STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

OFFICER JAKE GRUNWALD, Individually and the LAS VEGAS POLICE PROTECTIVE ASSOCIATION,

Complainants,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,

Respondent.

Case No. 2017-006

ORDER

Item No. 826

On December 13, 2017, this matter came before the State of Nevada, Local Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Local Government-Management Relations Act (the "Act"), NAC Chapter 288 and NRS Chapter 233B. The Board held an administrative hearing on this matter on September 12, 2017 in Las Vegas, Nevada. The Board accepted post-hearing briefs in this matter as well.

Complainants allege that the Las Vegas Metropolitan Police Department (the "Department") violated NRS 288.270(1)(e) by unilaterally changing terms of the agreed upon disciplinary matrix when it allegedly punished Officer Grunwald by removing his name from the Sergeant's promotional list. Complainants allege that the Department further violated NRS 288.270(1)(e) by unilaterally changing the terms of the agreed upon disciplinary matrix by issuing a suspension and removing Officer Grunwald's name from the Sergeant's promotional list (thereby issuing multiple forms of discipline). Moreover, they allege further violation of NRS 288.270(1)(e) when the Department allegedly circumvented its obligation to negotiate discipline and disciplinary procedures by changing Civil Service Rules.

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Officer Grunwald has been employed as a Police Officer with the Department for roughly 12 years. Officer Grunwald works at the Spring Valley Area Command ("SVAC"). In 2016, Officer Grunwald was a Field Training Officer ("FTO") in the SVAC. As an FTO, Officer Grunwald was responsible for supervising rookie officers who were going through the Department's Field Training Education Program ("FTEP") as well as teaching these rookie officers. Officer Grunwald's position as an FTO was that of a quasi-supervisor and he held a position of authority over his trainees.

Nonetheless, while Officer Grunwald was an FTO, he made the decision to engage in a sexual relationship with one of his trainees. Officer Grunwald admitted that engaging in sexual relations with trainees, as an FTO, was against the Department's expectations and FTEP rules. After a complaint was lodged regarding this conduct, the Association contacted the Office of Labor Relations and requested an expedited investigation/adjudication of the misconduct. After negotiations, Officer Grunwald was offered an expedited investigation and adjudication. As part of the negotiated deal, Officer Grunwald admitted to violating Civil Service Rule 510.2 – Standards of Conduct and 4/100 – Conformity to Rules and Regulations and received an 8 hour suspension. Officer Grunwald further agreed to waive any rights to a grievance regarding the discipline.

During the time Officer Grunwald's misconduct was discovered, Officer Grunwald had tested for and passed the Department's promotional test for the rank of sergeant. After Officer Grunwald accepted the expedited agreement, the eight candidates ahead of Officer Grunwald on the sergeants' list were promoted, bringing Officer Grunwald to the number one spot on the list. However, upon becoming number one on the list, Officer Grunwald was automatically disqualified pursuant to the Department's Promotional Guidelines.

On February 12, 2017, Officer Grunwald filed a grievance regarding his removal from the sergeant's list. The Department indicated that his grievance concerned Promotional Guidelines and per the CBA was expressly excluded from consideration as a grievance.

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DISCUSSION

Unilateral Change

NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to bargain in bad faith with a recognized employee organization and a unilateral change to the bargained for terms of employment is regarded as a per se violation of this statute. Under the unilateral change theory, an employer commits a prohibited labor practice when its changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002).

A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of conditions of employment have been changed by the employer such that after the occurrence, which the subject of the complaint, terms of the employment differ from what was bargaining for or otherwise established. *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (May 15, 2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, Case No. A1-045965 (Oct. 5, 2010); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-010 (2017); *Brown v. Las Vegas Metropolitan Police Dep't*, Item No. 818, Case No. 2015-013 (2016). Typically, a complainant can meet this burden by showing the following 4 elements: (1) the employer breached or altered the CBA or established past practice; (2) the employer's action was taken without bargaining with the union over the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not merely an isolated breach of contract, but amounts to a change in policy (*i.e.* the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment). *O'Leary*, at 7; *California State Employees' Ass'n v. Pub. Employment Relations Bd.*, 51 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d 488, 496 (1996).

