STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NICOLE WILSON ,

Complainant,

vs.

NORTH LAS VEGAS POLICE DEPARTMENT,

Respondents.

ITEM NO. 674E

CASE NO. A1-045925

ORDER

For Complainant: Nicole Wilson

For Respondent North Las Vegas Police Department.: Noel Eidsmore, Esq
North Las Vegas City Attorney's Office

This matter came on before the State of Nevada, Local Government Employee-Management Relations Board ("Board"), for consideration and decision pursuant to the provisions of the NRS and NAC chapters 288, NRS chapter 233B, and was properly noticed pursuant to Nevada's open meeting laws.

The Board conducted a hearing on this matter which commenced on May 14, 2009, and continued on August 25, 26, 27, 2009, November 17, 18, 19, 2009, and February 16, 2010. In lieu of closing arguments, the parties submitted post-hearing briefs and reply briefs. The parties' final reply briefs were submitted on May 4, 2010 by Complainant, and May 18, 2010 by Respondent.

Nicole Wilson was hired as a police officer by Respondent City of North Las Vegas ("City") on February 5, 2007. This represented a career change for Wilson who had previously spent roughly 20 years in the United States Air Force. At the time Wilson was hired she was 39 years old. Ultimately, Wilson was non-confirmed by the City effective November 21, 2007. At the time of her non-confirmation, Wilson was 40 years old.

Prior to being non-confirmed, Wilson had completed training as a police recruit at the Southern Desert Regional Police Academy and was in the process of completing the City's Field Training Program for new officers. Wilson successfully advanced through the first two phases of field training. She was in her third phase of field training at the time of her non-confirmation.

During her time at the Academy, Wilson submitted a request for overtime compensation when the long days of training at the Academy exceeded 40 hours per week. This request is not surprising, given the fact that the City's personnel order assigning her to the academy states on its face "If you work any compensable overtime, you are free to request compensation." (Ex. 17).

Wilson's overtime request was denied. Wilson contends that she was singled out for mistreatment due to this overtime request and that it was the catalyst in a series of discriminatory events that ultimately led to Wilson's non-confirmation as a North Las Vegas police officer.

Wilson's non-confirmation came about following a traffic stop that occurred during the third phase of field training on November 6, 2007. During that stop, Wilson was the lead officer, with her field training officer, Officer Laurianne Chimenti, primarily observing Wilson. During the traffic stop Officer Chimenti asked Wilson if she had run the driver's information as required by City Police Department procedures. Wilson responded that she had. Conflicting evidence was presented as to how many times Officer Chimenti again asked Wilson if she had run the driver's information and eventually Wilson began to question whether she had in fact run the driver's information. Officer Chimenti then showed the computer screen listing the driver's information to Wilson. The driver's information indicated that the driver had four prior "failures to appear." Wilson had not run the driver's information.

This incident was reported to the FTEP Coordinator - Lt. Randy Salyer[1] during a routine meeting between Lt. Salyer and some of the field training officers. Upon hearing of Wilson's actions, Lt. Salyer immediately relieved Wilson of duty pending a non-confirmation hearing, which is the procedure used by the City to terminate the employment of probationary employees. (Ex. 4).

[1] At the time of the incident Lt. Salyer held the rank of Sergeant.

Lt. Salyer then prepared a Request for Termination of Field Training (Ex. 7). This Request, prepared two days after the traffic stop incident, stated that Wilson was being sent to the non-confirmation board because "it appears to be the peak of a long pattern of resistance to instructive feedback..." (Ex. 7). The Request also referred to the City's policy on truthfulness and ultimately recommended that Wilson be non-confirmed for violating the City's truthfulness policy.

The non-confirmation hearing was held on November 14, 2007. The hearing was conducted by a panel of five members. The panel interviewed Lt. Salyer, Officer Chimenti and Nicole Wilson before recommending that Wilson be non-confirmed due to lack of truthfulness and due to conflicting testimony at the hearing that contradicted the statements made during the traffic stop. (Ex. 11). The recommendations of the panel were forwarded to Acting Chief Joseph Chronister, who gave final approval for the non-confirmation, to be effective November 21, 2007. (Ex. 1).

