duty of fair representation.

NRS 289.080(1) provides:

[A] peace officer who is the subject of an investigation . . . may upon request have two representatives of the peace officer's choosing present with the peace officer during any phase of an interrogation or hearing relating to the investigation, including, without limitation, a lawyer, a representative of a labor union or another peace officer.

(Emphasis added.) The PPA argues that the district court correctly concluded that the plain language of the statute does not create any affirmative duty on the union to provide a second representative at

the interview, rather, it only provides a right of two representatives. The district court then looked at the broader statutory scheme to determine that the statute only provides a right of representation in regards to the employer, and does not impose any duties on the police union.

[Headnotes 10-13]

The interpretation of NRS 289.080 regarding any duties it imposes on PPAs is an issue of first impression in Nevada. This court reviews questions of law, such as statutory interpretation, *de novo*. *Nyberg v. Nev. Indus. Comm'n*, 100 Nev. 322, 324, 683 P.2d 3, 4 (1984). In doing so, we apply the plain meaning of the statute and give the words their ordinary meaning where the statute is plain and unambiguous. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Where the statute is ambiguous, we look beyond the plain language of the statute to determine its meaning. *Id.* In order to give effect to the Legislature's intent, we have a duty to consider the statute within the broader statutory scheme "'harmoniously with one another in accordance with the general purpose of those statutes.'" *S. Nev. Homebuilders Ass'n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (quoting *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

[Headnote 14]

Here, the statute does not expressly impose any affirmative duties, but only provides the employee the right to have two representatives of his or her choosing present at an interrogation, which would necessarily prevent the employer from barring the employee from having two representatives. Because the statute does not impose any duty for any entity to provide a representative, we are unable, therefore, to conclude from the plain language of the statute that NRS 289.080 supports Bisch's arguments.³

Though we reject Bisch's argument that the statute imposes a duty on the PPA on its face, looking to the broader statutory scheme provides further illumination. NRS 289.080 is part of NRS Chapter 289's "Peace Officer Bill of Rights." See *Ruiz v. City of N. Las Vegas*, 127 Nev. 254, 256-57, 255 P.3d 216, 218 (2011) (indicating that the Peace Officer Bill of Rights is codified at NRS 289.010-.120). In Nevada and other states with such statutes, law enforcement bills of rights afford peace officers certain procedural protections when dealing with their *employer* in an

³Bisch also cites *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), for the proposition that a union member has a "right" to have a union representative present during an employer interrogation. The *Weingarten* Court held only that an employer may not force an employee to participate in an interrogation without a union representative. 420 U.S. at 262. It made no mention of the union's duties to the employee/member in such a situation.

adversarial setting. For example, NRS 289.120 provides: “Any peace officer aggrieved by an action of the employer of the peace officer in violation of this chapter may, after exhausting any applicable . . . administrative remedies, apply to the district court for judicial relief.” NRS 289.120 provides judicial review for violations of this chapter by *employers* and indicates that the duties of NRS Chapter 289 are only imposed on employers, not PPAs.

[Headnotes 15, 16]

We conclude, therefore, that the protection provided by NRS 289.080 is only in regard to Bisch’s employer. Because nothing in NRS 289.080 or the rest of the Peace Officer Bill of Rights governs a PPA’s responsibility toward its members, the EMRB correctly concluded that NRS 289.080 did not impose an additional duty of fair representation on the PPA.

The EMRB properly upheld LVMPD’s written reprimand of Bisch

After the IA investigation concluded, Bisch was issued a written reprimand for violating Civil Service Rule 510.2(G)(1) by committing misconduct outside of her official duties. She challenged this discipline before the EMRB in an effort to force the LVMPD to remove the written reprimand from her employee file. Bisch contended that removal was required because improper criteria had been used in issuing the discipline under Civil Service Rule 510.2(G)(1) and because she had been improperly punished for political reasons. The EMRB rejected these arguments, and the district court similarly declined to grant judicial review. On appeal, Bisch reiterates these arguments in support of her position that the written reprimand should have been removed. For the following reasons, we conclude that the EMRB properly upheld the LVMPD’s written reprimand.

The conduct for which Bisch was disciplined was sufficiently related to the performance of her duties as a peace officer

[Headnote 17]

Bisch argues that the LVMPD disciplined her for off-duty conduct, which she argues is an unconstitutional application of arbitrary discipline criteria. The regulation under which Bisch was disciplined, Civil Service Rule 510.2(G)(1), provides a basis for discipline as follows:

The term “misconduct” shall mean not only improper action by an employee in his official capacity, but also any conduct by an employee unconnected with his official duties, [(1)] tending to bring the Department into public discredit which [(2)] tends to affect the employee’s ability to perform his duties efficiently

The LVMPD counters that the application of the disciplinary criteria was appropriate and supported by substantial evidence. We find Bisch's arguments to be without merit.

Bisch cites *Stevens v. Hocker* for the proposition that discipline criteria that punishes an employee for off-duty conduct is arbitrary and capricious unless the improper conduct bears directly on the fitness of the employee to perform his or her profession. 91 Nev. 392, 394, 536 P.2d 88, 89-90 (1975). In *Stevens*, an off-duty prison guard was arrested for disorderly conduct after drunkenly yelling at his wife. *Id.* at 393, 536 P.2d at 89. Despite having never been convicted of a crime, the guard was discharged from his job based on a rule that forbade "conduct detrimental to the good of the institution." *Id.* at 393-94, 536 P.2d at 89-90 (citation omitted). This court reversed the discipline, concluding that the language of the rule was "so illusive as to embrace an almost unlimited area of conduct." *Id.* at 394-95, 536 P.2d at 90. While the court recognized that it had previously upheld the imposition of discipline for violation of equally amorphous rules prohibiting "unprofessional conduct," the *Stevens* court reasoned that in those cases, "the conduct in issue bore directly upon fitness to perform the profession involved." *Id.* (citing *Moore v. Board of Trustees*, 88 Nev. 207, 495 P.2d 605 (1972); *Meinhold v. Clark Cnty. Sch. Dist.*, 89 Nev. 56, 506 P.2d 420 (1973)). Applying this rule, the *Stevens* court concluded that "[appellant's] off-duty transgression . . . had [no] bearing at all upon his performance as an employee of the Nevada State Prison," and therefore it reversed the prison guard's termination. *Id.* at 395, 536 P.2d at 90.

[Headnote 18]

Bisch is incorrect that *Stevens* renders the discipline for her off-duty conduct improper. Like in *Stevens*, the language of Civil Service Rule 510.2 is relatively broad in terms of the types of conduct that may be disciplined. However, like the court in *Stevens*, we do not consider such language unconstitutionally vague where the disciplinary criterion is applied to conduct that directly bears upon an employee's fitness to perform the profession. Our next step, then, is to determine whether the conduct here bears directly upon Bisch's fitness to perform her profession. A police officer's job is to uphold the law, and the act of lying to the urgent care staff in order to circumvent a perceived parental-consent law could plausibly bear directly upon Bisch's fitness to be an officer. Unlike the conduct of the prison guard in *Stevens*, Bisch's untruthfulness could be used to impeach her credibility if she were called as a witness to testify at a trial. Accordingly, protecting the integrity of the police department is a legitimate basis for imposing discipline. A number of other jurisdictions have upheld similar

discipline “where the position requires high morals, control, and discipline and the off-duty conduct is in violation of specific employment policies.” *Utah Dep't of Corr. v. Despain*, 824 P.2d 439, 446 (Utah Ct. App. 1991).⁴ Thus, we conclude that the disciplined conduct bore directly on her fitness to be an officer.⁵

Substantial evidence supports the EMRB's conclusion that Bisch was not disciplined for political reasons

NRS 288.270(1)(f) provides that discrimination against an employee by a local government employer or the employer's designated representative for “political or personal reasons or affiliations” constitutes a prohibited practice. On appeal, Bisch maintains that the EMRB should have ordered that her written reprimand be stricken from her employee file because the LVMPD improperly disciplined her for political reasons in violation of that statute. In particular, Bisch contends that she received this written reprimand not as the result of a by-the-book IA investigation, but because the LVMPD wanted to use the reprimand against her in her upcoming run for sheriff. The LVMPD counters that the EMRB decision to uphold the reprimand was proper because Bisch failed to supply sufficient evidence of political motivation, she provided no evidence that the sheriff was involved in the disciplinary investigation, and the EMRB determined that the investigation was initiated following a complaint by the dog-bite victim's mother, not at the behest of the sheriff or any of the sheriff's subordinates.

⁴*Despain* cites a number of similar cases in other states. 824 P.2d at 446 n.16 (citing *Wilson v. Swing*, 463 F. Supp. 555, 564 (M.D.N.C. 1978) (affirming the discharge of a police officer for engaging in an extramarital affair with another police officer because the termination “was clearly designed to further the Department's interest in its morale, discipline, effectiveness and reputation in the community”); *Puzick v. City of Colo. Springs*, 680 P.2d 1283, 1286 (Colo. App. 1983) (affirming suspension of an off-duty police officer for sexual misconduct because such conduct “has the effect of impairing the operation or efficiency of the department” or may bring “the department into disrepute”); *Millsap v. Cedar Rapids Civil Serv. Comm'n*, 249 N.W.2d 679, 686 (Iowa 1977) (affirming suspension of an off-duty police officer for intoxication and unbecoming conduct because “[i]t is well established that the image presented by police personnel to the general public is vitally important to the police mission”). We further note that *Despain* and the cases it cites deal with termination and suspension, whereas here the discipline was a written reprimand, a lesser level of discipline.

⁵Bisch also argues that the LVMPD unilaterally changed its discipline criteria outside of the collective bargaining process by disciplining her for conduct that did not actually bring the LVMPD into public discredit or actually affect her ability to perform her duties. We reject this argument, as Bisch did not present evidence that the LVMPD ever changed the regulation outside of the collective bargaining process, and the regulation does not require Bisch to *actually* bring the LVMPD into public discredit or affect her ability to perform, only that her conduct *tended* to do both of these things.

[Headnote 19]

In *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986), this court adopted the framework used in adjudicating federal prohibited-labor-practice claims under the National Labor Relations Act for use in resolving state prohibited-labor-practice claims against employers brought under NRS 288.270. Specifically, this court concluded that

[a]n aggrieved employee must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden of proof shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. The aggrieved employee may then offer evidence that the employer's proffered "legitimate" explanation is pretextual and thereby conclusively restore the inference of unlawful motivation.

Reno Police Protective Ass'n, 102 Nev. at 101-02, 715 P.2d at 1323 (citing *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983), *abrogated by Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276-78 (1994); *N.L.R.B. v. United Sanitation Serv.*, 737 F.2d 936, 939 (11th Cir. 1984)). This court adopted this test, referred to as the *Transportation Management* test, prior to the U.S. Supreme Court's modification of that test in *Greenwich Collieries*. Under the revised federal framework, it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed by the factfinder. *Greenwich Collieries*, 512 U.S. at 276-78. Only upon meeting this burden of persuasion does the burden of proof shift to the employer. *Id.* We find this revised framework persuasive and adopt the federal burden of persuasion for the plaintiff to establish a prima facie case of discrimination in order to shift the burden to the employer.

It appears that the EMRB applied the *Reno Police Protective Ass'n* standard, which is the pre-*Greenwich Collieries* standard and required Bisch to only satisfy the burden of production. Bisch argues that the EMRB applied the incorrect frameworks in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and *Padilla-Garcia v. Guillermo Rodriguez*, 212 F.3d 69, 77-78 (1st Cir. 2000), in determining her employment discrimination case. While the EMRB's order does not clearly state which burden of proof was applied, Bisch's argument overstates the ambiguity in the EMRB's analysis. Despite citing the *Padilla-Garcia* test, the EMRB also cited and properly applied the *Reno Police Protective Ass'n* analysis. Thus, contrary to Bisch's assertions, the EMRB did apply the *Reno Police Protective Ass'n* analysis (albeit not as mod-

ified in *Greenwich Collieries*—which only serves to change her burden of proof to a burden of persuasion). Further, even if the EMRB did not apply the heightened standard of persuasion, there is substantial evidence to support a determination that the burden of persuasion was satisfied. We therefore proceed to examine how the EMRB applied the *Reno Police Protective Association/Greenwich Collieries* test.

[Headnote 20]

Here, the EMRB first determined that Bisch had provided evidence sufficient to establish a prima facie case that her discipline was politically motivated. The EMRB noted that it was widely known throughout the LVMPD that Bisch had run for sheriff in 2006 and was planning to run again in 2010. Further, the EMRB noted that Romane, the supervisor assigned to administer the discipline, testified that when he asked the IA investigator about the report, the investigator told him it was a “tower caper”⁶ and that his attempts to give Bisch a verbal warning were repeatedly met with resistance by those higher in the chain of command. Thus, although the parties contest the meaning of the phrase “tower caper,” the EMRB determined that Bisch established a prima facie case of discrimination.

[Headnote 21]

Because Bisch established a prima facie case, the EMRB correctly concluded that the burden then shifted to the LVMPD to rebut the presumption of discrimination. See *Reno Police Protective Ass'n*, 102 Nev. at 101-02, 715 P.2d at 1323. The EMRB then determined that the LVMPD produced enough evidence to satisfy its burden regarding its nondiscriminatory justification. Specifically, the EMRB’s decision provides that the complaint against Bisch was initiated by a third party (the mother of the child bitten by Bisch’s dog), rather than the LVMPD. It also indicates that the IA investigator properly investigated and dropped the insurance fraud allegation once it became apparent that Bisch did not commit insurance fraud. The EMRB further found that it was not until this phase of the investigation when the IA investigator confirmed that Bisch misrepresented the identity of the child. The IA investigator then contacted a deputy district attorney, who advised the LVMPD that Bisch may have committed felony identity theft.