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It is well established that promotional standards and qualifications are generally not a subject of mandatory subjects of bargaining. *See City of Sparks v. IAFF, Local 1265*, Item No. 103 Case No. 045332, at 4 (1980); *Clark Cnty. V. IAFF, Local 1908*, Item No. 146, Case No. A1-04537, at 4, 8-10 (1982); *LVPPA, Inc. v. City of Las Vegas*, Item No. 264, Case No. A1-045474, at 12, 14, 17 (1991); *IAFF, Local 1908 v. Cnty. of Clark*, Item No. 811, Case No. A1-046120, at 3 (2015).

Officer Grunwald's adjudication was issued on December 20, 2016, and he reached number one on the sergeants' list January 29, 2017. As such, he was adjudicated for a minor suspension within one year of a promotional job offer and, therefore was automatically disqualified from eligibility for the promotion.

The Board finds that there was not a unilateral change to a mandatory subject of bargaining, or one significantly related thereto (as further detailed below). Based on the facts of this case, promotional subjects are not a form of mandatory subjects of bargaining were removal from a promotional list was not a form of punishment or discipline, but instead a collateral effect. Indeed, there was also not a change in policy shown. Instead the Department followed policy and its guidelines. The promotional requirements were well in place before Officer Grunwald engaged in the misconduct and subsequent acceptance of the Department's offer related thereto. Officer Grunwald even specifically testified that he was aware of and had prior notice of the Department's promotional requirements prior to his application for the position of sergeant. The Board was not presented with sufficient evidence of an actual change in policy given the particular facts of this case. Moreover, the actual negotiated Matrix does not contain a discipline reference to removal from a promotional list, nor does the parties' CBA (but does specifically exclude the enforcement and establishment of Civil Service Rules from grievance consideration). Furthermore, Officer Grammas (executive board member at the PPA) testified that the PPA has not negotiated removal from a promotional list as a form of discipline (as other associations such as PMSA have). In the same vein, the Board finds Director Jamie Frost's testimony credible in terms of why the language of removal from a promotional list as being discipline is included in the Handbook. The Board also finds Director Frost's testimony credible regarding commonality of employees being prohibited from testing, either for 3 years if there was a major discipline in a file or one year if there was a minor discipline in a file (an automatic exclusion). Thus, we cannot conclude

that the Department's actions in this case reflected an actual change in policy by the Department to the disciplinary process. Consequently, we find that the Department did not commit a unilateral change in violation of NRS 288.270(1)(e).

Complainants argue that as NRS 288.150(2)(i) provides that disciplinary procedures are mandatory subjects of bargaining (as well as NRS 288.150(2) in terms of salary or wage rates or other forms of direct monetary compensation), removal from the promotional list is significantly related here to these subjects of mandatory bargaining. Specifically, Complainants argue that removing Officer Grunwald's name was a form of discipline. The Nevada Supreme Court has affirmed that subjects not specifically enumerated in NRS 288.150 as a nonnegotiable subject are nevertheless a mandatory subject of bargaining if it bears a "significant relationship" to wages, hours, and working conditions. *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 371, 849 P.2d 343, 346 (1993) (a decision to lay off employees had a direct and cognizable effect on wages). As noted in *Truckee Meadows*, the 1974 version of NRS 288.150 required employers to bargain with employee representatives concerning "wages, hours and conditions of employment", instead of the current laundry list of mandatory subjects of bargaining detailed therein, though the significant relation test has continuing viability based on those enumerated subjects.