Wilson filed a complaint with this Board on February 24, 2008, alleging that the City's actions were discriminatory, namely that the City had discriminated against her due to her gender, her age, her hearing disability, and due to personal reasons in violation of NRS 288.270(1)(f).

Around the same time, Wilson was applying for employment with other law enforcement agencies, such as the Las Vegas Metropolitan Police Department. One of these applications was made to the City of North Las Vegas for the position of Lateral Deputy Marshal. Even though Wilson had submitted the application, it was rejected when the City did not process the application. When Wilson contacted the City to inquire about the application, she was given various reasons why it had not been processed, but was assured that it would be processed and that Wilson would be notified of the outcome. As of the close of the hearing, Wilson still had not heard from the City regarding her application.

Wilson amended her complaint to include a claim against the City for retaliation due to her pending EMRB complaint, which is a claim for a prohibited labor practice under NRS 288.270(1)(d).

In addition to the testimony received over eight days of hearings, the Board received into evidence voluminous documentary exhibits presented by both Complainant and Respondent. The Board deliberated on the claims made as well as the evidence presented. Discussion of each of Wilson's claims is stated separately below.

Unilateral Change

Wilson's post-hearing brief argues that the City committed a prohibited labor practice under the "unilateral change" doctrine, asserting that the City unilaterally changed the bargained for disciplinary process. Specifically, Wilson asserts that non-confirmation was not a bargained-for form of discipline under the collective bargaining agreement, and that the City used the non-confirmation process to discipline her.

The City, in its post-hearing reply brief, objected to that argument by claiming that Wilson's unilateral change claim was never asserted in the complaint, or the amended complaint, and that it was not noticed as an issue to be heard in a contested case as required by NRS 233B.121(4).

In Coury v. Whittlesea-Bell Luxury Limousine, the Nevada Supreme Court recognized that a party before an administrative agency must be provided sufficient notice to give it "an adequate opportunity to prepare [for the hearing]." 102 Nev. 302, 308, 721 P.2d 375, 378 (1986). After reviewing the notice of hearing, as well as the complaints, amended complaints, pre-hearing statements and supplements to the pre-hearing statements filed in this matter, we determine that the various notices did not give the city an adequate opportunity to prepare for a hearing, or to address arguments on a charge of unilateral change. Therefore, under Coury, we cannot consider Wilson's unilateral change argument which was raised for the first time in her post-hearing brief.

Discrimination Claims

The crux of Wilson's case is her claim for discrimination on four different bases. If her non-confirmation was in fact due to Wilson's sex, age, physical handicap or because of personal reasons, then the City has committed a prohibited labor practice. NRS 288.270(1)(f). For

purposes of these claims it is immaterial whether or not Wilson was a probationary employee, as such discrimination is prohibited at all stages of employment. NRS 288.270(1)(f).

The City argues that discharging of an employee due to her race, color, religion, sex, age or any of the other protected categories listed in NRS 288.270(1)(f) is not an act of discrimination under the statute and that consequently this Board lacks jurisdiction over Wilson's claims. (See Post Hearing Reply Brief at pp. 23-27). The Board expressly rejects the City's argument. The statute clearly prohibits discrimination based upon gender, age, disability and personal reasons as well as race, color, religion, national origin and political reasons. NRS 288.270(1)(f). This Board has jurisdiction over claims of prohibited labor practices, such as Wilson's discrimination claims. NRS 288.280; Stationary Engineers, Local 39 v. County of Lyon, Item No. 231, EMRB Case No. A1-045441 (1989). Thus, we will proceed to decide Wilson's discrimination claims.

In Apeceche v. White Pine County, 96 Nev. 723, 615 P.2d 975 (1980), the Nevada Supreme Court adopted the burden-shifting analysis for deciding claims of discrimination that was promulgated in U.S. Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This Board has historically applied the same McDonnell burden shifting analysis to discrimination claims. Cynthia Thomas v. Las Vegas Metro, Item No. 588-1, EMRB Case No.: A1-045804 (2005).

