

1 STATE OF NEVADA
2 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
3 RELATIONS BOARD
4

5 BRUCE KIRBY,
6 Complainant,

7 vs.

8 RENO POLICE DEPARTMENT and CITY
9 OF RENO,
Respondents.

ITEM NO. 511B

CASE NO. A1-045719

DECISION

10 For Complainant: Michael E. Langton, Esq.

11 For Respondent: Donald L. Christensen, Esq.

12 STATEMENT OF THE CASE

13 On or October 10, 2001, Bruce Kirby (hereafter "Kirby") filed a prohibited labor
14 practices complaint with the Local Government Employee-Management Relations Board
15 (hereafter the "Board"). The complaint alleged that the City of Reno, Nevada (hereafter "City")
16 and the Reno Police Department (hereafter "Police Department") demoted Kirby from the
17 position of sergeant for disciplinary reasons in violation of NRS Chapter 288. On November 30,
18 2001, the City and Police Department filed a motion to dismiss based upon the complaint's
19 alleged failure to state a proper cause of action. Since no opposition was received, this Board
20 entered an order dismissing this action on February 13, 2002. Thereafter, on February 26, 2002,
21 Kirby filed a motion for reconsideration and the motion was granted on March 20, 2002.

22 On April 8, 2002, the City and Police Department filed their answer; and thereafter the
23 parties filed their respective pre-hearing statements.

24 On November 14, 2002, the Board held a hearing in this matter, noticed in accordance
25 with Nevada's Open Meeting Law, at which time the Board heard oral arguments from counsel,
26 received evidence, and heard testimony from seven (7) witnesses, namely, Officer Bruce Kirby,
27 Lt. Hal Wood, Lt. Joe Walker, Sgt. Kelly Dean, Det. Jeffrey Freelove, Lt. Kim Gibson, and
28 Deputy Chief Ondra Berry.

1 The Board's findings are set forth in its Discussion, Findings of Fact, and Conclusions of
2 Law, which follow:

3 **DISCUSSION ON TESTIMONY AND EXHIBITS OFFERED**

4 Kirby has been with the Police Department for approximately 12 years in various
5 positions. Previously, Kirby worked with the Los Angeles Sheriff's Office, and has an
6 Associate's degree as well as a Bachelor's degree. He was promoted to sergeant on August 14,
7 2000 with the Reno Police Department. Exhibits 2, 3, and 4 were his evaluations while he was a
8 sergeant. Exhibits 2 and 3 do not contain a "3" or a "4." They do contain the ratings of 5, 6, and
9 7. The scale utilized in these evaluations is one through seven, with one being the lowest
10 evaluation and seven being the highest. Exhibit 4 contains two "4" ratings, two "3" ratings, and
11 ten "7" ratings. Exhibit 6 was Kirby's last evaluation as a sergeant. Although it is dated March
12 12, 2001, Kirby and the others did not sign this evaluation until April or May 2001; yet Kirby
13 was demoted on March 16, 2001.

14 Upon his demotion, Kirby sought the assistance of Kelly Dean of the Reno Police
15 Supervisory & Administrative Employees Association (hereafter "Association"). Various emails
16 ensued and, on April 11, 2001, one meeting did occur with Chief Hoover regarding this
17 demotion. Kirby's demotion was allegedly based on a performance issue rather than as a
18 disciplinary action based on incidents with Officers Lever and Topoian. Kirby was not Officer
19 Lever's direct supervisor.

20 Although the stories vary somewhat, apparently Officer Lever wanted to be on the DRE
21 program and Dep. Chief Berry did not believe he should be in the program. The DRE program
22 was a program to allow police officers to better identify if someone was under the influence of
23 drugs and to identify what drug was taken. Kirby was one of the two instructors for the DRE
24 program. Kirby told Lever that Berry did not want him in the program, and Lever became upset
25 and went to his association representative (Freelove). Freelove approached Berry, who denied
26 making certain remarks. Freelove then approached Kirby and, in essence, asked Kirby who is
27 lying - - Kirby or Berry. Kirby allegedly indicated Berry. Apparently, the City and the Police

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1 Department were sued previously due to an officer improperly identifying a person as being
2 under the influence of a drug.