However, as indicated above, the Board finds that based on the specific facts of this case, removal from the promotional list was not a form of discipline, but rather a collateral effect with the Department following policy and guidelines. As such, removal from the promotional list, based on the facts of this case, is not significantly related to a subject of mandatory bargaining. *Compare with Clark Cty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 530 P.2d 114 (1974) ("This means wages, hours and conditions of employment are significantly enmeshed with the requirement to be prepared."); *Carson City Firefighters v. Carson City*, EMRB Case No. A1-045569, Item No. 345 (1994) (the Board found that the "the payment of such [ambulance] fees clearly constitutes a form of direct monetary compensation"); *Ormbsy Cty. Ed. Ass'n v. Carson City Sch. Dist.*, EMRB Case No. A1-045549, Item 333 (1994) (the Board held that "[w]hether an employee's family is provided insurance coverage, and at what cost, are critical concerns with direct impact upon the employee."); *Washoe County Sch. Dist. V. Washoe Ed. Ass'n*, EMRB Case No. A1-045878, Item No. 626C (2009) (the Board found that its prior

conclusion that the direct deposit and pay card system was significantly related to salary or wages or other forms of direct compensation under NRS 288.150(2)(a), that additional cost of the direct deposit and pay card system on the employees).

Complainants further attempt to argue that there was a past practice that Civil Service Rules are subject to negotiations as the rules relate to mandatory subjects of bargaining. NRS 288.150(1) states that government employers must negotiate with employee organizations concerning mandatory subjects of bargaining. NRS 288.150(2) provides a list of these subjects, which includes "[d]ischarge and disciplinary procedures." An employer may create, by practice over a substantial period of time, a term of condition of employment which it is obligated to continue, subject to negotiation. *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220. However, as indicated above, removal from the promotional list, in this case, was a collateral effect and not as a form of discipline. As such, any changes to the Civil Services Rules as alleged, did not relate to a mandatory subject of bargaining as Complainants assert or one significantly related thereto (as detailed above) and were not subject to negotiation. Moreover, executive board member Grammas testified that the union could have objected to the agenda item on the Civil Service Board if it felt it was a mandatory subject of bargaining but simply chose not to. The Board thus notes that even if promotional requirements were significantly related to a mandatory subject of bargaining, the Board would have been inclined to find a waiver, as clear notice had been provided to the Association and it simply choose not to object (in addition to the credible testimony of Director Frost detailed above).[1] *See also Krumme*, Item No. 822, Case No. 2016-010, at 7-8; *Bisch v. LVMPD*, Case No. A1-045955, Item No. 705B (2010), *aff'd Bisch v. LVMPD*, 302 P.3d 1008 (2013).

[1] A past practice by the parties may evidence that a party waived a statutory or contractual right, but such waiver must be clear and unmistakable. *Washoe County Teachers Ass'n v. Washoe County Sch. Dist.*, Case No. A1-045678, Item No. 470C (2001), at 4, *citing Ormsby County Educ. Ass'n v. Carson City Sch. Dist.*, Case No. A10945527, Item No. 311; *see also El Dorado Cty. Deputy Sheriff's Ass'n v. Cty. of El Dorado*, 244 Cal. App. 4th 950, 956, 198 Cal. Rptr. 3d 502, 507 (2016) (holding that "[f]ailure by the [employee organization] to assert its bargaining rights after receiving notice of the proposed change in terms of employment constitutes waiver of its rights."). "To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." *American Distrib. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983) (citations omitted).

Finally, based on the facts in this case and the issues presented, the Board declines to award cost and fees in this matter.

FINDINGS OF FACT

1. In 2016, Officer Grunwald was a FTO in the SVAC.

2. As an FTO, Officer Grunwald was responsible for supervising rookie officers who were going through the Department's FTEP as well as teaching these rookie officers.

3. Officer Grunwald's position as an FTO was that of a quasi-supervisor and he held a position of authority over his trainees.

4. Officer Grunwald admitted that engaging in sexual relations with trainees, as an FTO, was against the Department's expectations and FTEP rules.