Under this framework, a claimant may establish a *prima facie* case of discrimination either by meeting the four-part test laid out in McDonnell Douglas, or by providing direct evidence suggesting that the employment decision was based on an impermissible criterion. e.g., E.E.O.C. v. Boeing Co. 577 F.3d 1044, 1049 (9th Cir. 2009).

Once the *prima facie* case is established, the burden then shifts to the employer to establish a legitimate explanation for its actions against the employee.

If a legitimate explanation is offered by the employer, the burden then shifts back to the employee to prove that the employer's stated legitimate explanations are not the true reasons for its actions and are merely pretext for unlawful discrimination. Apeceche., *supra.*

Each of Wilson's four discrimination claims are discussed separately:

Wilson's Gender Discrimination Claim

In order to demonstrate a prima facie case of gender discrimination, Wilson must show that: 1) she is a member of a protected class; 2) she performed her job satisfactorily; 3) she was subjected to an adverse employment action; and 4) she was treated differently from similarly situated individuals outside of her protected class. Apeceche, *supra.*

Wilson is a female and therefore is a member of a protected class. Wilson was also subject to an adverse employment action when she was non-confirmed and her employment with the City was terminated.

Wilson presented evidence to the Board that she was performing her job satisfactorily. At the time of her non-confirmation, Wilson was progressing through the City's Field Training Evaluation Program, or FTEP. FTEP consisted of three phases, and in order to advance from one phase to the next, a trainee must demonstrate satisfactory performance. Wilson had successfully passed through phase 1 and phase 2 of the FTEP program, and was progressing through phase 3 of the FTEP program. During FTEP, Wilson was evaluated on a daily basis on her performance of a number of areas, such as general appearance, knowledge of laws and procedures, attitude, and performance of duties. Wilson submitted into evidence a Daily Training Chart detailing her daily scores throughout the FTEP program (Ex. 63). These scores were given by Wilson's field training officers. Wilson's scores as reflected on this Daily Training Chart reflected that she was performing her job satisfactorily, as she received acceptable, or higher, scores in nearly every category. A consistent score of 4 or higher is needed to successfully complete the phases of FTEP. (Ex. 3, p. 6).

The City disputes that she was performing her job satisfactorily, asserting that untruthfulness in a police officer is a training issue and that a lack of truthfulness cannot lead to a satisfactory job performance. The Board finds substantial evidence to demonstrate that Wilson was performing her job satisfactorily. Wilson introduced into evidence her performance marks, which showed that Wilson was at least meeting expectations in all areas of performance and was consistently earning high marks in many areas and overall was progressing through the Field

Training Program on a pace to be expected from a new officer. Further, Wilson had not been held back for remedial training at any time during the phases of field training.

The City also disputes that she was treated differently from similarly situated males. At this stage, Wilson bears the burden to demonstrate that she was subject to this different treatment and that other males were similarly situated. We do not believe that Wilson has proved this element of her gender discrimination claims. Wilson asserts that other male police officers were given training extensions, whereas she was simply non-confirmed without the option of a training extension. This does not necessarily mean that Wilson was similarly situated to these male officers, and we see no credible evidence from Wilson explaining how the other male officers were in fact "similarly situated." Therefore, Wilson has not carried her burden on this point. Because Wilson did not establish a *prima facie* case of gender discrimination, our inquiry ends and the City will prevail on this claim.

Wilson's Age Discrimination Claim

The City argues that the protected class for age discrimination claims is "40 or over" and acknowledges that Wilson was 40 at the time she was non-confirmed. Thus, the City agrees that Wilson was a member of a protected class, and the City does not dispute that Wilson was subject to an adverse employment action. (Respondent's Post-Hearing Brief, p. 8). We accept the City's contentions for purposes of this case.

The City contends that Wilson fails to establish a *prima facie* case of age discrimination because she cannot demonstrate that she was performing her job satisfactorily, and because there was no evidence that she was replaced by a substantially younger officer, or that the department treated a younger officer more favorably, or any evidence that age was the reason for the adverse employment action.

As discussed above, we find that Wilson was performing her job satisfactorily. However, we agree with the City on its second contention that Wilson did not establish that she was replaced by a substantially younger officer, or that the department treated a younger officer more favorably, or present any evidence that age was the reason for the adverse employment action.