⁶Both Bisch and LVMPD agree that a tower caper is a complaint that high-ranking officials pay particular attention to. According to LVMPD, the term refers to any complaint in which a crime has potentially been committed and gets put on a list so that the head of IA can stay apprised of the investigation into the complaint. Bisch asserts that this term refers to an investigation overseen by the high-ranking officers for political purposes. The district court noted, however, that Bisch provided “no citations to any testimony or evidence in the record supporting this broad and considerably more inflammatory characterization.”

Based on that advice, the IA investigation initially concluded that Bisch had committed identity theft, a terminable offense. Upon establishing that no such felony occurred, the LVMPD limited its conclusions only to the violation of Civil Service Rule 510.2(G)(1). Ample evidence in the record supports the conclusion that this violation actually did occur. Thus, substantial evidence supports the EMRB's conclusion that the LVMPD established a nondiscriminatory reason for discipline and the burden shifted back to Bisch. See *Reno Police Protective Ass'n*, 102 Nev. at 101-02, 715 P.2d at 1323.

Bisch contends that this evidence has little to no bearing on whether her written reprimand was the result of a politically motivated investigation, and that the IA investigator should have closed the investigation after determining that no insurance fraud occurred. However, Bisch's evidence supporting an inference of discrimination is speculative, as she provides no factual basis short of one investigator's reference to the investigation as a "tower caper." There is no evidence on record that LVMPD officials actually directed the complaint to be given special attention besides this secondhand assertion, and Bisch does not provide evidence that continuing the investigation was contrary to any IA policy. Furthermore, the facts supporting the discipline itself are not in question. Accordingly, the EMRB was correct to conclude that Bisch did not satisfy her burden to show that the LVMPD's stated reasons for discipline were merely pretextual.

[Headnote 22]

As this court has previously stated, we review an administrative decision for substantial evidence and will not reweigh evidence or witness credibility, nor will we substitute our judgment for the administrative judge's. *Nellis Motors v. State, Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.3d 1061, 1066 (2008). Accordingly, we are unwilling to reverse a decision where the disciplined behavior actually occurred and the evidence of political motivation is speculative. We therefore conclude that the EMRB decision was supported by substantial evidence. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002).

Accordingly, we affirm the judgment of the district court in upholding the decision of the EMRB.

GIBBONS, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ.,
concur.

KATHERINE BROWN, APPELLANT, v.
MHC STAGECOACH, LLC, RESPONDENT.

No. 59036

May 30, 2013

301 P.3d 850

Jurisdictional screening of a proper person appeal from a district court order statistically closing a case in an employment matter. Eighth Judicial District Court, Clark County; Douglas W. Haddon, Judge.

Former employee filed suit against employer, asserting violations of civil rights. The district court granted employer's motion to enforce settlement agreement. Employee appealed, and the supreme court, *Brown v. MHC Stagecoach, LLC*, No. 57066, 2011 WL 824624 (Nev. March 8, 2011) (unpublished disposition), dismissed appeal for lack of final, appealable order. Employer then filed motion to deposit settlement proceeds. The district court granted motion and then statistically closed case. Employee appealed. The supreme court, GIBBONS, J., held that form order statistically closing case, without addressing employee's opposition to settlement agreement on employer's motion to enforce agreement and to deposit settlement proceeds, was not final, appealable order.

Dismissed.

Katherine Brown, Tacoma, Washington, in Proper Person.

Jackson Lewis LLP and *Elayna J. Youchah*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.

The district court's form order statistically closing former employee's civil rights case against employer on basis that there was a stipulated judgment, without addressing employee's opposition to settlement agreement on employer's motion to enforce agreement and to deposit settlement proceeds, was not final, appealable order, where neither of orders entered before order statistically closing case—the order granting employer's motion to enforce disputed settlement and order granting employer's motion to deposit settlement proceeds—entered judgment in favor of any party or otherwise resolved employee's claims. NRAP 3A(b)(1).

2. APPEAL AND ERROR.

The supreme court's appellate jurisdiction is limited, and it may only consider appeals authorized by statute or court rule. Const. art. 6, § 4.

3. APPEAL AND ERROR.

If an order constitutes a final judgment, then it is substantively appealable. NRAP 3A(b)(1).

4. APPEAL AND ERROR.

The finality of an order or judgment, for purposes of appeal, depends on what the order or judgment actually does, not what it is called. NRAP 3A(b)(1).

5. APPEAL AND ERROR.

To be final, for purposes of appeal, an order or judgment must dispose of all the issues presented in the case, and leave nothing for the future consideration of the court, except for post-judgment issues such as attorney fees and costs. NRAP 3A(b)(1).

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

This court has jurisdiction to consider an appeal from a district court order only when the appeal is authorized by statute or court rule. Katherine Brown appeals from a district court form order that statistically closed her case, even though the district court had not yet entered a final judgment resolving Brown's claims. The question we must decide is whether such an order is substantively appealable. It is not, as no statute or court rule authorizes an appeal from an order statistically closing a case and the order does not constitute a final, appealable judgment, as none was entered. Because we lack jurisdiction, we dismiss this appeal.

FACTS

This appeal arises from a district court employment action filed by appellant Katherine Brown against her former employer, respondent MHC Stagecoach, LLC. Brown alleged that her supervisor had violated her civil rights by engaging in discriminatory treatment, and as a result, she was constructively terminated from her job. Through counsel, Brown filed a complaint, and the parties entered into settlement negotiations in an effort to resolve the action. Brown initially authorized her attorney to settle with MHC for \$7,500. The parties dispute whether a settlement was ever actually agreed to, however, because Brown ultimately refused to sign the settlement agreement that she was presented with based on her objection to certain language in the agreement limiting the parties' ability to disclose details about the conflict and settlement. Following the breakdown of these settlement efforts, Brown's attorney requested, and was granted, leave to withdraw.

Immediately after Brown's counsel withdrew, MHC filed a motion in the district court to enforce the settlement agreement, asserting that the parties had agreed on the material terms of the settlement, rendering the agreement enforceable. As the basis for its motion, MHC furnished correspondence between MHC and Brown's former counsel and correspondence between Brown and her former counsel regarding the settlement terms. Brown, now proceeding pro se, opposed the motion, but the district court

granted the motion and entered an order setting forth the terms of the parties' settlement. The order did not enter judgment in favor of either party nor did it otherwise expressly resolve Brown's insistence that the parties did not reach a settlement. Brown appealed from that order, but this court dismissed that appeal for lack of jurisdiction, after concluding that the order was not an appealable, final judgment because it did not dismiss or formally resolve Brown's complaint.

Following the district court's grant of the motion to enforce the settlement agreement, and after the dismissal of Brown's first appeal, MHC issued a check to Brown for the settlement amount, which she refused to accept and returned to MHC marked "void." As a result, MHC filed a motion to deposit the settlement proceeds with the district court, which the district court granted. Like the prior order granting the motion to enforce the settlement, this order failed to enter judgment in favor of either party or otherwise resolve the case. Approximately two weeks after the district court granted MHC's motion to deposit the settlement proceeds, Brown filed an untimely opposition to MHC's motion and proposed order. Thereafter, without addressing Brown's opposition to MHC's motion, the district court entered a form order statistically closing the case on the basis that there had been a stipulated judgment. Brown has appealed from that order.

DISCUSSION

[Headnotes 1-5]

This court has appellate jurisdiction to review decisions of the district courts. Nev. Const. art. 6, § 4. But this court's appellate jurisdiction is limited, *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994), and we may only consider appeals authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). No statute or court rule directly provides for an appeal from an order statistically closing a case, *see* NRAP 3A(b) (designating the judgments and orders from which an appeal may be taken); however, if the order constitutes a final judgment, then it is substantively appealable under NRAP 3A(b)(1) (permitting an appeal from a final judgment in a civil action). The finality of an order or judgment depends on "what the order or judgment actually *does*, not what it is called." *Valley Bank of Nev.*, 110 Nev. at 445, 874 P.2d at 733. To be final, an order or judgment must "dispose[] of all the issues presented in the case, and leave[] nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Thus, we look to the text of the order statistically closing Brown's case to determine whether the order renders a final, appealable judgment.

The order statistically closing the underlying case is a form that, like a standard district court order, contains at the top of the page a heading identifying the court and the county, the case caption, and the case number and department. The body of the order has a title and instructs the court clerk to statistically close the case for a variety of reasons:

**CIVIL ORDER
TO STATISTICALLY CLOSE CASE**

Upon review of this matter and good cause appearing,
IT IS HEREBY ORDERED that the Clerk of the Court is hereby directed to statistically close this case for the following reason:

DISPOSITIONS:

- Voluntary Dismissal
- Transferred (before/during trial)
- Involuntary (statutory) Dismissal
- Judgment on Arbitration Award
- Stipulated Dismissal
- Stipulated Judgment
- Default Judgment
- Motion to Dismiss (by Defendant)
- Summary Judgment
- Non-Jury (bench) Trial
- Jury Trial

At the bottom of the form order is the date the order was entered and the district court judge's signature. The order contains no other language or directives. Drawing from its language, the only effect of the challenged order at issue in this case is that the district court clerk has been directed to statistically close the case based on the reason indicated by the checked box—"Stipulated Judgment."

The language of the order seems to anticipate that a disposition in the case has already been entered and that the previous entry of such a disposition forms the basis for the statistical closure of the case. But Brown still disputes the validity of the settlement agreement ordered by the district court. And neither of the district court orders entered before the order statistically closing the case—the order granting respondent's motion to enforce the disputed settlement and the order granting respondent's motion to deposit the settlement proceeds—entered judgment in favor of any party or otherwise resolved Brown's claims. As a result, these determinations do not constitute final, appealable judgments. *See Valley*

Bank of Nev., 110 Nev. at 446, 874 P.2d at 733-34 (concluding that the district court's order approving a settlement agreement was not a final, appealable judgment because the parties' claims were not dismissed or otherwise resolved); *St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.*, 272 S.W.3d 504, 505 (Mo. Ct. App. 2008) (noting that an order granting a motion to enforce a settlement agreement becomes final and appealable only after a judgment on the settlement is entered and the case is dismissed); see also *Resnick v. Valente*, 97 Nev. 615, 615-16, 637 P.2d 1205, 1205 (1981) (considering an appeal from an order granting a motion to enforce a settlement agreement where a judgment was also entered pursuant to the motion). Thus, it appears that there was no final judgment or disposition in Brown's case below to provide the basis for statistically closing the case in accordance with the listed dispositions.¹

For the foregoing reasons, the order Brown challenges cannot be construed as a final, appealable judgment within the ambit of NRAP 3A(b)(1). See *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 481-82 (3d Cir. 2006) (determining that "[a]n order reciting that no further action is contemplated and directing the clerk to mark the case closed does not become final for purposes of appellate jurisdiction merely by reason of the execution of that order and its entry on the docket"); *Delgrosso v. Spang & Co.*, 903 F.2d 234, 236 (3d Cir. 1990) (considering an appeal from an order that directed the clerk of the court to "mark the above captioned case closed" but noting that "[n]othing contained in this order shall be considered a dismissal or disposition of th[e] matter" and concluding that the order was not final for appellate purposes). As no other statute or court rule provides for an appeal from such an order statistically closing a case, this court lacks jurisdiction to consider this appeal, and it must therefore be dismissed. *Taylor Constr. Co.*, 100 Nev. at 209, 678 P.2d at 1153.

Once the district court formally resolves the underlying case by entering a judgment or order that finally and completely resolves Brown's claims based on its prior order enforcing the settlement agreement,² if aggrieved, Brown may appeal from that disposition to this court. See *Lee*, 116 Nev. at 426, 996 P.2d at 417; *Valley Bank of Nev.*, 110 Nev. at 446, 874 P.2d at 733-34. Further, Brown will be able to challenge in the context of that appeal the in-

¹Because the order only serves to direct the statistical closure of a case rather than to resolve any claims pending in that case, our conclusion would be the same had the district court checked the box indicating that the basis for the statistical closure was a voluntary, involuntary, or stipulated dismissal or a default or summary judgment.

²Because we conclude that we lack jurisdiction over this appeal, we do not reach the merits of Brown's argument disputing the validity of the settlement.

terlocutory orders entered in the underlying matter, including the orders granting respondent's motions to enforce the settlement agreement and to deposit the settlement proceeds. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (explaining that interlocutory orders may be challenged when appealing a final judgment).

PICKERING, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

CITY OF SPARKS; SPARKS CIVIL SERVICE COMMISSION,
APPELLANTS, v. SPARKS MUNICIPAL COURT, RESPONDENT.

No. 59139

May 30, 2013

302 P.3d 1118

Appeal from a district court order granting a preliminary injunction. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Municipal Court filed complaint against City, seeking declaratory and injunctive relief and for writs of mandamus and prohibition to establish its independence from City to make personnel and budget decisions. The district court entered order granting a preliminary injunction prohibiting City from asserting control over Municipal Court employees. City appealed. The supreme court, HARDESTY, J., held that: (1) Nevada Constitution did not authorize City to exert control over Municipal employees, (2) Municipal Court had inherent authority to control its employees, (3) sections of city charter violated state constitutional provision requiring separation of powers, but (4) preliminary injunction prohibiting City from interfering with Municipal Court's use of its budget was overbroad and premature.

Affirmed in part, reversed in part, and remanded.

PICKERING, C.J., dissented in part.