5. After negotiations, Officer Grunwald was offered an expedited investigation and adjudication.

6. Officer Grunwald agreed to waive any rights to a grievance regarding the discipline.

7. During the time Officer Grunwald's misconduct was discovered, Officer Grunwald had tested for and passed the Department's promotional test for the rank of sergeant.

8. Officer Grunwald's adjudication was issued on December 20, 2016, and he reached number one on the sergeants' list January 29, 2017.

9. He was adjudicated for a minor suspension within one year of a promotional job offer and, therefore was automatically disqualified from eligibility for the promotion.

10. There was also not a change in policy shown. Instead the Department followed policy and its guidelines.

11. The promotional requirements were well in place before Officer Grunwald engaged in the misconduct and subsequent acceptance of the Department's offer related thereto.

12. Officer Grunwald had prior notice of the Department's promotional requirements prior to his application for the position of sergeant.

13. The actual negotiated Matrix does not contain a discipline reference to removal from a promotional list, nor does the parties' CBA (but does specifically exclude the enforcement and establishment of Civil Service Rules from grievance consideration).

14. The PPA has not negotiated removal from a promotional list as a form of discipline.

15. The Board finds Director Jamie Frost's testimony credible in terms of why the language of removal from a promotional list as being discipline is included in the Handbook.

16. The Board also finds Director Frost's testimony credible regarding commonality of employees being prohibited from testing, either for 3 years if there was a major discipline in a file or one year if there was a minor discipline in a file (an automatic exclusion).

17. Clear notice had been provided to the Association and it could have objected to the agenda item on the Civil Service Board if it felt it was a mandatory subject of bargaining but simply choose not to.

18. If any of the foregoing findings is more appropriately construed as a conclusion of law, it may be so construed.

CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the Local Government Employee-Management Relations Act.

2. The Board has exclusive jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS Chapter 288.

3. It is a prohibited labor practice under NRS 288.270(1)(e) for a local government employer to unilaterally change the terms and conditions of employment concerning a mandatory subject of bargaining.

4. Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent.

5. A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of conditions of employment have been changed by the employer such that after the occurrence which the subject of the complaint, terms of the employment differ from what was bargaining for or otherwise established.

6. A complainant can demonstrate a unilateral change by showing: (1) the employer breached or altered the collective bargaining agreement, or established past practice; (2) the employer's

actions was taken without bargaining with the recognize bargaining agent over the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not merely an isolated breach of contract, but amounts to a change of policy, *i.e.*, the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment.

7. Promotional standards and qualifications are generally not a subject of mandatory subjects of bargaining.

8. The Board was not presented with sufficient evidence of an actual change in policy given the particular facts of this case.

9. There was not a unilateral change to a mandatory subject of bargaining, or one significantly related thereto.

10. Based on the facts of this case, promotional subjects are not a form of mandatory subjects of bargaining were removal from a promotional list was not a form of punishment or discipline, but instead a collateral effect.

11. The Department's actions in this case did not amount to an actual change in policy by the Department to the disciplinary process.

12. The Department did not commit a unilateral change in violation of NRS 288.270(1)(e).

13. Removal from the promotional list, based on the facts of this case, is not significantly related to a subject of mandatory bargaining

14. Even if promotional requirements were significantly related to a mandatory subject of bargaining, the Board would have been inclined to find a waiver.

15. The complaint filed in this matter is not well-taken.

16. If any of the foregoing conclusions is more appropriately construed as a finding of fact, it may be so construed.

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ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondent LVMPD as set forth above. Complainants shall take nothing by way of their Complaint. Each party shall be responsible for its own fees and costs.

DATED this 28th day of December, 2017.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By:_____
BRENT ECKERSLEY, ESQ., Chair

By:_____
SANDRA MASTERS, Vice-Chair

By:_____
PHILIP LARSON, Board Member