3 Kirby did not seek an arbitration hearing on his demotion; he felt the complaint to this
4 Board was the appropriate remedy. Kirby admitted that he was a probationary employee in the
5 capacity of a sergeant. The probation period is one year; thereafter, you are confirmed in that
6 position with certain rights and remedies including appeal rights to the Civil Service Board. He
7 has remained a police officer since his demotion in March 2001, although he has taken the
8 sergeant examination again.

9 The Board questioned Kirby thoroughly concerning possible prohibited practices under
10 NRS 288.270 (1)(f). Kirby responded he did not believe he was demoted based on those specific
11 items.

12 Hal Wood, although now retired, was the supervisor of Kirby on the graveyard shift and
13 testified. He found Kirby to be acceptable as a new sergeant. As a matter of fact, he offered
14 three memos he wrote concerning Kirby (Exhibits 18, 19, and 20), all of which were favorable to
15 Kirby. He stated he would meet with Lt. Gibson and discuss the evaluations. He did not,
16 however, observe any "rankling" of peer officers. He was Kirby's supervisor a couple of days
17 per week, whereas Lt. Gibson was on day shift as area commander.

18 Joe Walker was the lieutenant watch commander on the graveyard shift. He has known
19 Kirby since Kirby was hired by the Police Department, and stated he had "no substantial
20 problems" with Kirby's performance. Lt. Walker told Lt. Gibson that Kirby worked well for him
21 and then a remark was made to the extent that "you would perform well too if you had a gun to
22 your head." Officer Wishkrauem allegedly made this remark. Lt. Walker did not prepare a
23 written report on Kirby, but offered verbal comments to Gibson for Kirby's evaluations. Gibson
24 would provide the numerical ratings on the evaluations, not Lt. Walker. Lt. Walker does not
25 recall giving Kirby a "3" or "4" rating. Lt. Walker did acknowledge that a rift existed between
26 newer sergeants and the older-tenured sergeants. The tenured sergeants felt that officers were
27 promoted to sergeant too fast. He was surprised that Kirby was demoted for poor performance.

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1 Lt. Walker was not aware of any specific instance in which Kirby may have "rankled"
2 peer officers. Kirby was not the first new sergeant complained about by the tenured sergeants,
3 but he was within that first group of new sergeants. He does not know of any other new sergeant
4 who has been demoted.

5 The next witness was Kelly Dean from the Association. Mr. Dean is the current
6 President of that Association, and participated in the negotiation of the collective bargaining
7 agreement between the parties (Exhibit 8). He personally believes Kirby was demoted for
8 disciplinary reasons, and arbitration is allowed in disciplinary actions. However, the Police
9 Department has termed this demotion as a performance issue and because of such, an appeal to
10 Police Chief Hoover was appropriate. The Employee Representation Services sent
11 correspondence dated July 3, 2002 to the Reno Assistant City Manager, on behalf of Kirby,
12 requesting a "Skelly" hearing (Exhibit "A"). According to Dean, no such hearing was ever
13 scheduled. Dean stated that he believes Kirby was demoted because he simply embarrassed Dep.
14 Chief Berry with the Officer Lever situation.

15 Detective Jeffrey Freelove was the next witness, and he has been with the Police
16 Department since September 1983. He has represented Officer Lever for approximately one year
17 in various situations.