Lemons, Grundy & Eisenberg and *Alice Campos Mercado*, Reno, for Appellants.

Holland & Hart LLP and *Anthony L. Hall* and *Deanna C. Brinkerhoff*, Reno, for Respondent.

Kaempfer Crowell Renshaw Gronauer & Fiorentino and *Jason D. Woodbury*, Carson City, for Amici Curiae Nevada District

Judges Association; the Honorable T. Arthur Ritchie, Jr., in his capacity as President of the Nevada District Judges Association; the Nevada Judges of Limited Jurisdiction; and the Honorable John Tatro, in his capacity as President of the Nevada Judges of Limited Jurisdiction.

1. INJUNCTION.

Because a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm, as a requirement for issuance of preliminary injunction. NRS 33.010.

2. INJUNCTION.

Whether to grant or deny a preliminary injunction is within the district court's discretion. NRS 33.010.

3. APPEAL AND ERROR.

In the context of an appeal from a preliminary injunction, the supreme court reviews questions of law de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support.

4. COURTS; MUNICIPAL CORPORATIONS.

Section of Nevada Constitution, providing that "in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control," did not authorize the City to control hiring, supervision, or discipline of the Municipal Court employees, since provision did not apply to municipal court employees; intent of provision was to exempt municipalities from constitutional provision prohibiting Legislature from creating any office having a tenure longer than four years, and to the extent that provision applied to the City employees, it applied only to employees who were also considered to be officers. Const. art. 15, § 11.

5. CONSTITUTIONAL LAW.

The rules of statutory construction apply to the interpretation of a constitutional provision.

6. CONSTITUTIONAL LAW.

When interpreting a constitutional provision, the supreme court looks first to the plain language of the provision, and, if the meaning of that language is unambiguous, the court does not look beyond it, unless it is clear that the ordinary meaning was not intended by the drafters.

7. CONSTITUTIONAL LAW.

A constitutional provision is ambiguous if its language may be reasonably interpreted in two or more inconsistent ways.

8. CONSTITUTIONAL LAW.

In order to interpret an ambiguous constitutional provision, the supreme court considers the provision's history, public policy, and reason to determine what the voters intended.

9. CONSTITUTIONAL LAW.

The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.

10. CONSTITUTIONAL LAW; COURTS.

Inherent judicial powers stem from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence.

11. CONSTITUTIONAL LAW; COURTS.

Municipal courts, as coequal branches of their local governments and a part of the state constitutional judicial system, are protected by the constitutional separation of powers doctrine and possess inherent judicial powers to the same extent as the other courts of the state. Const. art. 3, § 1; art. 6, § 1.

12. CONSTITUTIONAL LAW.

Under the separation of powers doctrine of the Nevada Constitution, each of the three branches of government is vested with authority to exercise its own functions, and no branch may exercise the functions of another unless expressly permitted to do so by the Nevada Constitution. Const. art. 3, § 1.

13. COURTS.

Courts, whose judicial functions involve hearing and resolving legal controversies, possess the authority to take any actions that are inherent or incidental to that function.

14. CONSTITUTIONAL LAW.

Any statutory scheme that would allow the executive or legislative branches of a municipal government to control or exercise the inherent powers of the municipal court would violate the separation of powers doctrine. Const. art. 3, § 1.

15. CONSTITUTIONAL LAW.

Each governmental branch has certain inherent powers, by virtue of its sheer existence and as a coequal branch of government, to carry out its basic functions; this authority is broader and more fundamental than the inherent power conferred by separation of powers. Const. art. 3, § 1.

16. CONSTITUTIONAL LAW.

In addition to the specific powers assigned to the governmental branches, each branch has inherent ministerial powers, which include methods of implementation to accomplish or put into effect the basic function of that branch.

17. CONSTITUTIONAL LAW.

Within the inherent ministerial functions of each branch of government, the powers of the branches sometimes appear to overlap; to the extent that any duplication of authority can be traced back to the individual branch's essential functions and basic source of power, the overlapping may be valid, but it is essential to the balance of powers that each branch is careful not to impinge on the authority of the other two branches, even in a small and seemingly harmless manner. Const. art. 3, § 1.

18. CONSTITUTIONAL LAW.

Even apart from any constitutional or statutory concerns, based solely on a court's inherent authority to manage its own affairs, the legislative and executive branches are strictly prohibited from infringing on a court's incidental powers reasonable and necessary to carry out the duties required for the administration of justice.

19. CONSTITUTIONAL LAW; COURTS.

If an action falling under a court's inherent authority is part of the court's day-to-day functioning or regular management of its internal affairs, the court is empowered to perform that action without the need for further justification and without interference from the legislative or executive branches; in contrast, if a court's need to exercise its inherent authority arises outside of the court's regular management of its affairs, the invocation of the court's inherent powers must be justified by demon-

strating that some circumstance requires the court to invoke such authority in order to perform its constitutional functions.

20. CONSTITUTIONAL LAW; COURTS; INJUNCTION.

The Municipal Court had inherent authority to manage and control court employees, and the City's interference with that authority was a violation of constitutional principle of separation of powers, and thus, the City could be subject to preliminary injunction prohibiting it from exercising any power over Municipal Court employees, including their selection, promotion, or termination; ability to manage Court employees was necessary to the Municipal Court's ability to carry out its essential functions to decide controversies and enforce judgments, and management of Court employees was not related to any of the City's express legislative or executive functions. Const. art. 3, § 1.

21. CONSTITUTIONAL LAW; COURTS; MUNICIPAL CORPORATIONS.

Sections of city charter, giving city manager authority to appoint any employee employed in a bona fide executive, administrative, or professional capacity, and requiring city manager to exercise control over all departments of the City government and its officers and employees, were invalid as violating state constitutional provision requiring separation of powers, to the extent that the charter sections permitted the City to interfere with the Municipal Court's management and control of Municipal Court employees. Const. art. 3, § 1.

22. INJUNCTION.

Preliminary injunction in favor of the Municipal Court, prohibiting the City from interfering with the Municipal Court's ability to use, distribute, allocate, and make decisions regarding the budget adopted for it by the City, was overbroad and premature; prior to enjoining the City from interfering with the Municipal Court's use of its budget, the district court was required to determine whether any actual budget controversy existed, whether any action the Municipal Court sought would be a permissible exercise of the Municipal Court's ability to manage its internal affairs, and whether the Municipal Court's intended action was reasonable and necessary to allow it to carry out its constitutional duty to administer justice.

23. MUNICIPAL CORPORATIONS.

If a municipal court needs funds for particular items or expenses, it can compel such funding from a city on a showing that the requests are reasonable and necessary to carry out its powers and duties in the administration of justice.

24. MUNICIPAL CORPORATIONS.

Once a municipal court's general budget is appropriated to it by a city, the municipal court possesses the power to make independent financial decisions as to how to allocate the funds within that budget pursuant to its inherent authority to manage its internal affairs.

25. MUNICIPAL CORPORATIONS.

Statute permitting a political subdivision's attorney to employ special counsel if he or she determines that it could constitute a conflict of interest for the legal services to be rendered by that attorney, did not apply to counsel retained by the Municipal Court, in action by the Municipal Court seeking injunction to prohibit the City from interfering with the Court's control over Court employees; counsel had not been retained by the city attorney and was responsible to the Municipal Court and not to the city council. NRS 41.0344.

26. MUNICIPAL CORPORATIONS.

The Municipal Court had inherent power to retain outside counsel to represent it in action by the Municipal Court seeking injunction to prohibit the City from interfering with the Court's control over Court employees; pursuant to its inherent power to protect its ability to perform its constitutional functions, the Municipal Court had the right to hire the counsel of its choosing, without interference from the City.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

The City of Sparks has traditionally made most personnel and budget decisions for the Sparks Municipal Court. Following a dispute between these entities over the City's exercise of this authority, the district court enjoined the City from making these decisions in the future based on the Municipal Court's broad authority to manage its own affairs. We are asked to decide whether the separation of powers doctrine and the Municipal Court's inherent authority bar the City from interfering with the Municipal Court's control over personnel decisions. We conclude that they do, and we therefore affirm that portion of the district court's order enjoining the City from interfering with the Municipal Court's ability to make personnel decisions. As to the parties' budgetary dispute, we conclude that the Municipal Court's inherent power over its budget must be weighed against the City's authority over government finances. Because the parties have failed to develop the record sufficiently for us to determine whether the Municipal Court properly invoked its inherent powers on this point, we reverse the district court's order as to this issue and remand the matter for further proceedings consistent with this opinion.

BACKGROUND

Appellant City of Sparks is a municipal corporation, organized and existing under the laws of the State of Nevada through a charter approved by the Legislature. By statute, Sparks, like all Nevada cities, is required to have a municipal court with jurisdiction over certain civil and criminal actions arising under city ordinances and other matters directly involving the City. *See* NRS 5.010, 5.050. The Sparks City Charter provides for respondent Sparks Municipal Court in Article IV, entitled "Judicial Department." In addition to the judicial department, the charter separates the governmental functions of the City into a legislative department, which is made up of the Sparks City Council, *see* Sparks City Charter art. II, § 2.010, and the executive department, which consists of the

mayor, the city manager, and the city attorney, among other city officers.¹ *See* Sparks City Charter art. III, §§ 3.010-.070. Thus, the structure of the Sparks government mirrors the tripartite system of government established for the state by the Nevada Constitution. Nev. Const. art. 3, § 1.

Historically, the City has subjected certain employees of the Municipal Court to provisions of the Sparks City Charter and to the Sparks Civil Service Commission's² rules, which also govern the City's employees. These provisions and rules have allowed the City to make or influence decisions regarding the selection, discipline, transfer, and termination of Municipal Court employees. The City has also routinely entered into collective bargaining agreements with two labor organizations that have further affected the terms and conditions of employment, including wages and disciplinary procedures, for certain Municipal Court employees.

The events underlying this appeal were set in motion when the Sparks City Council asked the Municipal Court to reduce the salaries of its court administrator and judicial assistant by 7.5 percent beginning on July 1, 2010, and an additional 7.5 percent effective July 1, 2011, which appears to result in a 15-percent salary reduction for those employees over a two-year period. The request prompted the Municipal Court to question the City's authority to require it to reduce the salaries of these Municipal Court positions by specific amounts when the positions are exempt from the city charter provisions and civil service rules governing City employees. In presenting its concerns to the City, the Municipal Court also asserted that it holds certain inherent powers, pursuant to the separation of powers doctrine of the Nevada Constitution and by virtue of its sheer existence. The Municipal Court contended that those inherent powers include the authority to administer its own budget once that budget is appropriated to it by the City and the power to manage the two employees who would be affected by the proposed reductions.

¹As the powers of both the legislative and the executive branches of the City of Sparks are implicated by the issues raised in this appeal, we refer to those branches as appropriate in this opinion, although we note that the particular government entities making up these branches have not been specifically designated as parties in these proceedings. *See* Sparks City Charter art. II, § 2.010 (vesting the legislative power of the City in the city council); Sparks City Charter art. III, §§ 3.010, 3.020, 3.040, and 3.050 (identifying the duties of the mayor, city manager, city clerk, and city attorney, respectively, in their roles as part of the City's executive branch).

²Appellant Sparks Civil Service Commission is a body of five Sparks residents appointed by the mayor that is responsible for adopting regulations governing the selection and appointment of all employees of the City. Sparks City Charter art. IX, §§ 9.010, 9.020.

The Municipal Court indicated that, as a result of these objections, it had instructed the court administrator and the judicial assistant not to execute any documents required to effectuate the salary reductions. In later correspondence, however, the Municipal Court communicated its intention to satisfy the City's budget-cutting objectives, but the record fails to disclose how the reduction was accomplished.

While the Municipal Court purportedly complied with the budget reductions, it continued to seek clarification from the City as to its rights in connection with what the Municipal Court viewed as the City's unconstitutional interference with the Municipal Court's inherent power to administer its budget and manage its employees, including those who had traditionally been treated as City employees: the court administrator, administrative assistant, marshals, court clerk/interpreters, and court clerks I and II.³ The Municipal Court asserted that the authority to manage these employees gave it the power to make all decisions as to hiring and firing, set the terms and conditions of employment, and determine employee wages. Further, the Municipal Court contended that it was not bound by the collective bargaining agreements negotiated between the City and the labor organizations, the Sparks Police Protective Association (SPPA) and the Operating Engineers Local Union No. 3 (OE3).

At the request of the Municipal Court, the City obtained a legal opinion on these issues from the city attorney, but later asserted that it could not share the opinion with the Municipal Court because doing so would violate the City's attorney-client privilege. Thus, it was agreed that the Municipal Court would need to retain outside counsel to address the questions on which it sought clarification. The Municipal Court thereafter engaged independent counsel, who provided it with a legal opinion that concluded that the Municipal Court had the authority to make its own personnel decisions. As to its right to manage its budget, the opinion stated only that "the Court has the discretion to use the budget allocated to it by the City in the manner it sees fit."

Pursuant to the opinion of counsel, the Municipal Court notified the City that it would begin the process of taking control of its personnel by notifying the SPPA and the OE3 that the Municipal Court was not subject to any collective bargaining agreements, informing its employees that they would no longer be considered

³In particular, Section 9.020 of the Sparks City Charter directs the Civil Service Commission to adopt regulations regarding recruitment, promotion, and discipline of City employees; Section 9.060 requires department heads, including the Municipal Court judges, to fill employee vacancies from a list of applicants created by the Commission; and Section 9.100 permits the city manager or his or her representative to suspend, dismiss, or demote covered employees.

civil service employees covered by the civil service rules, and explaining to its employees that it would thereafter be responsible for making all substantive personnel decisions. The Municipal Court also stated that it would “continue to meet the City’s budget requirements, to the extent feasible to sustain the Municipal Court’s essential functions, acknowledging the Municipal Court’s ultimate responsibility, and control of the allocation of its budget.” The Municipal Court further objected to the method for establishing its budget in the future by requiring an itemized allocation of the appropriation.

