

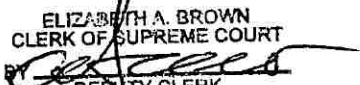
IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF HENDERSON, A MUNICIPAL
CORPORATION AND A POLITICAL
ASSOCIATION OF THE STATE OF
NEVADA,
Appellant,
vs.
HENDERSON POLICE SUPERVISORS
ASSOCIATION, NEVADA
ASSOCIATION OF PUBLIC SAFETY
OFFICERS/COMMUNICATIONS
WORKERS OF AMERICA, LOCAL 9110,
Respondent.

No. 84897

FILED

JUN 16 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in a declaratory relief action. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.¹

This case stems from a labor dispute between respondent Henderson Police Supervisors Association (HPSA) and appellant the City of Henderson (the City) regarding the arbitrability of a grievance filed by Lieutenant Brandon Brooks under the parties' Collective Bargaining Agreement (CBA). Brooks requested the specialized assignment of Public Information Officer, but the City awarded that assignment to Sargent John Plunkett, the same day Plunkett was also promoted to lieutenant. Brooks initiated a grievance against the City, arguing that under the City's policies, the City could not award Plunkett a specialized assignment on the day he was promoted because his promotion resulted in him being placed on a

¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

qualifying probationary period and he could not perform a specialized assignment during that period. After more than a year of substantially participating in the CBA's grievance process, the City filed the underlying complaint for declaratory relief, stating that Brooks' grievance was not arbitrable and was outside of the arbitrator's jurisdiction. On HPSA's motion, the district court entered summary judgment in favor of HPSA, concluding that the grievance was arbitrable.

This court reviews orders granting summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper where the pleadings and evidence presented pose "no genuine issue of material fact . . . and the moving party is entitled to a judgment as a matter of law." *Mardian v. Greenberg Family Tr.*, 131 Nev. 730, 733, 359 P.3d 109, 111 (2015). When there is a question of whether a particular grievance is subject to an arbitration clause, courts should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Int'l Ass'n of Firefighters, Local #1285 v. City of Las Vegas*, 104 Nev. 615, 620, 764 P.2d 478, 481 (1988) (quoting *AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986)).

The City first argues the district court erred in determining the City waived its right to contest the arbitrator's jurisdiction. "Waiver requires the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). "The waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished. However, delay

alone is insufficient to establish a waiver.” *Id.* Here, the City argued during the grievance process that decisions concerning specialized assignments are exempt from arbitration. Before the scheduled arbitration date, the parties, during a call with the selected arbitrator, agreed that the City reserved the right to seek declaratory relief in district court to determine whether Brooks’ grievance was arbitrable. The City filed its complaint for declaratory relief before officially participating in arbitration proceedings. Under the circumstances, the City’s participation in the grievance process before that time does not demonstrate, as required for waiver, a clear intent to relinquish its right to challenge the arbitrability of Brooks’ claim. *Nevada Yellow Cab Corp.*, 123 Nev. at 49, 152 P.3d at 740. The district court therefore erred in determining a waiver applied. *See Id.* at 49-50, 152 P.3d at 740-41 (affirming the district court’s determination of no waiver of the right to seek disqualification of opposing counsel despite the defendant waiting two years into litigation to file its motion to disqualify); *McKellar v. McKellar*, 110 Nev. 200, 202, 871 P.2d 296, 297-98 (1994) (holding wife did not waive the right to collect child support arrearages despite waiting 14 years to initiate action).

Second, the City argues the district court erred in determining the City was judicially estopped from challenging the arbitrator’s jurisdiction. Judicial estoppel applies “when a party’s inconsistent position arises from intentional wrongdoing or an attempt to obtain an unfair advantage.” *Marcuse v. Del Webb Cmty., Inc.*, 123 Nev. 278, 288, 163 P.3d 462, 469 (2007) (internal quotation marks omitted). “Whether judicial estoppel applies is a question of law that we review de novo.” *Deja Vu Showgirls v. State, Dep’t of Taxation*, 130 Nev. 711, 716, 334 P.3d 387, 391

(2014). All five of the following elements are necessary to sustain a finding of judicial estoppel:

- (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Delgado v. Am. Family Ins. Grp., 125 Nev. 564, 570, 217 P.3d 563, 567 (2009). In this case, the district court failed to make the requisite judicial estoppel findings under the five-factor test. And at least one of the factors was not present as the City did not assert inconsistent arguments to obtain an unfair result because it consistently argued that decisions concerning specialized assignments are exempt from arbitration. Thus, the district court erred in applying the doctrine of judicial estoppel. *See Kaur v. Singh*, 136 Nev. 653, 658, 477 P.3d 358, 363 (2020) (concluding that the district court erred in applying judicial estoppel without analyzing and making the requisite five-factor findings).

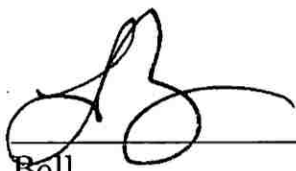
Third, the City contends the district court erred in determining the arbitrator had jurisdiction over Brooks' grievance pursuant to the CBA. "[L]abor arbitration is a product of contract, and, therefore, its legal basis depends entirely upon the particular contracts of particular parties." *City of Reno v. Int'l Assoc. of Firefighters, Local 731*, 130 Nev. 1013, 1018, 340 P.3d 589, 593 (2014) (internal quotation marks omitted). "[T]he arbitrator's jurisdiction derives from contract and the arbitrator is limited to resolving disputes over the terms of that contract." *Id.* While Article 29 of the CBA defines a grievance broadly to include disputes over City policies or procedures, Section 1 of Article 29 is limiting as it provides that only

disputes “concerning the interpretation or application of an expressed provision of [the CBA are] subject to . . . [the] grievance procedure.” Further, the CBA limits the arbitrator’s jurisdiction “to the interpretation and application of an expressed provision or provisions of [the CBA].” HPSA does not argue that Brooks’ grievance involves a dispute regarding an expressed provision of the CBA, and instead, concedes that the dispute concerns an application of the City’s policies. Thus, under the terms of the CBA, such a grievance is not subject to the CBA’s grievance process and an arbitrator would not have jurisdiction over it. Accordingly, we conclude the district court erred in granting summary judgment in favor of HPSA because Brooks’ grievance is not subject to Article 29. *See id.* (holding that a grievance was not arbitrable as it was expressly excluded from the arbitration provision). Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Stiglich


_____, J.
Lee


_____, J.
Bell

cc: Hon. Veronica Barisich, District Judge
Charles K. Hauser, Settlement Judge
Fisher & Phillips LLP
Henderson City Attorney
Clark Hill PLLC
Eighth District Court Clerk