18 At the time the DRE situation occurred between Kirby and Dep. Chief Berry, Officer
19 Lever was attempting to become a K9 officer. Freelove contacted Lt. Gibson regarding Officer
20 Lever and the DRE program. Lt. Gibson allegedly responded that Kirby was trying to oust Lever
21 and that he (Kirby) would repair any problems between himself (Kirby) and Lever. Instead of
22 "repairing" any problem with Lever, Kirby "chewed" Lever out at a meeting between Kirby,
23 Freelove, Lever, and Sgt. Keith Brown. Officer Lever taped this meeting; and Det. Freelove
24 again contacted Lt. Gibson about this tape and Kirby. Det. Freelove also saw Dep. Chief Berry
25 about this situation (with Lever), and allegedly Berry stated he had not told Kirby to go after
26 Lever. That is when Det. Freelove told Berry that Kirby called him (Berry) a liar. This matter
27 was then turned over to Internal Affairs Division. Freelove turned the tape over to Internal
28 Affairs as well as gave a statement. In Freelove's opinion, someone is lying regarding the

1 Officer Lever and the DRE situation, although it could have been a misunderstanding, and that
2 Lever feels Dep. Chief Berry is out to get him (Lever). Freelove also offered that there are
3 tensions between the Association and the Police Department, and in all likelihood, Berry wanted
4 to prove something to the Association with this Kirby and Lever situation. (See transcript of
5 hearing, Page 175.)

6 Lt. Kim Gibson then testified. He has been with the Police Department since February
7 1980. He has held a variety of positions, including field-training officer, special operations, K9,
8 patrol, narcotics, and with the Internal Affairs Division. He is now Lt. Watch Commander on
9 swing shift. He knows Kirby and believes he has a good working relationship with him. He was
10 the officer preparing Kirby's evaluations, and prepared them based upon his personal
11 observations and speaking with Kirby's peers and supervisors. He testified no one, including
12 Dep. Chief Berry, forced him to evaluate Kirby a certain way, and the mention of Lt. Walker in
13 the evaluation identified as Exhibit 6 was a mistake. Lt. Walker's name should be deleted from
14 that evaluation and Lt. Gibson's name substituted therein. Gibson does not recall talking to Dep.
15 Chief Berry about Kirby's demotion, but agrees with the demotion decision. He felt Kirby did
16 not own up to his own mistakes, citing various incidents including the Lever and Topoian
17 incidents. He also stated that Kirby did not apologize to Lever as he was instructed. He also
18 does not know if all new sergeants receive six-month evaluations, but Dep. Chief Berry did
19 instruct Gibson to prepare the overview on Kirby.

20 Lt. Gibson did admit that he had not personally observe Kirby "rankling" anyone, and
21 that today Kirby is a good officer. He further testified regarding Kirby's involvement with
22 several committees.

23 Dep. Chief Berry testified he has been with the Police Department for 21 years and as the
24 Deputy Chief for the last 7 years. He has known Kirby since Kirby joined the Police
25 Department. He admitted talking to Chief Hoover and other deputy chiefs regarding Kirby's
26 demotion based upon performance. He did not see the evaluation identified as Exhibit 6 prior to
27 him making the demotion decision. Dep. Chief Berry stated he was concerned with Kirby's lack
28 of performance involving a rookie officer disrespectfully rolling up his car window on Kirby and

1 driving off. He also believed Kirby may have had a "know it all" attitude which created
2 problems, and a problem arose with Kirby and a fellow officer on the DARE program.
3 Concerning the Lever situation, he felt Kirby did not own up to his own problems and personally
4 deal with it, e.g., blaming others instead. He also believed Kirby failed to follow his orders, i.e.,
5 resolve the problems with Lever by apologizing. He did not demote Kirby due to race, age,
6 political affiliations, or religion. Berry also testified that there is no right to appeal after Chief
7 Hoover approves a demotion based upon performance issues. (See Exhibits 16 & A. Exhibit 16
8 is the email from Chief Hoover dated April 10, 2002 that there are no appeal rights. Exhibit "A"
9 is the correspondence from the Association concerning conversations on June 19, 2001 regarding
10 any possible appeals, the Skelly Hearing, and Chief Hoover's approval of the demotion.)