In response to the Municipal Court’s declaration, the City expressed concern that the Municipal Court’s proposed actions could expose both the Court and the City to liability from affected Court employees. The City argued that the Municipal Court’s inherent powers did not provide it with unfettered control over its employees in violation of their civil service status and any rights provided to them under collective bargaining agreements and state law. Nevertheless, the City agreed to work with the Municipal Court towards reaching the goal of assuming greater control over its employees. In the months that followed, the City and the Municipal Court engaged in negotiations in an attempt to draft mutually agreeable proposed amendments to the Sparks City Charter provisions affecting the Municipal Court’s ability to manage its employees. The City and the Municipal Court also discussed approaching the SPPA and the OE3 regarding voluntary withdrawal of union representation of Municipal Court employees. During this time, the OE3 withdrew any claim of representation of Municipal Court employees, but the SPPA did not.

Ultimately, the City and the Municipal Court were unable to reach an agreement on amendments to the Sparks City Charter. When the negotiations failed, the Municipal Court filed a complaint in the district court for declaratory and injunctive relief and for writs of mandamus and prohibition to establish its independence from the City to make personnel and budget decisions. In conjunction with its complaint, the Municipal Court also filed an application for a preliminary injunction, which is the subject of this appeal. In the application, the Municipal Court argued that it had the inherent power to make independent decisions regarding its personnel, as well as to determine how to use the budget allocated to it by the City. The Municipal Court asked for an injunction preventing the City from entering into collective bargaining agreements purporting to cover Municipal Court employees and from enforcing provisions of the Sparks City Charter or the civil service rules that the Municipal Court believed interfered with its right to manage its employees and control its budget. Finally, the Municipal Court asserted that the City had threatened to withhold

funding for the Municipal Court's attorneys in this case and requested that the City be prohibited from interfering with its right to retain special counsel in situations such as this one.

The City opposed the application for a preliminary injunction, arguing that the Municipal Court had not met its burden of showing that it would be irreparably harmed in the absence of an injunction or that it had a reasonable likelihood of success on the merits in the underlying action. In particular, although the City recognized that the Municipal Court held certain inherent powers, the City contended that it could not exercise such powers in the absence of a showing that it was unable to perform its judicial functions using established methods. Moreover, the City asserted that the Municipal Court had failed to show that any action of the City had impeded its ability to perform its core constitutional functions.

The Municipal Court filed a reply, asserting that it had suffered and continued to suffer irreparable harm because, by asserting control over the Municipal Court's management of its personnel and budget, the City had impeded the Municipal Court's ability to perform its ministerial functions. As examples, the Municipal Court noted, among other things, that it had been required to close for one hour each day due to budget constraints and that the City had prevented it from using certain volunteers to ensure that all of its functions were fulfilled.

After a hearing, the district court entered an order granting the Municipal Court's application for a preliminary injunction. Concluding that the Municipal Court has the inherent authority to independently manage its employees and its budget, the district court broadly enjoined the City from asserting any control over the Municipal Court's employees, including their selection, discipline, and termination, and from applying either the civil service rules or certain Sparks City Charter provisions to the Municipal Court. The district court also prohibited the City from entering into or attempting to enforce collective bargaining agreements purporting to cover Municipal Court employees. Although the district court found that the Municipal Court's employees were never properly covered by the civil service rules or the collective bargaining agreements, and thus, did not have any property rights under those sources, the district court ordered the Municipal Court not to withdraw any of the protections purportedly supplied by such rules or agreements without giving its employees 30 days' notice to allow the employees to decide if they wanted to retain their employment under the new rules established by the Municipal Court. As to the budget, the district court enjoined the City from "interfering with the Municipal Court's ability to use, distribute, allocate, and make decisions regarding the budget adopted for it by the City." Finally, with regard to the Municipal Court's retention of special counsel, the district court enjoined the City from applying

NRS 41.0344 or Sparks City Charter art. III, § 3.055 in the pending proceedings. This appeal followed.

DISCUSSION

Standard of review

[Headnotes 1-3]

A preliminary injunction is available when it appears from the complaint that the moving party has a reasonable likelihood of success on the merits and the nonmoving party's conduct, if allowed to continue, will cause the moving party irreparable harm for which compensatory relief is inadequate. NRS 33.010; *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm. See *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Whether to grant or deny a preliminary injunction is within the district court's discretion. *Nevadans for Sound Gov't*, 120 Nev. at 721, 100 P.3d at 187. In the context of an appeal from a preliminary injunction, we review questions of law de novo and the district court's factual findings for clear error or a lack of substantial evidentiary support. *Id.*

We begin our consideration of the issues presented in this appeal by examining the Nevada Constitution's impact on the parties' dispute over whether the City or the Municipal Court is properly vested with the authority to manage and control Municipal Court employees, before addressing the issues concerning the budget. As to the personnel issues, we must determine whether Article 15, Section 11 of the Nevada Constitution authorizes the City to control the hiring, supervision, and discipline of Municipal Court employees based on the inclusion of certain provisions to that effect in the Sparks City Charter. Because we conclude that the Constitution does not confer such authority on the City, we must next address whether the City's exercise of such control unconstitutionally interferes with the inherent powers possessed by the Municipal Court based on the separation of powers doctrine and by virtue of its sheer existence.

Article 15, Section 11

[Headnote 4]

Initially, we note that the issues presented by this matter arose out of the City's request that the Municipal Court reduce the salaries of the court administrator and judicial assistant. The City concedes, as it must, that under Sparks City Charter art. IV, §§ 4.023 and 4.025, the Municipal Court has "virtually unfettered authority" over the hiring and firing of its court administrator

and judicial assistant. Thus, what is at issue here is whether the Municipal Court or the City may exercise control over the remaining Municipal Court employees, namely, the marshals, court clerk/interpreters, and court clerks I and II. The City claims authority to control certain aspects of the Municipal Court's personnel decisions based on provisions of the city charter, which it contends give the City authority to make decisions with regard to the hiring, supervision, and discipline of Municipal Court employees. But the charter cannot provide the City with authority that is otherwise unconstitutional.

The City attempts to find a viable constitutional basis for the authority to control Municipal Court employees, conferred by the charter, in Article 15, Section 11 of the Nevada Constitution, which provides that

[t]he tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four (4) years, except as herein otherwise provided in this Constitution. In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control.

The City more specifically contends that Article 15, Section 11 permits a municipality to enact charter provisions governing the tenure and dismissal of all city employees, including Municipal Court employees. The Municipal Court asserts that Article 15, Section 11 applies only to city officers, as distinguished from city employees.⁴

This court has long recognized the distinction between an "officer" and an "employee." *Compare Eads v. City of Boulder City*, 94 Nev. 735, 736-37, 587 P.2d 39, 40-41 (1978) (holding that a position created and defined by law, which invested the person holding it with a "portion of the sovereign functions of government," was an office), *with Mullen v. Clark Cnty.*, 89 Nev. 308, 310-11, 511 P.2d 1036, 1037-38 (1973) (concluding that an individual was an employee and not an officer when his duties were defined by his superiors, "no tenure attached to his position," he could not hire or fire other employees, and "he was wholly subordinate and responsible to his superiors"); *see also State v. Cole*,

⁴The Municipal Court alternatively argues that its employees are not city employees. Because we conclude that Article 15, Section 11 generally does not apply to city employees, we need not reach the Municipal Court's alternative argument.

38 Nev. 215, 148 P. 551 (1915) (determining that a party was not an officer for the purpose of a constitutional provision prohibiting a senator from being appointed to an office created during the term in which the senator was elected). The parties do not dispute that the controversy in this action involves only employees of the Municipal Court, as opposed to officers. Thus, if Article 15, Section 11 applies only to officers, it has no application to this action. But if Article 15, Section 11 applies generally to employees as well as officers, the charter provisions provide a valid basis for the City to exercise control over the tenure and dismissal of Municipal Court employees.

[Headnotes 5-9]

Determining whether Article 15, Section 11 applies to city employees requires us to interpret that constitutional provision. “The rules of statutory construction apply to the interpretation of a constitutional provision.” *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). Thus, we look first to the plain language of the provision, and, if the meaning of that language is unambiguous, we do not look beyond it, *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.2d 1132, 1135 (2004), unless it is clear that the ordinary meaning was not intended by the drafters. *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722 (2011). A provision is ambiguous if its language may be reasonably interpreted in two or more inconsistent ways. *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010). In order to interpret an ambiguous constitutional provision, we consider “the provision’s history, public policy, and reason to determine what the voters intended.” *Id.* (quoting *Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008)). “The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.” *Id.* (internal quotations omitted).

On its face, the relevant language of Article 15, Section 11 is ambiguous. In particular, although the text refers to “any officer or employee” of a municipality, it also states that the charter will control as to the “tenure of office or the dismissal from office” of those officers or employees. Nev. Const. art. 15, § 11 (emphasis added). This creates an ambiguity because reading the provision to apply only to officers appears to render the phrase “or employee” meaningless, while reading it to apply to both officers and employees seems to render the phrases “of office” and “from office” meaningless. *See Eads*, 94 Nev. at 736-37, 587 P.2d at 40-41 (holding that a position created and defined by law, which invested the person holding it with a “portion of the sovereign functions of the government,” was an office). Additionally, as this

court's cases have specifically associated "tenure" with officers in discussing the differences between officers and employees, *see Mullen*, 89 Nev. at 311, 511 P.2d at 1038 (concluding that an individual was an employee, rather than an officer, in part because "no tenure attached to his position"); *Cole*, 38 Nev. at 223, 148 P. at 553 (explaining that "[t]he great weight of authority holds the term 'office' to embrace the ideas of tenure, duration, fees, or emoluments, and duties"), reading the provision to apply to employees as well as officers also would arguably be contrary to the usual meaning of the term "tenure."

In the face of this ambiguity, we look beyond the language of the provision to determine the intent of the voters in approving the amendment that added this language to Article 15, Section 11. *See Strickland*, 126 Nev. at 234, 235 P.3d at 608. Prior to 1946, Article 15, Section 11 provided only that

[t]he tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, but the legislature shall not create any office the tenure of which shall be longer than four (4) years, except as herein otherwise provided in this constitution.

1945 Nev. Const. art. 15, § 11, at 56. As originally drafted, Article 15, Section 11 plainly applied only to officers, as the provision did not even mention employees. In 1946, the provision was amended to add the final sentence, at issue here, stating that, "[i]n the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control." *See* 1943 Nev. Stat., Assembly Joint Resolution No. 19, at 325; 1945 Nev. Stat., Assembly Joint Resolution No. 10, at 505; 1947 Nev. Const. art. 15, § 11, at 56.

The stated purpose of the 1946 amendment was "to except [a] municipality from the present constitutional provision that the legislature shall not create any office the tenure of which shall be longer than four years." Legal Notice, *Amendment to the Constitution to Be Voted Upon in State of Nevada at General Election, November 5, 1946*, Nevada State Journal, October 5, 1946, at 9. Because the amendment was intended to create an exception to the existing rule, it follows that only those who had been subject to the pre-amendment provision were meant to be included in the exception. Applying this reasoning, the amendment would not have been intended to apply to employees, as they were not subject to the pre-amendment version of the provision.

This reasoning, however, leads to the question of why the drafters included the term employee in the amended provision if

employees were not included within the rule or the exception. The answer to this query is that it appears that the drafters believed that certain city employees, particularly employees within the civil service, were considered to be officers, and thus, were subject to Article 15, Section 11. Editorial, *Question No. 1*, Nevada State Journal, November 2, 1946, at 4 (stating that “[e]mployees of cities, holding civil service status, are considered [to be] holding office and consequently it is contended their tenure of office would be limited to four years by strict application of the constitution”). As a result, the drafters appear to have intended to exempt from the provision any such employees who were subject to the provision because, in the drafter’s view, they were considered to be officers. But as is clear from our jurisprudence, officers are fundamentally different from employees, and thus the employees that this amendment sought to exempt from Article 15, Section 11 were never subject to that provision to begin with based upon the very nature of their roles as employees rather than officers. See *Eads*, 94 Nev. at 736-37, 587 P.2d at 40-41; *Mullen*, 89 Nev. at 311, 511 P.2d at 1038; *Cole*, 38 Nev. at 223, 148 P. at 553. Therefore, in seeking to clarify that employees were not subject to this provision, the amendment instead conflated the meaning of the terms “officers” and “employees” and created the very ambiguity in Article 15, Section 11 that we must now resolve here.

In advancing a literal reading of the text of the amendment to Article 15, Section 11, so that both officers and employees can be constitutionally subject to the charter provisions at issue here, our concurring and dissenting colleague ignores the purpose behind this amendment and the fundamental misapprehension regarding the applicability of the pre-amendment version of Article 15, Section 11 to employees that spurred the amendment’s enactment. Adopting the approach taken by our colleague would require us to ignore the well-established distinctions between officers and employees and would only serve to perpetuate the conflation of these terms created by this amendment, which we will not do.