Wilson presented evidence that while at the Academy, which is a "boot camp" type of environment, Sgt. Jill Morrison made some stray remarks about Wilson's age. However, these remarks are insufficient to establish a *prima facie* case of age discrimination. Nesbitt v. Pepsico, Inc., 994 F.2d 703 (9th Cir. 1993). There was no credible evidence that younger recruits were treated more favorably by Sgt. Morrison.

Wilson also presented evidence that Officer Laurianne Chimenti, her Field Training Officer in Phase 3, referred to Wilson as "mama." Officer Chimenti explained at the hearing that this was meant to be friendly towards Wilson, and that Officer Chimenti used this term with other women that she worked with. In any event, there was no evidence presented that younger employees were treated differently in this regard. Nor was there any evidence of Wilson being replaced by a substantially younger individual or any other credible evidence of different treatment being provided to substantially younger individuals. Thus, Wilson cannot establish a *prima facie* case of age discrimination, and the City will prevail on this claim as well.

Wilson's Disability Discrimination Claim

NRS 288.270(1)(f) prohibits discrimination based upon "physical or visual handicap." Wilson's claimed physical handicap is a partial hearing loss that is related to her time in the United States Air Force. This type of handicap is not readily apparent, and there exists a question as to whether or not the City was even aware of Wilson's disability. When Wilson filled out her recruit information sheet she listed her medical conditions as "none." (Ex. L). Further, on January 23, 2007, Wilson was administered a hearing test for her job as a North Las Vegas police officer, and that hearing test did not reveal any "recent ear related problems." (Ex. J). The City asserts that it did not know of any documentation regarding Wilson's disability until this Board ordered Wilson to provide documents to the City prior to the hearing and well after the non-confirmation had already occurred. If the City was not aware of Wilson's disability then we do not see how the disability can be the impetus for discrimination. Hedberg v. Indiana Bell Telephone Co., 47 F.3d 928 (7th Cir.1995). We agree with the City that there is no evidence demonstrating that the City was actually aware of Wilson's disability. We do not think that

Wilson informing Sgt. Morrison that she has a hearing problem in response to a question as to why Wilson was not repeating the cadence while running in formation with other recruits at the Academy is sufficient to put the City on notice that Wilson in fact had a hearing problem.

Even if the City had been aware of the disability, there is no evidence to support a finding that Wilson's partial hearing loss in her right ear rises to the level of a physical handicap under NRS 288.270(1)(f). Wilson was tested for ear related problems by the City in January of 2007 just before being hired by the City on February 5, 2007. Wilson successfully passed that test (Ex. J). There was no reason to think that Wilson's hearing problems impaired her ability to perform her job or limited any other major life activity. See E.E.O.C. v. UPS, Inc., 306 F.3d 794, 801 (9th Cir. 2002). Thus, the disability discrimination claim fails as well.

Wilson's Personal Reasons Discrimination Claim

Next, Wilson asserts that her non-confirmation was due to discrimination for personal reasons. NRS 288.270(1)(f) makes it a prohibited labor practice for an employer to discriminate "because of political or personal reasons."

Discrimination based on personal reasons occurs where an employer takes adverse action against an employee for "non-merit-or-fitness factors" such the dislike of or bias against a person which is based upon an individual's characteristics, beliefs, affiliations, or activities that do not affect the individuals merit or fitness for a particular job." Kilgore v. City of Henderson, Item No. 550H, EMRB Case No. A1-045763 (2005).

In this case Wilson has presented substantial direct evidence sufficient to support the inference that personal reasons were a motivating factor in the City' decision to non-confirm her.

Wilson presented credible evidence that her overtime request while in the academy, as well as general impressions from everyday training, were passed along from Sgt. Morrison to the FTEP Coordinator, Lt. Salyer who testified that he was made aware of Wilson's reputation in the academy. Evidence was presented that the overtime incident pervaded through the department, and overshadowed the whole environment in which Wilson worked as a police officer.