11 Berry admitted that Kirby is on the list to be promoted to sergeant, and also admits that
12 Kirby has been passed over once already. According to Berry, the sergeant's position is a "key"
13 position in the police organization; it is the sergeants who run the day-to-day operations and they
14 are the future lieutenants and deputy chiefs.

15 Permission to file post-hearing briefs was requested and granted.

16 FINDINGS OF FACT

17 1. Bruce Kirby was promoted to Sergeant with the Police Department on August 14,
18 2000; and Lt. Gibson prepared certain evaluations thereafter concerning Kirby's performance.

19 2. The evaluations offered as Exhibits 2 and 3 reflect Kirby's performance level at 5, 6,
20 and 7, with 7 being the highest possible rating. The evaluation offered as Exhibit 4 evidenced
21 Kirby receiving ten ratings at the 7 level, only two at the 4 level and only three at the 3 level. All
22 other ratings were either 5 or 6.

23 3. Exhibit 6 was an overview evaluation ordered by Dep. Chief Berry. Although it is
24 dated March 12, 2001, the parties did not sign this evaluation until after Kirby's demotion on
25 March 16, 2001. According to testimony offered, Exhibit 6 was not utilized in the decision to
26 demote Kirby and the reason given for the demotion was "performance" issues.

27 4. After the demotion, Kirby sought the assistance of Kelly Dean of the Association.
28 Emails ensued concerning that issue (e.g., Exhibits 15, 16, and 17) and a meeting held with Chief

1 Hoover on April 11, 2001 (Exhibit 17). Deputy Chief Berry confirmed Chief Hoover's decision
2 not to reverse Kirby's demotion on June 19, 2001.

3 5. As a sergeant, several incidents occurred involving Kirby, e.g., Topoian and the Dare
4 program, an incident with a rookie officer rolling up his car window on Kirby and driving off,
5 and the Lever incident.

6 6. Each witness at this administrative hearing had a slightly different version of the
7 Lever incident. However, after observing the demeanor of the witnesses while on the witness
8 stand and listening to their recitation of the facts, the Board finds all witnesses credible with the
9 exception of Lt. Gibson. Lt. Gibson mistaking Lt. Walker's name for his own, and recording
10 admittedly false dates, leave this Board with the impression that the police department
11 management tolerated extremely sloppy record keeping in this matter.

12 7. The Board finds it noteworthy that no other sergeant than Kirby was demoted during
13 their probationary times.

14 8. The Board finds that Kirby's immediate supervisors, Hal Wood and Lt. Joe Walker,
15 did not have problems with Kirby's performance as a sergeant, and Hal Wood wrote several
16 memos favorable of Kirby.

17 9. Lt. Gibson admitted to not personally observing Kirby "rankling" anyone, and further
18 admitted that Kirby is a good street officer with involvement on a number of different
19 committees. Lt. Gibson also offered that had Kirby been suspended for the various incidents, he
20 would not have been demoted.

21 10. Kirby was not demoted due to his race, Association affiliation, religious affiliation,
22 gender, age, or any other reason prohibited by NRS 288.270.

23 11. After the demotion, Kirby was able to pass the sergeant examination again, and has
24 been passed over once for the promotion back to the sergeant position.

25 12. As late as April 10, 2001 (Exhibit 16), Chief Hoover advised Kirby that he
26 understood there was no appeal process but if Kirby believed otherwise, he should have his
27 "representative contact Rick Gonzales to explain her position. . . . I'll wait for further
28 information from the experts," with a later verbal confirmation dated June 19, 2001.

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DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That Petitioner failed to meet his burden of proof that his demotion was improper under the circumstances;

2. That the Respondents did not commit a prohibited practice in this matter involving Kirby; and

3. That no fees and costs are awarded to either party.

DATED this 23rd day of January 2003.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: *John E. Dicks*
JOHN E. DICKS, ESQ., Chairman

BY: *Janet Trost*
JANET TROST, ESQ., Vice-Chairman

BY: *Tamara E. Barengo*
TAMARA E. BARENGO, Member