Based on the purpose of the amendment and the apparent intent of the drafters and voters, we conclude that, to the extent that Article 15, Section 11 may apply to city employees, it applies only to employees who are also considered to be officers. In reaching this conclusion, we recognize that, given this court’s precedent regarding the differences between officers and employees, it is not clear which, if any, city employees would be deemed to fall into this category. Nevertheless, as it is undisputed that the Municipal Court employees at issue in this case are not considered to be officers, and thus, would not fall under the ambit of Article 15, Section 11, it is not necessary to reach that question here. Thus, Article 15, Section 11 does not render the charter provisions authorizing the City to make decisions regarding the hiring, su-

pervision, and discipline of Municipal Court employees constitutional, and we therefore turn to whether the inherent authority and separation of powers doctrines bar the application of these charter provisions to Municipal Court employees.

Inherent powers

[Headnotes 10, 11]

This court has long recognized that “the judiciary, as a coequal branch of government, has the inherent power to protect itself and to administer its affairs.” *City of N. Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 294, 550 P.2d 399, 400 (1976). “Inherent judicial powers stem from two sources: the separation of powers doctrine and the power inherent in a court by virtue of its sheer existence.” *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Of particular importance here, municipal courts, as coequal branches of their local governments, see *Daines*, 92 Nev. at 295, 550 P.2d at 400, and a part of the state constitutional judicial system,⁵ see Nev. Const. art. 6, § 1 (authorizing the Legislature to establish municipal courts as part of the court system vested with the judicial power of the state); *Daines*, 92 Nev. at 295, 550 P.2d at 400, are protected by the constitutional separation of powers doctrine and possess inherent judicial powers to the same extent as the other courts of this state. See Nev. Const. art. 3, § 1; *Daines*, 92 Nev. at 295, 550 P.2d at 400; see also *Mowrer v. Rusk*, 618 P.2d 886 (N.M. 1980) (concluding that, although the constitutional separation of powers doctrine generally does not apply to local government entities, it does apply to the New Mexico municipal courts because they are a part of their state judicial system).

[Headnotes 12-14]

Under the separation of powers doctrine of the Nevada Constitution, each of the three branches of government is vested with authority to exercise its own functions, and no branch may exercise

⁵While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state. See *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000). Beyond this conclusion, we do not find it necessary in resolving this appeal to delineate, as the City asks us to do, the extent to which a municipal court is a part of the city, as opposed to a part of the state judicial system. Although the City contends that resolving this issue will determine the outcome of questions as to whether the Municipal Court is an employer, whether it is subject to NRS Chapter 288, and whether it is exclusively liable for employment-related lawsuits, we conclude that those questions are not properly presented here, as this situation does not involve any Municipal Court employees challenging employment-related decisions. See *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (explaining that “[t]his court’s duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment”).

the functions of another unless expressly permitted to do so by the Nevada Constitution. *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 241-42 (1967) (discussing Nev. Const. art. 3, § 1). Thus, the courts, whose judicial functions involve hearing and resolving legal controversies, possess the authority to take any actions that are inherent or incidental to that function. *Id.* at 20, 422 P.2d at 242. Furthermore, any statutory scheme that would allow the executive or legislative branches of a municipal government to control or exercise the inherent powers of the municipal court would violate the separation of powers doctrine. *See id.* at 19, 422 P.2d at 241-42; *see also Mowrer*, 618 P.2d at 891.

[Headnotes 15-17]

Each governmental branch also has certain inherent powers, by virtue of its sheer existence and as a coequal branch of government, to carry out its basic functions. *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439-40 (2007). This authority is “broader and more fundamental than the inherent power conferred by separation of powers.” *Blackjack Bonding*, 116 Nev. at 1218, 14 P.3d at 1279. Thus, in addition to the specific powers assigned to the governmental branches, each branch has inherent ministerial powers, which include “methods of implementation to accomplish or put into effect the basic function” of that branch. *Galloway*, 83 Nev. at 21, 422 P.2d at 243. Within these ministerial functions, the powers of the branches sometimes appear to overlap. *Id.* at 21-22, 422 P.2d at 243. To the extent that any duplication of authority can be traced back to the individual branch’s essential functions and basic source of power, the overlapping may be valid, but it is essential to the balance of powers that each branch is careful not to impinge on the authority of the other two branches, even in a small and seemingly harmless manner. *Id.*

[Headnotes 18, 19]

When a court’s inherent authority arises out of the court’s management of its own affairs, this court has held that the court is “entitled to manage [its] internal affairs without interference from separate governmental branches.” *Nunez v. City of N. Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000). Put differently, even apart from any constitutional or statutory concerns, based solely on the court’s inherent authority to manage its own affairs, the legislative and executive branches are strictly prohibited from infringing on the court’s “incidental powers reasonable and necessary to carry out the duties required for the administration of justice.” *Goldberg v. Eighth Judicial Dist. Court*, 93 Nev. 614, 616, 572 P.2d 521, 522 (1977). Thus, if an action falling under the court’s inherent authority is part of the court’s day-to-day functioning or regular management of its internal affairs, the court is empowered to perform that action without the need for further justification and

without interference from the legislative or executive branch. *See id.* In contrast, if the court's need to exercise its inherent authority arises outside of the court's regular management of its affairs, the invocation of the court's inherent powers must be justified by demonstrating that some circumstance requires the court to invoke such authority in order to perform its constitutional functions. *See Halverson*, 123 Nev. at 263, 163 P.3d at 441.

The resolution of the controversy in this action turns on the parties' differing interpretations of the Municipal Court's ability to invoke its inherent powers under the present circumstances. On one side, the Municipal Court contends that it has the inherent power to exercise control over its employees and the budget appropriated to it by the City, and that the City cannot interfere with that power. Conversely, while conceding that the Municipal Court possesses certain inherent powers, the City contends that the Municipal Court may only act pursuant to those powers when it is reasonable and necessary to do so, and the City denies that the Municipal Court has demonstrated that it is reasonable and necessary to use its inherent powers in this situation. The City further argues that the Municipal Court has not established a constitutional violation, insofar as it has not shown that any action of the City has impeded its ability to perform its core constitutional functions.

With this background in mind, we turn to the invocations of inherent authority involved in this case.

Management and control of employees

[Headnote 20]

The district court's order enjoined the City from exercising any power over Municipal Court employees, including their selection, promotion, or termination. To the extent that both the Municipal Court and the City claim the authority to be involved in the Municipal Court's personnel decisions, this purported function of the two branches appears to overlap. *See Galloway*, 83 Nev. at 21-22, 422 P.2d at 243. In order to determine whether both branches validly claim this authority, the question that follows is whether the function can be traced back to each branch's essential functions and basic source of power. *Id.*

This court has recognized that municipal courts are the judicial branches of their respective city governments, and they possess all of the inherent powers enjoyed by this court, the district courts, and the justice courts. *Nunez*, 116 Nev. at 539-40, 1 P.3d at 962. As such, the Municipal Court's express function is to decide controversies and enforce judgments. *See Galloway*, 83 Nev. at 20, 422 P.2d at 242. It would be impossible for the Municipal Court to exist and fulfill this role without employees to manage the docket, process paperwork, provide administrative assistance, and monitor compliance with its orders, among many other ministerial

duties. *See Halverson*, 123 Nev. at 261, 163 P.3d at 439-40 (explaining that some inherent ministerial powers arise out of the sheer existence of the governmental branches). Furthermore, the Municipal Court must be able to exercise control over the employees who perform these tasks in order to ensure that the appropriate candidates are chosen for the jobs, the tasks are performed in a satisfactory manner, and proper sanctions and rewards are available when necessary. *See State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 770, 32 P.3d 1263, 1273 (2001) (recognizing that the provisions of the Nevada Constitution providing for an independent judiciary “would be seriously undermined if the judiciary were prohibited, under any circumstance, from exercising direct control over the personnel who were performing vital and essential court functions”).

Thus, the Municipal Court’s claim of inherent authority to manage its employees relates directly to its essential functions. *See Galloway*, 83 Nev. at 21-22, 422 P.2d at 243. Additionally, because the management of Municipal Court employees is a ministerial function that is implicated by the Municipal Court’s everyday management of its internal affairs, we conclude that it is continuously present insofar as its removal would impair the Municipal Court’s ability to fulfill its constitutional functions. *See Harvey*, 117 Nev. at 770, 32 P.3d at 1273. Here, the record shows that staffing shortages have led to the Municipal Court closing for one hour every judicial day and that disputes have arisen between the Municipal Court and the City with regard to the Municipal Court’s use of volunteers, which the Municipal Court argues it needs to use to perform certain tasks that will otherwise be severely delayed if the Municipal Court must rely on its current employees. These issues go to the heart of the Municipal Court’s ability to perform its core judicial functions and demonstrate why the Municipal Court reasonably needs to maintain control over its employees.

The City’s legislative function is to make and pass local laws and to control the power of the purse. *See generally* Sparks City Charter art. II; *see also* Sparks City Charter art. II, § 2.060(1) and (5); *State of Nev. Emps. Ass’n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992); *Galloway*, 83 Nev. at 20, 422 P.2d at 242. Its executive function is to carry out and enforce those laws and to administer the affairs of the city. *See generally* Sparks City Charter art. III; *see also* Sparks City Charter art. III, § 3.020(1); *Galloway*, 83 Nev. at 20, 422 P.2d at 242. Thus, the act of managing Municipal Court employees does not itself relate to any of the City’s express legislative or executive functions. Moreover, the City has not identified any reason why it would need to exert control over the Municipal Court’s employees in order to fulfill its constitutional duties. In the absence of any valid basis for exercising control over these employees, the City’s imposition of its in-

fluence on the Municipal Court's personnel decisions violates the separation of powers doctrine because it unconstitutionally infringes on the Municipal Court's authority to manage its employees. *See* Nev. Const. art. 3, § 1 (providing that no branch may perform the function of another branch unless expressly permitted to do so by the Nevada Constitution); Nev. Const. art. 6, § 1 (including municipal courts in the state judicial system); *see also Goldberg*, 93 Nev. at 616, 572 P.2d at 522; *Galloway*, 83 Nev. at 19, 422 P.2d at 241-42; *Mowrer*, 618 P.2d at 891.

In the underlying case, the district court enjoined the City from interfering in any way with the Municipal Court's personnel decisions, including the hiring, firing, and discipline of employees. In light of our conclusions herein, the district court correctly found that the Municipal Court was likely to succeed on the merits of its action to prevent the City from interfering with its personnel decisions on the ground that doing so violated the Municipal Court's rights under the separation of powers doctrine. *See* Nev. Const. art. 3, § 1. Additionally, the harm from this constitutional violation is irreparable, as it would be difficult, if not impossible, to assign a monetary value to remedy the violation. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (1997). We therefore affirm that portion of the district court's injunction prohibiting the City from interfering with the Municipal Court's management of its employees.⁶ Additionally, because Article IX of the Sparks City Charter sets forth the civil service provisions, which authorize the hiring, supervision, and control of employees by the City, we affirm that portion of the district court's order preventing the City from applying Article IX to the Municipal Court and its employees.

Charter provisions

[Headnote 21]

We next address the particular provisions of the Sparks City Charter that the district court found to be unconstitutional, specifically, Sections 1.080, 3.020, 3.120, 4.023, and 4.025.⁷

Under Section 1.080 of the Sparks City Charter, the city manager has the authority to appoint "any employee employed in a bona fide executive, administrative or professional capacity," ex-

⁶To the extent that the City has purported to enter into collective bargaining agreements affecting Municipal Court employees, the issue is moot with regard to the OE3, which voluntarily withdrew its representation of Municipal Court employees. As for any agreements between the City and the SPPA, we hold that such agreements are invalid because they unconstitutionally interfere with the Municipal Court's power to manage its employees for the reasons discussed above.

⁷In their appellate briefs, the parties discuss the Sparks City Charter as it read before the most recent amendments, which took effect on July 1, 2011. As the district court entered the preliminary injunction on August 31, 2011, this opinion analyzes the provisions in their current amended form.

cept as otherwise provided in the charter. Sparks City Charter art. I, § 1.080(3). Two sections of the charter, Section 4.023 and Section 4.025, specifically provide for the appointment of two Municipal Court positions by the Municipal Court judges. Sparks City Charter art. IV, §§ 4.023 and 4.025. And the Municipal Court judges are chosen by election. Sparks City Charter art. V, § 5.010(6) and (7). Otherwise, the charter is silent as to appointment of Municipal Court employees. Although it is unclear whether any other Municipal Court employee would fall under the definition of an “executive, administrative or professional” employee, to the extent that they do, this provision of the charter is unconstitutional insofar as it permits the City to interfere with the Municipal Court’s employment decisions. *See Harvey*, 117 Nev. at 770, 32 P.3d at 1273. Thus, we affirm that portion of the injunction prohibiting application of this provision to the Municipal Court.

Next, Section 3.020 of the city charter provides that the city manager must carefully supervise the City’s affairs, exercise control over all departments of the City government, attend city council meetings, and recommend adoption of measures and bills to the city council. Sparks City Charter art. III, § 3.020(1).⁸ Generally, this provision directs the city manager to administer the affairs of the City, which largely do not appear to involve the Municipal Court. Nevertheless, the portions of this provision that allow the City to interfere with the Municipal Court’s management of its operations are an impermissible infringement on the Municipal Court’s inherent authority. *See Goldberg*, 93 Nev. at 616, 572 P.2d at 522. In particular, subsection (c) requires the city manager to “[e]xercise control over all departments of the City government and its officers and employees,” and subsection (f)(2) directs the city manager to make investigations into any department of the City. Sparks City Charter art. III, § 3.020(1)(c) and (1)(f)(2). As these provisions permit the City to interfere with the Municipal Court’s management of its operations and its employees, we affirm the district court’s issuance of the injunction in this regard.⁹

⁸The pre-2011 amendment version of Section 3.020(1)(c) read: “The City Manager is responsible to the Council for the efficient administration of all the affairs of the City. He shall . . . [e]xercise control over all departments of the City government and its officers and employees, *except any department whose chief executive officer is not appointed by the City Manager.*” (Emphasis added.) *See A.B. 97*, 76th Leg. (Nev. 2011). Thus, prior to 2011, the Municipal Court would not have been included in Section 3.020(1)(c), as its chief executive officer, the administrative judge, is elected rather than appointed by the city manager.