The North Las Vegas Police Department policy on truthfulness states that "employees shall not willfully misrepresent or falsify any information under any circumstances...." Ex. 9. It follows that the truthfulness policy would not be violated unless the misrepresentation is willful, a condition which appears to require some inquiry into an employee's state of mind at the time of the alleged untruthfulness. The evidence presented to the Board indicates that the decision had already been made to send Wilson to a non-confirmation hearing before Lt. Salyer had even spoken with Wilson about the incident to investigate whether or not Wilson's mistake was a willful misrepresentation. The City's haste to push this matter to a non-confirmation board before investigating whether Wilson actually violated the truthfulness policy is evidence of discriminatory intent. See Alstyle Apparel, 351 N.L.R.B. 1287, 1287-1288 (2007); Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. N.L.R.B. 414 F.3d 158, 163 (1st Cir. 2005). Therefore we find that Wilson has presented sufficient evidence to establish an inference of discrimination.

Once the inference of discrimination has been established, the burden shifts to the employer to demonstrate a legitimate reason for its actions which, if believed, would support a finding that unlawful discrimination was not the cause of the adverse employment action. e.g., Clark County Public Employees Association v. County of Clark, Item No. 215, EMRB Case No. A1-145425, p. 3 (1988).

The City explained that its "legitimate reason" for non-confirming Wilson was for violating the department policy for truthfulness. The City asserts that in light of the U.S. Supreme Court's decisions in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), a violation of the department's truthfulness policy renders a police officer essentially useless and unfit to continue on the job. Thus, according to the City, Wilson would be non-confirmed for untruthfulness regardless of any personal feelings that other officers may have had toward her.

The Board agrees with the City that this constitutes a legitimate explanation for the City's decision to non-confirm Wilson. There was substantial evidence to support the City's actions to move to a non-confirmation hearing. Specifically we look to the testimony of Officer Chimenti

and the memo authored by Chimenti following the traffic stop incident which we find to be credible. These present an account of events where Wilson not only represented that she had in fact run the driver of the vehicle when she had not, but also represented to her Field Training Officer that the driver came back "with a valid Class C with A restrictions." Ex. 13. Further, there was some vacillation in Wilson's account as to when she first informed Officer Chimenti that she was not really sure if she had really run the driver. Based upon the information that the City had at the time it could have moved forward in the non-confirmation process to the hearing before the non-confirmation panel, which was ultimately the body that recommended the non-confirmation to Acting Chief Chronister. Thus, the City has carried its burden to provide a legitimate explanation that it would have taken the same action regardless of any alleged personal dislike or bias.

Finally, the burden shifts back to Wilson to prove that the City's proffered legitimate explanation is not the true reason for her non-confirmation, and is merely pre-text for actual discrimination. Upon reviewing the evidence, we do not see sufficient credible evidence from Wilson that would satisfy her burden. As noted above, it was not Lt. Salyer, or Sgt. Morrison or Officer Chimenti that ultimately recommended that Wilson be non-confirmed; it was the non-confirmation panel.

Wilson asserts that the decision of the non-confirmation panel was discriminatory because the panel acted as her supervisor's "cat's-paw." e.g., Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990). However, under such a theory as this, Wilson must present sufficient evidence to show that her supervisor's alleged prejudice tainted the decision of the non-confirmation panel. Id. at 405. We see no evidence of any taint in this case. The Board considered the testimony of the Chairman of the non-confirmation panel, Alfonso Noyola, as well as the testimony of Sgt. Tim Bedwell who also served on the non-confirmation panel. The Board also reviewed a transcript of the non-confirmation hearing. Ex. H. We do not see this evidence as rising to the necessary level of proof that the non-confirmation board was tainted, or that the City's "legitimate explanation" was merely pre-text. Thus, the City will ultimately prevail on the personal reasons discrimination claim as well.