⁹To the extent that sections of these provisions do not apply to the Municipal Court, they are unaffected by the district court’s injunction, as the injunctive order only restricts the City from enforcing the provisions against the Municipal Court.

Section 3.120 of the charter states that “[e]mployees in appointive positions are entitled to receive the salary designated by the City Manager within the range established for each position by the City Council.” Sparks City Charter art. III, § 3.120. Additionally, Sections 4.023 and 4.025 provide the city council with the authority to appropriate the money for the salaries of the Municipal Court’s administrator and judicial assistant. Sparks City Charter art. IV, §§ 4.023 and 4.025. Although the City’s budgeting power is implicated by these provisions, the Municipal Court’s authority to manage its employees is also put at issue.

As noted above, the Municipal Court’s ability to exercise direct control over its employees is necessary to ensure its survival as an independent governmental branch. *Harvey*, 117 Nev. at 770, 32 P.3d at 1273. Moreover, a court cannot effectively manage its employees if it is unable to determine the wages of those employees. *See Circuit Court of Jackson Cnty. v. Jackson Cnty.*, 776 S.W.2d 925, 927 (Mo. Ct. App. 1989) (explaining that Missouri law provides the circuit court with statutory authority to fix the salaries of its employees because, in the absence of this authority, “the legislative department could determine the extent to which the judicial department would perform its judicial function by limiting the number of employees of the Circuit Court, or providing for no employees at all”); *see also Ottawa Cnty. Controller v. Ottawa Probate Judge*, 401 N.W.2d 869, 873 (Mich. Ct. App. 1986) (concluding that the probate court had the inherent authority to set reasonable salaries for its necessary employees within the court’s total budget appropriation). Thus, so long as the Municipal Court can provide for the salaries of its employees within the budget appropriated to it by the City, we conclude that it may do so consistently with its power to manage its internal affairs without interference from the other governmental branches.¹⁰ *See Nunez*, 116 Nev. at 540, 1 P.3d at 962. As a result, we also affirm that portion of the district court’s order of injunction preventing the City from applying these charter provisions to the Municipal Court.

Control over budget

[Headnote 22]

With regard to the budget, the district court enjoined the City from “interfering with the Municipal Court’s ability to use, distribute, allocate, and make decisions regarding the budget adopted for it by the City.” Neither party disputes that the City has the authority, pursuant to its legislative powers, to appropriate a budget

¹⁰As discussed in the next section, to the extent that the Municipal Court would need additional funding to pay wages set by it, the Municipal Court would be required to establish that such requests were reasonable and necessary to allow it to carry out its constitutional functions. *See Young v. Bd. of Cnty. Comm’rs*, 91 Nev. 52, 56, 530 P.2d 1203, 1206 (1975).

to the Municipal Court. *See* Sparks City Charter art. II, § 2.060(5); *State of Nev. Emps. Ass'n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992). Moreover, although the Municipal Court, in the communications leading up to these proceedings, asked the City to stop itemizing its budget, the Municipal Court has not argued in this appeal that the City was required to provide it with a lump sum appropriation. Even if it had raised this argument, neither the judicial function of resolving legal controversies nor the Municipal Court's power to manage its internal affairs provides it with a general power to be involved with the Sparks budgeting process. Moreover, state law requires the City to prepare a detailed budget, NRS 354.600, and it is difficult to imagine how the City could arrive at a general amount for an appropriation without considering specific categories of expenditures to be made by the Municipal Court.

[Headnotes 23, 24]

That said, the Municipal Court does have certain specific powers to influence the budget appropriated to it. For instance, if the Municipal Court needs funds for particular items or expenses, it can compel such funding on a showing that the requests are "reasonable and necessary to carry out [its] powers and duties in the administration of justice." *Young v. Bd. of Cnty. Comm'rs*, 91 Nev. 52, 56, 530 P.2d 1203, 1206 (1975). Moreover, once the Municipal Court's general budget is appropriated to it by the City, the Municipal Court possesses the power to make independent financial decisions as to how to allocate the funds within that budget pursuant to its inherent authority to manage its internal affairs.¹¹ *See Nunez*, 116 Nev. at 540, 1 P.3d at 962.

While we recognize these general principles, we note that the parties have failed to develop the record or define the scope of the question presented by the budget issue in this case. For instance, the record is devoid of evidence as to how the City determines the Municipal Court's budget, how the budget is implemented and distributed, whether the Municipal Court has attempted to use money appropriated to it in a manner that varied from the City's itemization, or whether the City has prevented the Municipal Court from making independent internal budget decisions. In particular, there is no evidence that the City has required the Municipal Court to administer its budget in any specific manner. Instead, the record demonstrates only that the conflict in this case arose in response to the City's request that the Municipal Court reduce the salaries of

¹¹We note that if the City makes a specific appropriation to the Municipal Court apart from the general budget, such an appropriation must be used for its designated purpose, so long as doing so does not interfere with the Municipal Court's ability to carry out its constitutional functions. *See Galloway v. Truesdell*, 83 Nev. 13, 21-22, 422 P.2d 237, 243 (1967).

two of its employees. As the parties have not identified any other actual conflict with regard to the budget, this requested reduction is the only budget issue that is properly before this court. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (explaining that “[t]his court’s duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment”).

Even as to this issue, however, the parties have not sufficiently developed the record to demonstrate whether an actual controversy exists in this regard. Based on the timing of the request, it appears likely that it was made in the context of the City’s preparation of its annual budget, *see* NRS 354.596(2) (requiring a city’s tentative budget under the Local Government Budget and Finance Act to be submitted annually by April 15); NRS 354.598 (requiring a city’s final budget under the Local Government Budget and Finance Act to be approved annually by June 8), but the parties have not explained the circumstances surrounding the requested budget reduction. Moreover, the Municipal Court initially asserted that it had instructed its employees not to execute any documents to effectuate a salary reduction, but later stated that it had complied with the City’s budget request. Nothing in the record demonstrates that the Municipal Court sought to reduce its budget by means other than through the salary reduction or that the City refused to allow the Municipal Court to do so.¹² Without this information, it is impossible to determine whether the City impermissibly interfered with the Municipal Court’s inherent authority to manage its internal affairs by administering its budget in the manner it saw fit. Therefore, we conclude that the district court’s issuance of the preliminary injunction on budget issues was overbroad and premature. Accordingly, we reverse that portion of the injunction prohibiting the City from interfering with the Municipal Court’s budget and remand this matter to the district court for further proceedings consistent with this opinion.

On remand, the district court must initially consider whether any actual controversy is presented with regard to the budget, given that the Municipal Court apparently complied with the re-

¹²At oral argument before this court, the Municipal Court represented that it had sought to reduce the budget other than by reducing the identified salaries and had been precluded from doing so by the City. The City denied that the situation had occurred as described by the Municipal Court, asserting that as long as the budget was reduced, the manner of reducing it was irrelevant. This court asked the Municipal Court to supplement the briefing to identify any specific record evidence supporting its claim that the City had refused to allow it to proceed with a budget reduction as proposed by the Municipal Court. Although the Municipal Court filed the requested supplement, it failed to point to any record evidence demonstrating that it had made, or the City had denied, any such request.

requested budget reductions and there is no indication in the record as to the manner of compliance or the City's response to the Municipal Court's proposed method of compliance. *See Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. If the case does present an actual controversy, the district court should then decide whether any action the Municipal Court seeks to take would be a permissible exercise of the Municipal Court's ability to manage its internal affairs, *see Nunez*, 116 Nev. at 540, 1 P.3d at 962, or would be an assertion of inherent power that would overlap with the City's legislative power over the budget. *See Galloway*, 83 Nev. at 21-22, 422 P.2d at 243. Finally, if the district court determines that the Municipal Court's proposed action does not fall under the management of its internal affairs, the district court must evaluate whether the Municipal Court's intended action is reasonable and necessary to allow it to carry out its constitutional duty to administer justice. *See Young*, 91 Nev. at 56, 530 P.2d at 1206; *see also Halverson*, 123 Nev. at 263, 163 P.3d at 441.

Special counsel

[Headnote 25]

Finally, the district court enjoined the City from applying NRS 41.0344 or Section 3.055 of the Sparks City Charter to this case. The district court did not issue any further ruling with regard to the Municipal Court's ability to retain counsel or compel payment of counsel generally.

[Headnote 26]

Section 3.055 of the Sparks City Charter provides that the city council may "employ attorneys to perform any civil or criminal duty of the City Attorney." Sparks City Charter art. III, § 3.055. This provision further states that counsel retained pursuant to this provision is responsible only to the city council. *Id.* NRS 41.0344 permits a political subdivision's attorney to employ special counsel if he or she determines that it could constitute a conflict of interest for the legal services to be rendered by that attorney. Based on the language of these provisions, we conclude that they are not applicable to this case, as counsel in this situation was retained by the Municipal Court, rather than by the city attorney, and, as the representative of the Municipal Court, counsel was responsible to the Municipal Court and not to the city council. Thus, we affirm the district court's order to the extent that it found that these provisions were inapplicable. Moreover, the City agreed that the Municipal Court needed to hire independent counsel, and we conclude that, pursuant to its inherent power to protect its ability to perform its constitutional functions, the Municipal Court had the right to hire the counsel of its choosing, without interference from the City. *See Nunez*, 116 Nev. at 540, 1 P.3d at 962.

As the district court did not take any further action in regard to the special counsel issue, we decline to issue any additional ruling in this regard. We note, however, that to the extent that the Municipal Court seeks any appropriation to pay special counsel's fees, the City, pursuant to its legislative budgetary authority, may review the reasonableness of counsel's hourly rate when determining whether to make such an appropriation, but may not make a more specific review of the cost of the representation, as permitting the City to review and question the reasonableness of particular expenditures connected with the instant action would impermissibly infringe on the attorney-client relationship and the Municipal Court's right to seek legal advice and to make decisions regarding its legal strategy.

CONCLUSION

In light of the foregoing, as to the Municipal Court's administrator, administrative assistant, marshals, court clerk/interpreters, court clerks I and II, and volunteers, we affirm the portions of the district court's order prohibiting the City from interfering with the Municipal Court's management of its employees, enforcing or entering into collective bargaining agreements on behalf of Municipal Court employees, and applying Sparks City Charter art. I, § 1.080; art. III, §§ 3.020, 3.120; art. IV, §§ 4.023 and 4.025; and art. IX to the Municipal Court and its employees. We reverse, however, that portion of the district court's order preventing the City from taking certain actions with regard to the Municipal Court's budget, and we remand the matter to the district court for further proceedings. Finally, we affirm that portion of the district court's order permitting the Municipal Court to retain and pay special counsel.

GIBBONS, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

PICKERING, C.J., concurring in part and dissenting in part:

I respectfully disagree with the majority's decision to the extent that it invalidates the Sparks City Charter provisions that apply to court employees besides the court administrator and judicial assistants. In my view, the holding with respect to civil service and union employees is inconsistent with the express terms of the Nevada Constitution, Article 15, Section 11, and the Sparks City Charter, which the Legislature and the City of Sparks adopted according to the political process specified in the Nevada Constitution, Article 8, Section 8. That process, and these charter provisions, induced reliance interests on the part of those involved that

I would not disturb, particularly not on the inadequate record thus far presented in this case.

The Sparks City Charter vests the power to hire, fire, and discipline the court administrator and judicial assistants in the Municipal Court's Administrative Judge, not the City Council. See Sparks City Charter art. IV, §§ 4.023 and 4.025. *But it makes no similar provision for other employees providing service to the Sparks Municipal Court. Id.* Sections 4.023 and 4.025 recognize, *legislatively*, that employees who occupy the positions of court administrator or judicial assistant “perform[] vital and essential court functions,” and so answer to the Municipal Court directly, not the City. *State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 770, 32 P.3d 1263, 1273 (2001) (court clerk); *AFSCME v. Wayne Cnty.*, 811 N.W.2d 4, 20-21 (Mich. Ct. App. 2011) (court clerk); *Barland v. Eau Claire Cnty.*, 575 N.W.2d 691, 702-03 (Wis. 1998) (judicial assistant). Notably, the Sparks City Charter does *not* extend this status to other personnel who provide services to the Municipal Court. Rather, such other personnel are governed by the Sparks Civil Service Commission and the regulations promulgated pursuant to the Charter. See Sparks City Charter art. IX, § 9.020(1) and (2).

The inherent-powers doctrine allows the judicial branch “to administrate its own procedures and to manage its own affairs . . . when *reasonable and necessary* for the administration of justice.” *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007) (internal quotation omitted).¹ But “such inherent powers must be exercised with discernment and circumspection.” *Angell v. Eighth Judicial Dist. Court*, 108 Nev. 923, 926, 839 P.2d 1329, 1331 (1992). Proper respect for coordinate branches of government limits resort to inherent judicial powers to situations in which the judicial branch has exhausted other executive and legislative avenues available and the need is such that the “efficient administration of justice [will be] destroyed or seriously impaired” if left unfulfilled. *Bd. of Cnty. Comm'rs v. Devine*, 72 Nev. 57, 60, 294 P.2d 366, 367 (1956). Put another way, “inherent [judicial] power should be exercised only when established methods fail or in an emergency situation[, and] ceases when the court's ability to carry out its constitutional duty to ensure the administration of justice no longer is in jeopardy.” *Halverson*, 123 Nev. at 263, 163 P.3d at 441 (footnotes omitted). Also, “because inherent power arises from the constitution's operation, constitutional clauses may

¹Although legislatively, as opposed to constitutionally, created, Nev. Const. art. 6, § 1, municipal courts possess the same inherent powers as constitutionally created courts do. *City of N. Las Vegas v. Daines*, 92 Nev. 292, 295, 550 P.2d 399, 400 (1976).

remove or modify that power” from the purview of the judiciary.
Id.

I respectfully submit that, under the Nevada Constitution, the Sparks City Charter provisions control. Exercising its constitutional prerogative, the Legislature approved the Sparks City Charter. Nevada Const. art. 8, § 8. Another section of the Nevada Constitution specifies that, when a municipality (Sparks) has a “legally adopted charter” (the Sparks City Charter), the charter controls the city’s employment relationships, certainly as to tenure and dismissal: “In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control.” Nev. Const. art. 15, § 11. Since the Sparks City Charter divides authority over Municipal Court employees between the Municipal Court (court administrator and judicial assistants) and the Civil Service Commission (all others), *constitutionally*, those provisions “shall control.” *Id.* (emphasis added). Thus, under *Halverson*, it appears that the inherent-judicial-power doctrine should not apply because another, more specific constitutional provision displaces it.

The majority argues that Article 15, Section 11 uses “officer” and “employee” to mean the same thing, such that the provision only applies to elected or appointed officials, not employees generally. But this gives the word “employee” a singular meaning unique to Article 15, Section 11. Elsewhere, the Nevada Constitution distinguishes between “officers” and “employees.” *Compare, e.g.*, Nev. Const. art. 15, § 10 (“All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law.”) with Nev. Const. art. 15, § 15 (“The legislature shall provide by law for a state merit system governing the employment of employees in the executive branch of state government.”). Basic rules of statutory and constitutional interpretation teach that “[a] word or phrase is presumed to bear the same meaning throughout a text,” and that

[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170, 174 (2012) (footnote omitted) (Canons 25 and 26). Given these basic rules, I disagree that “officer” and “employee” mean the same thing—“officer”—in the Nevada Constitution, Article 15, Section 11, even though they are not used in that sense anywhere else in Article 15 or the Nevada Constitution as a whole.

Nor does the legislative history support the majority's conclusion that Article 15, Section 11 has no application to Sparks civil service employees doing work for the Municipal Court.

As the majority notes, the voters amended the Nevada Constitution in 1946 to add the italicized language to Article 15, Section 11 shown below:

The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, but the Legislature shall not create any office the tenure of which shall be longer than four (4) years, except as herein otherwise provided in this Constitution. *In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control.*

Nev. Const. art. 15, § 11. The majority reasons that, because the first sentence refers to "office[s]," the second sentence should be taken to apply only to "officers," not civil service employees, when it refers to "any officer *or employee* of any municipality." As support, it cites an editorial that appeared in the Nevada State Journal on November 2, 1946. But the Nevada State Journal editorial on which the majority relies says the exact opposite. It notes that, as originally adopted, Article 15, Section 11 "provide[d] that the legislature cannot create any office the tenure of which shall be longer than four years," and reasons that, "[s]ince the state constitution governs, a city cannot create an office the tenure of which [is] longer than four years." Editorial, *Question No. 1*, Nevada State Journal, November 2, 1946, at 4. According to the 1946 editorial writer, this created problems for *municipal civil service employees* that the amendment was designed to fix:

Employees of cities, holding civil service status, are considered holding office and consequently it is contended their tenure of office would be limited to four years by strict application of the constitution. Civil service is designed to protect employees and make permanent their tenure of office.

The proposed amendment adds the following sentence to Section 11 of Article 15 of the constitution:

"In the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control."

The amendment simply broadens the field for municipal charters and in no other way directs the legislature to change

the four-year provision of the constitution with respect to state officers.

. . . [Its purpose is] to remove ambiguities from the law which might cause unexpected trouble.

Id. (emphasis added). Thus, according to the source relied on by the majority, the final sentence of Article 15, Section 11 was added to ensure that, when it comes to municipal civil service employees, if the city has a “legally adopted” charter, that charter controls their “tenure or . . . dismissal.” This makes inexplicable the majority’s decision to invalidate the Sparks City Charter civil service provisions that, by their express terms, apply to all city employees except the Municipal Court’s court administrator and judicial assistants, authority over whom is vested in the Municipal Court.

The majority’s recitation of the history of this dispute demonstrates that the parties’ first instinct was correct. Thus, they originally looked to the political process of amending the Sparks City Charter to clarify the status of the employees besides the court administrator and judicial assistants who provide service to the Municipal Court. But they abandoned that avenue and turned to the courts for relief instead. By means of this shortcut, the tenure and dismissal of municipal employees whose employment, previously, was controlled by the Sparks City Charter civil service provisions is now controlled by the Municipal Court. Basic rules of construction do not permit express constitutional terms to be overridden that easily by concepts of implicit or inherent, but unwritten, authority.

I also note that, even if the Municipal Court could overcome Article 15, Section 11, the record assembled does not, in my estimation, make the threshold showings of impasse and need required for the judicial branch to exert its inherent authority against another, coordinate branch. Thus, while impasse and need are *argued*, the evidence does not establish such basic information as the positions involved, the services the affected employees provide, the impact the City Charter provisions have on their performance, or the threat having the City Charter provisions apply to them poses to the administration of justice in the Sparks Municipal Court. Only a few examples are given, one dating back to 2002; the others do not establish “the destruction or serious impairment of the administration of justice” and the failure of other alternatives that our case law requires. *Devine*, 72 Nev. at 60-61, 294 P.2d at 367-68 (reversing mandamus requiring the county to appoint a bailiff; although “the court or the judge has inherent power to secure an attendant for his court, at public expense, if the regular, orderly, statutory methods fail, or if the officials charged by the legislature arbitrarily or capriciously fail or neglect to provide the necessary attendant, whereby the efficient administration of justice is de-

stroyed, or seriously impaired,’’ the record did not adequately establish impasse or need).

For these reasons, I would vacate the preliminary injunction issued by the district court, insofar as it applies to Municipal Court employees other than the court administrator and judicial assistants. As to the court administrator and judicial assistants, I agree with the majority’s reversal and remand. I therefore, respectfully, concur in part and dissent in part.

IN RE ANA J. FOX, DEBTOR.

YVETTE WEINSTEIN, CHAPTER 7 TRUSTEE, APPELLANT,
v. ANA J. FOX, RESPONDENT.

No. 59396

May 30, 2013

302 P.3d 1137

Certified question, pursuant to NRAP 5, regarding permissible exemptions under NRS 21.090 for property belonging not only to the judgment debtor but also to her non-debtor spouse. United States Bankruptcy Appellate Panel of the Ninth Circuit.

In Chapter 7 bankruptcy proceedings, Chapter 7 trustee filed objection to debtor’s filing of exemptions on behalf of her non-filing spouse. The United States Bankruptcy Court for the District of Nevada overruled trustee’s objection, and trustee appealed. The United States Bankruptcy Appellate Panel presented certified question regarding permissible scope of exemptions under Nevada law. As a matter of first impression, the supreme court, CHERRY, J., held that Nevada statute governing exemptions of property from execution did not permit Chapter 7 debtor to claim additional exemptions on behalf of non-filing spouse.

Question answered.

Sullivan, Hill, Lewin, Rez & Engel and *Elizabeth E. Stephens*, Las Vegas, for Appellant.

Ana J. Fox, Las Vegas, in Proper Person.

Law Offices of Amy N. Tirre, P.C., and *Amy N. Tirre*, Reno; *Lewis & Roca, LLP*, and *Laury M. Macauley*, Reno, for Amicus Curiae Bankruptcy Law Section of the State Bar of Nevada.

1. EXEMPTIONS.

Provisions of Nevada exemption statute permitting judgment debtor to exempt “one vehicle if the judgment debtor’s equity does not exceed \$15,000 or the creditor is paid an amount equal to any excess above that

equity,” and “any personal property not otherwise exempt from execution . . . not to exceed \$1,000 in total value, to be selected by the judgment debtor,” did not authorize Chapter 7 debtor to claim exemptions on behalf of non-filing spouse, in addition to claiming exemptions for herself. NRS 21.090(1)(f), (z).

2. EXEMPTIONS.

The legislative purpose of the Nevada statute governing exemptions of certain property from execution is to secure to the debtor the necessary means of gaining a livelihood, while doing as little injury as possible to the creditor. NRS 21.090.

3. STATUTES.

The supreme court will concentrate on the plain language of statutes when examining issues of statutory construction.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

The United States Bankruptcy Appellate Panel of the Ninth Circuit has certified a question of law to this court relating to permissible exemptions claimed by judgment debtors under Nevada’s exemption statute, NRS 21.090. In particular, the certified question asks, “[i]n Nevada, may a judgment debtor claim exemptions under NRS 21.090 belonging not only to herself, but also to her non-debtor spouse?” In the bankruptcy case, however, only two types of exemptions are at issue: the exemption under NRS 21.090(1)(f) for motor vehicles and the exemption under NRS 21.090(1)(z) for up to \$1,000 of property not already exempted, which is known as the “wildcard exemption.” See *In re Newman*, 487 B.R. 193, 196 (B.A.P. 9th Cir. 2013). Thus, we focus on whether the motor vehicle and wildcard exemptions may be claimed on behalf of a non-debtor spouse. See NRS 21.090(1)(f) and (z); *In re Fontainebleau Las Vegas Holdings, L.L.C.*, 128 Nev. 556, 571-72, 289 P.3d 1199, 1209 (2012) (rephrasing certified questions under NRAP 5). We adopt the plain language rationale embraced by the United States Bankruptcy Court for the District of Idaho in *In re DeHaan*, 275 B.R. 375 (Bankr. D. Idaho 2002), and conclude that, based on NRS 21.090(1)(f) and (z)’s plain language, Nevada law does not allow debtors to claim motor vehicle and wildcard exemptions on behalf of their non-debtor spouses.

FACTS AND PROCEDURAL HISTORY

In May 2010, respondent Ana Fox filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Fox’s spouse did not join in the bankruptcy petition and did not file a separate petition for relief. Nevertheless, under bankruptcy law, the bankruptcy estate includes all of the marital community property,

in addition to Fox's separate property. 11 U.S.C. 541(a)(2); NRS 123.225; NRS 123.230. Out of the bankruptcy estate, Fox claimed exemptions for two motor vehicles under NRS 21.090(1)(f) and property worth over \$1,400 under NRS 21.090(1)(z). Both the vehicles and the other assets claimed as exemptions were community property.

The Chapter 7 Trustee, appellant Yvette Weinstein, filed an objection on the grounds that a debtor spouse may exempt only a single vehicle and property worth no more than \$1,000 under NRS 21.090(1)(f) and (z) and a non-debtor spouse has no right to claim any exemptions in a debtor spouse's bankruptcy. Fox filed a response to the Trustee's objection, arguing that a debtor spouse may claim exemptions under NRS 21.090(1)(f) and (z) on behalf of a non-debtor spouse.

After a hearing, the United States Bankruptcy Court for the District of Nevada entered an order overruling the Trustee's objection. The court found that Nevada law allows a debtor to claim motor vehicle and wildcard exemptions on behalf of a non-debtor spouse, which, in effect, doubled Fox's exemptions. The Trustee timely appealed to the United States Bankruptcy Appellate Panel of the Ninth Circuit. Because Nevada has opted out of the federal exemption scheme, Nevada's judgment debtor exemption law applies, 11 U.S.C. 522(b); NRS 21.090(3), and the Bankruptcy Appellate Panel has sought a ruling from this court regarding whether, under Nevada law, judgment debtors are allowed to claim exemptions on behalf of non-debtor spouses. In particular, it requests a definitive construction of Nevada's motor vehicle and wildcard exemption provisions, NRS 21.090(1)(f) and (z). The Bankruptcy Appellate Panel stayed the proceedings before it until our resolution of the certified question.¹

We have decided to consider the certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1164 (2006) (in determining whether to exercise its discretion to consider certified questions, this court looks to whether the "answers may 'be determinative' of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law" (quoting *Ventura Grp. Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 719 (Cal. 2001))).

DISCUSSION

[Headnotes 1, 2]

The Nevada Constitution provides that "[t]he privilege of the debtor to enjoy the necessary comforts of life shall be recognized

¹The Bankruptcy Law Section of the State Bar of Nevada filed an amicus curiae brief addressing the divergent views of debtors, creditors, and trustees.

by wholesome laws, exempting a reasonable amount of property from seizure or sale for payment of any debts or liabilities’ Nev. Const. art. 1, § 14; see *Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 75-76, 157 P.3d 704, 707 (2007). Nevada’s ‘‘Legislature enacted what is now NRS 21.090 to fulfill the mandate set forth in Nevada’s Constitution.’’ *Savage v. Pierson*, 123 Nev. 86, 90, 157 P.3d 697, 700 (2007). ‘‘The legislative purpose of NRS 21.090 is ‘to secure to the debtor the necessary means of gaining a livelihood, while doing as little injury as possible to the creditor.’’’ *In re Galvez*, 115 Nev. 417, 419, 990 P.2d 187, 188 (1999) (quoting *Krieg v. Fellows*, 21 Nev. 307, 310, 30 P. 994, 995 (1892)), *superseded by statute on other grounds as stated in In re Christensen*, 122 Nev. 1309, 1320, 149 P.3d 40, 47 (2006); see *Savage*, 123 Nev. at 90, 157 P.3d at 700 (‘‘the exemptions set forth in NRS 21.090 are ‘absolute and unqualified,’ with few exceptions, ‘and [their] effect is to remove the property beyond the reach of legal process’’ (alteration in original) (quoting *Elder v. Williams*, 16 Nev. 416, 423 (1882))); *Sportsco Enters. v. Morris*, 112 Nev. 625, 630, 917 P.2d 934, 936 (1996) (‘‘In NRS 21.090, the Legislature provided express exemptions from execution for some property interests.’’).