Retaliation Against Wilson For Filing Her EMRB Complaint

Finally, Wilson asserts that the City retaliated against her when the City refused to process her application for Deputy Marshal because she had filed her complaint with this Board. Wilson, as a job applicant, falls within the scope of protected employees under the Act, e.g., Venetian Casino Resort, L.L.C. v. N.L.R.B., 484 F.3d 601 (D.C. Cir. 2007); John Hancock Mut. Life Ins. Co. v. N.L.R.B., 191 F.2d 483 (D.C. Cir. 1951); Truckee Meadows Fire Protection Dist. v. International Ass'n of Fire Fighters, Local 2487, 109 Nev. 367, 849 P.2d 343 (1993)(NLRB precedent is guidance on claims arising under the Act). Retaliation against an employee for engaging in protected conduct, such as filing a complaint with this Board, or even for appearing and offering testimony before this Board pursuant to a subpoena, is one of the most serious of unfair labor practices. N.L.R.B. v. Schill Steel Products, Inc. 480 F.2d 586, 594 (5th Cir. 1973)

In order to prevail on a claim for retaliation, an 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 v. City of Reno 102 Nev. 98, 101-102, 715 P.2d 1321, 1323 (1986); All Pro Vending, Inc., 350 N.L.R.B. 503, 515 (2007) (Wright Line analysis applies to section 8(4)(a) of National Labor Relations Act).

Wilson filed her Complaint with this Board on January 24, 2008, and served the Complaint on the City's Human Resources Department at the same time. Although the specific date of Wilson's application for the Deputy Marshal's job was not provided, there is sufficient evidence to establish that the application was made while the EMRB complaint was pending. Wilson testified that the application was made around the same time that she applied for a position with the Las Vegas Metropolitan Police Department, which would be around January-February of 2008. (Ex. 15). Additionally, Wilson had at the time been corresponding with Joyce

Lira from the Human Resources Department, asking for documents related to her non-confirmation, and the responses to that inquiry were generated by the City Attorney's office (Ex. 53). Thus, we find that the City knew of the pending EMRB complaint. Substantial evidence also establishes an inference that the City harbored animus against Wilson for filing the Complaint because it was reluctant to provide Wilson with her personnel documents that she was requesting for the EMRB proceeding. There is also substantial evidence to support the inference that the City's refusal to process Wilson's application was due to that animus. Wilson presented evidence that two other former police officers, who had likewise failed to complete their probationary period with the police department, were brought in for interviews for the Deputy Marshal position. However, unlike Wilson, neither of these other candidates had filed a complaint with this Board. Additionally, the Board heard testimony that the City had rejected Wilson's application "based on its initial description," (Tr. 08/25/09, p. 212) however, when Wilson contacted the City to inquire about the status of her application she was given "several different reasons" why it had not gone forward. Only after Wilson informed them that she had a notification that the City had in fact received the application, did the City promise that the application would be processed and notification of the result would be given to Wilson. Contrary to the City's promise, Wilson has never received any notification from the City regarding her application. (See Tr. from 2/16/10, pp. 60-61). Taken together, this is sufficient to establish the inference of unlawful motivation on the part of the City, and Wilson has met her initial burden to present a *prima facie* showing under City of Reno.

Because Wilson has presented sufficient evidence to support the inference of unlawful motivation by the City, the City now bears the burden to state a "legitimate reason" for its actions. The City fails to meet its burden.

Initially, the City argues that it would have taken the same action against Wilson's application because Human Resources, and specifically Human Resources Director Joyce Lira, were not aware of Wilson's EMRB complaint. However, this purported "legitimate reason" is flatly contradicted by the Certificate of Service attached to Wilson's initial complaint which indicates that the initial EMRB complaint was served upon the City's Human Resources

Department, to the attention of Joyce Lira. Wilson was also gathering evidence for her EMRB complaint by directing requests for personnel information from her time with the police department to Joyce Lira. Ex. 53. Further, Wilson testified that she spoke with Barbara Cella from Human Resources about the pending EMRB complaint and its possible effect on her application. (Tr. 2/16/10, pp. 126-127). This is the same Barbara Cella who gave Wilson "several different reasons" why her application had not been processed and then promised Wilson that it would be processed. (Tr. 2/16/10, pp. 60-61). Joyce Lira testified that she was unaware of the EMRB complaint, despite the fact that it had been mailed specifically to her attention, and we do not find Ms. Lira's testimony on this point to be credible. The Human Resources representatives would also be expected to communicate with the Chief Marshal as well as the police department regarding Wilson's application. (Tr. 8/25/09 at pp. 212-214). This explanation that the City and the hiring authority were unaware of the EMRB complaint is contrary to evidence and thus cannot be a legitimate reason for the City's actions.

The City's next attempt to show a legitimate explanation is that Wilson's application for the Deputy Marshal position was rejected because of her non-confirmation. The City's Civil Service Ordinance, as enacted at the time of Wilson's application and rejection, allowed for the Human Resources Director to reject an application on the basis of "termination or resignation from other employment because of failure, omission, violation of duty or misconduct, which is substantially related to the qualifications, functions, or duties of the job for which application is made." North Las Vegas Municipal Code § 2.68.180(D)(5) (2008); Ex. 2. This does not present a legitimate explanation of the City's actions in this case.

If Wilson's application truly had been rejected due to a non-confirmation for "failure, omission, violation of duty or misconduct," the City was required by law to promptly notify Wilson of the rejection and state the reasons for the rejection. North Las Vegas Municipal Code § 2.68.180 (2008); Ex. 2 ("A person whose application is rejected shall be promptly notified of the rejection and the reasons therefor"). Substantial evidence, including the credible testimony of Nicole Wilson on this point, indicated that Nicole Wilson was never given the required notification. We presume that the City would follow its own ordinance had it truly rejected

Wilson's application on this basis. NRS 47.250(16). Thus, we conclude that the non-confirmation was not the true reason that Wilson's application was rejected and is not a "legitimate explanation" of its actions.

The City did not present any other explanation for its actions. Consequently, the City's did not demonstrate that the same action would have taken place even in the absence of the EMRB complaint. The City's purported explanations for its actions do not proffer the necessary "legitimate explanation" as required under the decisional framework set forth in City of Reno.

Accordingly, Wilson has established that the City retaliated against her because she had filed a complaint with this Board in violation of NRS 288.270(1)(d).

Having considered the above, the Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Unilateral Change

1. The complaint, amended complaints, pre-hearing statements, supplements to pre-hearing statements, notice of hearing, and notices of continued hearing did not contain any allegation that Nicole Wilson would assert a claim for unilateral change against the City.

Gender Discrimination

2. Nicole Wilson is a female and therefore a member of a protected class

3. Nicole Wilson suffered an adverse employment action when she was non-confirmed as a police officer with the City of North Las Vegas.

4. Prior to her non-confirmation, Nicole Wilson was performing her job satisfactorily.

5. Nicole Wilson did not present sufficient evidence to show that she was treated differently than similarly situated males.

Age Discrimination

6. Nicole Wilson was over the age of 40 at the time of her non-confirmation and therefore a member of a protected class.

7. Nicole Wilson suffered an adverse employment action when she was non-confirmed as a police officer with the City of North Las Vegas.

8. Prior to her non-confirmation, Nicole Wilson was performing her job satisfactorily.

9. Nicole Wilson did not present sufficient evidence to show that she was treated differently than substantially younger employees.

10. Nicole Wilson did not present sufficient evidence to show that she was replaced by a substantially younger employee.

Disability Discrimination

11. The City of North Las Vegas was not aware that Wilson had a partial hearing loss.

12. Wilson's response to Sgt. Morrison's question about whether Wilson had a hearing problem during her time at the Academy was not sufficient to put the City on notice of Wilson's partial hearing loss.

13. Wilson's partial hearing loss did not affect her ability to perform her job as a police officer for the City of North Las Vegas, nor did it impair any other major life activity.

Personal Reasons Discrimination

14. During training, as a recruit at the Southern Desert Regional Police Academy, Wilson submitted a request for overtime compensation.

15. Wilson's request for overtime pervaded through the entire police department, and overshadowed the whole environment in which Wilson worked as a police officer.

16. Wilson's reputation in the academy was passed from Sgt. Jill Morrison to FTEP Coordinator Lt. Randy Salyer.

17. The City did not investigate whether or not Wilson acted contrary to the department policy on truthfulness before it decided to convene a non-confirmation board.

18. Regardless of any personal animus or bias against Nicole Wilson, the City would have taken the same non-confirmation action against Nicole Wilson.