NRS 21.090(1) states, in relevant part, that

[t]he following property is exempt from execution, except as otherwise specifically provided in this section or required by federal law:

. . . .
 (f) Except as otherwise provided in paragraph (p),² one vehicle if the *judgment debtor’s* equity does not exceed \$15,000 or the creditor is paid an amount equal to any excess above that equity.

. . . .
 (z) Any personal property not otherwise exempt from execution pursuant to this subsection belonging to the *judgment debtor*, including, without limitation, the *judgment debtor’s* equity in any property, money, stocks, bonds or other funds on deposit with a financial institution, not to exceed \$1,000 in total value, to be selected by the judgment debtor.

(Emphases added.)

We have yet to address whether a judgment debtor may claim Nevada’s motor vehicle and wildcard exemptions on behalf of her non-debtor spouse. Before examining whether Nevada’s personal property exemptions could be claimed by a debtor on behalf of a non-debtor spouse, we turn to the United States Bankruptcy Court for the District of Idaho, which recently addressed the identical

²NRS 21.090(1)(p) does not apply in the instant matter, as it pertains to a motor vehicle ‘‘for a person with a permanent disability.’’

question under Idaho law. *In re DeHaan*, 275 B.R. 375 (Bankr. D. Idaho 2002). The bankruptcy court concluded that the Idaho exemption scheme did not allow a debtor to claim a second set of personal property exemptions on behalf of a non-filing spouse. *Id.* at 381-82. Focusing on the language of the applicable state exemption statute, the court held that “[t]he plain language speaks to the right of the ‘individual’ debtor to claim exemptions within the relevant monetary limits. It does not purport to authorize such a debtor to claim a second set of like exemptions for another individual (*i.e.*, his spouse).” *Id.* at 382; *see* Idaho Code Ann. § 11-605(3), (10) (2010) (an “individual” debtor can claim personal property exemptions under Idaho’s personal property exemptions).

[Headnote 3]

In Nevada, we likewise concentrate on the plain language of statutes when examining issues of statutory construction. *J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (“[w]hen the language . . . is clear on its face, ‘this court will not go beyond [the] statute’s plain language’” (second alteration in original) (quoting *Great Basin Water Network v. State Eng’r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010))); *see Hardy Cos. v. SNMARK, LLC*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010) (we review *de novo* the construction of statutes). “Although exemptions are to be liberally construed in favor of the debtor, the Court must not depart from the statutory language nor extend the legislative grant.” *In re Lenox*, 58 B.R. 104, 106 (Bankr. D. Nev. 1986); *see In re Christensen*, 122 Nev. 1309, 1314, 149 P.3d 40, 43 (2006) (this court “liberally and beneficially construe[s] . . . state exemption statutes in favor of the debtor”).

The Nevada statutory subsections applicable here, NRS 21.090(1)(f) and (z), refer to exempt property of the judgment debtor. Nowhere in these provisions does it mention the non-debtor spouse or a dependent.³ Given the plain language of NRS 21.090(1)(f) and (z), we conclude that a judgment debtor may claim exemptions for a single motor vehicle and up to \$1,000 in personal property for herself; however, a debtor is not permitted to claim those exemptions on behalf of a non-debtor spouse. *See DeHaan*, 275 B.R. at 382.⁴ Thus, in accordance with the

³Non-debtor spouses are considered dependents under the Bankruptcy Code. 11 U.S.C. § 522(a)(1) (2006).

⁴We acknowledge that the United States Bankruptcy Court for the District of Arizona reached a contrary conclusion in *In re Perez*, 302 B.R. 661, 663 (Bankr. D. Ariz. 2003) (holding that a debtor may claim that property is exempt from community debts under Arizona law by asserting not only his but also his spouse’s exemptions because each spouse acts for the benefit of the community and thus Arizona law allows one spouse to claim the other’s exemptions on her behalf).

clear and unambiguous language of NRS 21.090(1)(f) and (z), a judgment debtor in Nevada is limited to one motor vehicle exemption not to exceed \$15,000 and other personal property exemptions not to exceed \$1,000.

We, therefore, answer the certified question in the negative as set forth above.

PICKERING, C.J., and GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, and SAITTA, JJ., concur.

MARCIA BERGENFIELD, APPELLANT, v.
BANK OF AMERICA, RESPONDENT.

No. 58060

June 6, 2013

302 P.3d 1141

Appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program matter. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Borrower sought judicial review in foreclosure mediation program matter. The district court denied petition. Borrower appealed. The supreme court, DOUGLAS, J., held that holder of promissory note was not beneficiary of deed of trust and thus failed to demonstrate its authority to nonjudicially foreclose and to participate in mediation.

Reversed and remanded.

[Rehearing denied October 4, 2013]

[En banc reconsideration granted in part April 25, 2014*]

Law Office of Jacob L. Hafter & Associates and Jacob L. Hafter and Michael Naethe, Las Vegas, for Appellant.

Akerman Senterfitt, LLP, and Ariel E. Stern and Heidi Parry Stern, Las Vegas, for Respondent.

1. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

Holder of promissory note was not beneficiary of deed of trust and thus failed to demonstrate its authority to nonjudicially foreclose and to participate in mediation pursuant to foreclosure mediation program and, therefore, imposition of sanctions was warranted against holder, which held itself out as beneficiary of deed of trust. NRS 107.086(4), (5).

***Reporter's Note:** The court granted en banc reconsideration to the extent of modifying the opinion originally filed on June 6, 2013. The opinion printed here includes those modifications.

2. MORTGAGES.

Deeds of trusts and promissory notes may be severed and independently transferred without impairing the right to ultimately foreclose.

3. MORTGAGES.

To nonjudicially foreclose a deed of trust of an owner-occupied residence, the party seeking foreclosure must demonstrate that it is both the current beneficiary of the deed of trust and the current holder of the promissory note. NRS 107.080.

4. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

If the deed of trust beneficiary fails to attend mediation under the foreclosure mediation program (FMP), the FMP certificate allowing beneficiary to go forward with foreclosure proceedings must not issue. NRS 107.086(4).

5. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

Language of statute requiring attendance of the beneficiary of a deed of trust at mediation pursuant to foreclosure mediation program (FMP) precludes the holder of the promissory note from attending and participating in an FMP mediation on its own behalf, when it is not also the beneficiary of the deed of trust. NRS 107.086(4).

6. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.

When a deed of trust and promissory note have been severed, whether at the inception of the loan or by subsequent assignment, the instruments must be reunified to establish proper authority to participate in mediation pursuant to foreclosure mediation program.

Before GIBBONS, DOUGLAS and SAITTA, JJ.

OPINION

By the Court, DOUGLAS, J.:

In Nevada, when the deed of trust to real property and the promissory note are held by two different entities and not reunified before mediation in the Foreclosure Mediation Program, the note holder's attendance at the mediation on its own behalf is insufficient to meet the statutory requirement that the deed of trust beneficiary attend and participate in good faith. Here, when the mediation occurred, Bank of America was the holder of the note, but it was not the beneficiary of the deed of trust because the note and deed of trust were intentionally separated at the inception of the loan and were not reunified. The district court therefore erred when it determined that Bank of America had the authority to mediate and when it denied Marcia Bergenfield's petition for judicial review. Thus, we reverse the district court's judgment and remand this matter to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant Marcia Bergenfield obtained a home loan from Countrywide Home Loans, Inc., and executed a promissory note in

Countrywide's favor. The note was secured by a deed of trust naming Countrywide as the lender and Mortgage Electronic Registration Systems, Inc. (MERS), as beneficiary of the deed of trust. The deed of trust specifically stated that MERS had the authority to transfer the deed of trust. MERS subsequently assigned its interest in the deed of trust to HSBC Bank USA. The assignment stated that it carried the deed of trust along with the underlying note. Meanwhile, Countrywide endorsed the promissory note in blank, meaning that the holder of the note could demonstrate entitlement to payment through possession of the note. Respondent Bank of America later acquired Countrywide and its assets, including Bergenfield's promissory note.

Bergenfield defaulted on the loan and elected to participate in Nevada's Foreclosure Mediation Program (FMP). A mediation scheduling notice was issued that named Bank of America as the deed of trust beneficiary and ReconTrust Co. as the trustee. Before the mediation, Bank of America provided the mediator with certified copies of the note, the deed of trust, and the assignments of the deed of trust.

At the mediation, BAC Home Loans Servicing, LP, appeared through counsel, purporting to represent Bank of America and indicating that it was authorized to modify the loan. HSBC did not attend the mediation and did not send a representative. No agreement was reached. The mediator's statement indicated that BAC failed to bring short sale estimates and that Bergenfield failed to provide updated financial information. The report did not indicate that any party lacked authority to negotiate or failed to attend the mediation. Bergenfield then filed a petition for judicial review, which the district court denied after concluding that the parties had addressed the document production issues to the district court's satisfaction, and that BAC, as Bank of America's representative, had authority to negotiate a loan modification and participated in good faith. This appeal followed.

DISCUSSION

[Headnote 1]

In this appeal, we address whether a party who purports to hold a promissory note, but who is not the deed of trust beneficiary of record, may participate in an FMP mediation and obtain an FMP certificate permitting it to go forward with foreclosure proceedings. Bergenfield argues that Bank of America lacked authority to negotiate a loan modification at the mediation because the documents provided at the mediation demonstrated that the note and the deed of trust had been assigned to two separate entities and remained split at the time of the mediation. Bank of America contends that

it is the lender and holder of the note and that the assignment of the deed of trust to HSBC did not disturb Bank of America's interest in the loan and its authority to enforce the note.

[Headnotes 2, 3]

Nevada law permits the severance and independent transfer of deeds of trusts and promissory notes without impairing the right to ultimately foreclose. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 519-20, 286 P.3d 249, 258-60 (2012). Thus, it is possible for Bank of America to remain the holder of the note while HSBC is the deed of trust beneficiary. But in order to nonjudicially foreclose a deed of trust of an owner-occupied residence, the party seeking foreclosure must demonstrate that it is both "the current beneficiary of the deed of trust and the current holder of the promissory note." *Id.* at 514, 286 P.3d at 255; see NRS 107.080.

[Headnote 4]

This requirement stems from the fact that a deed of trust is a lien on the property to secure the debt and the beneficiary of the deed alone does not have a right to repayment on the loan. *Edelstein*, 128 Nev. at 512, 286 P.3d at 254. Rather, it is the holder of the note that is entitled to repayment. *Id.* Therefore, only when the note and deed of trust are held by the same party is foreclosure proper under NRS Chapter 107. *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 474, 255 P.3d 1275, 1279 (2011). To that end, NRS 107.086(4) mandates that a deed of trust beneficiary must, among other things, attend the mediation itself or through a representative who has authority to modify the loan or has access at all times to a person with such authority. *Leyva*, 127 Nev. at 475, 255 P.3d at 1278. If the deed of trust beneficiary fails to attend the mediation, the FMP certificate must not issue. *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 893, 266 P.3d 602, 606-07 (2011).

[Headnotes 5, 6]

NRS 107.086(4)'s language requiring the beneficiary of the deed of trust's attendance clearly and unambiguously precludes the holder of the note from attending and participating in an FMP mediation on its own behalf, when it is not also the beneficiary of the deed of trust. See *Webb v. Shull*, 128 Nev. 85, 88-89, 270 P.3d 1266, 1268 (2012) (holding that a statute's words will be given their plain meaning). Thus, when a deed of trust and promissory note have been severed, whether at the inception of the loan or by subsequent assignment, the instruments must be reunified to establish proper authority to participate in the FMP. See *Edelstein*, 128 Nev. at 522, 286 P.3d at 260-61. That did not happen here.

At the underlying mediation, the recorded beneficiary of the deed of trust, HSBC, did not attend. Accepting Bank of America's

assertion that it is the holder of the note and consequently had authority to negotiate the loan, it nevertheless was not the beneficiary of the deed of trust, and therefore, failed to demonstrate its authority to nonjudicially foreclose and to participate in the FMP mediation. Although the district court found that Bank of America had authority to negotiate the loan, that finding does not overcome the fact that Bank of America was not the beneficiary of the deed of trust at the time of mediation, based on the recorded assignment from MERS to HSBC. *Id.* at 520-21, 286 P.3d at 260 (recognizing that on appeal this court gives deference to the district court's factual findings and reviews its legal determinations anew). In this instance, no FMP certificate could validly issue, and sanctions were mandated. *Leyva*, 127 Nev. at 480, 255 P.3d at 1281; *see Holt*, 127 Nev. at 893, 266 P.3d at 607.

CONCLUSION

Because Bank of America was not the deed of trust beneficiary at the time of the FMP mediation, we conclude that it failed to satisfy NRS 107.086(4)'s attendance and participation requirement. Consequently, the district court erred when it denied Bergenfield's petition for judicial review. We therefore reverse the judgment of the district court and remand this matter to the district court for proceedings consistent with this opinion.¹

GIBBONS and SAITTA, JJ., concur.