19. Per the credible testimony of Officer Chimenti, during the traffic stop incident on November 6, 2007, Nicole Wilson stated that she had run the driver and that the driver came back as "a valid Class C with A restrictions." Wilson also repeatedly stated that she had run the driver.

20. The memo drafted subsequent to the traffic stop by Wilson stating that she realized her mistake before Officer Chimenti showed her the computer screen could be construed as inconsistent with Wilson's prior account of the traffic stop.

21. The non-confirmation panel ultimately made the recommendation to Acting Chief Chronister to non-confirm Wilson. Acting Chief Chronister accepted the panel's recommendation and issued the order terminating Wilson's employment with the City.

22. The non-confirmation panel was not tainted by the alleged dislike or bias of Wilson's supervisors.

23. Wilson did not present sufficient evidence to demonstrate that the City's non-confirmation was merely pre-text for unlawful discrimination based on personal reasons.

Retaliation

24. Wilson filed her complaint with this Board on January 24, 2008, and served a copy of the complaint to the City of North Las Vegas Human Resources Department, Attention Joyce Lira.

25. Wilson discussed her EMRB complaint with a Barbara Cella from the City of North Las Vegas who was aware that Wilson had filed an application for Lateral Deputy Marshal, and that Wilson had also filed her complaint with this Board.

26. Joyce Lira's testimony that she was not aware of Wilson's EMRB complaint is not credible.

27. The City did not process and rejected Wilson's application for Deputy Marshal.

28. The City did process applications for the Deputy Marshal job for two other individuals who had failed to complete their probationary period with the police department. Neither of these two other individuals had filed a complaint with this Board.

29. When Wilson contacted the City, and Barbara Cella specifically, to inquire about the status of her application she was given "several different reasons" why it had not been processed.

30. Wilson informed the City that she had proof the application had been received. Only then did the City promise that the application would be processed and that Wilson would be notified of the results.

31. Wilson has never been notified of any results from her application for Deputy Marshal.

32. Wilson's EMRB complaint had been filed and was pending at the time the City refused to process her application for Deputy Marshal.

33. The City would not have taken the same adverse actions against Wilson in the absence of her EMRB complaint.

34. The City was well-aware that Wilson had filed her complaint with this Board, as notice had been provided to the City's Human Resource's department when Wilson served her complaint.

35. Wilson's non-confirmation does not warrant an automatic rejection of Wilson's application per the testimony of Joyce Lira.

36. The failure to process Nicole Wilson's application for Deputy Marshal deprived Wilson of the benefit of being able to work for the City as a Deputy Marshal.

CONCLUSIONS OF LAW

1. The EMRB has exclusive jurisdiction over claims for unfair labor practices arising under NRS Chapter 288.

2. Discharge of an employee due to race, gender, personal reasons, age, or disability is a form of discrimination under NRS 288.270(1)(f).

Unilateral Change

2. Pursuant to the Nevada Supreme Court's decision in Coury v. Whittlesea-Bell Luxury Limousine, the City did not have an adequate opportunity to prepare for a hearing, or to address arguments on a charge of unilateral change.

3. The Board cannot consider Wilson's arguments that the City committed a prohibited labor practice under the doctrine of unilateral change.

Gender Discrimination

4. Because Wilson has not demonstrated that she was treated differently that similarly situated males, Wilson does not establish a *prima facie* case for gender discrimination.

5. Because Wilson cannot demonstrate a *prima facie* case of gender discrimination, Wilson cannot prevail on this claim.

6. The City did not discriminate against Nicole Wilson based on her gender.

Age Discrimination

7. Because Nicole Wilson did not establish that she was treated differently that substantially younger employees, or was replaced by a substantially younger employee, Wilson cannot demonstrate a *prima facie* case of age discrimination.

8. Because Wilson cannot demonstrate a *prima facie* case of age discrimination, Wilson cannot prevail on this claim.

9. The City did not discriminate against Nicole Wilson based on her age.

Disability Discrimination

10. Because the City was not aware of Nicole Wilson's partial hearing loss, it could not have discriminated against her on that basis.

11. Nicole Wilson's hearing loss did not impair her ability to perform her job or impair other major life functions, thus Nicole Wilson cannot establish a prima facie case of disability discrimination.

12. The City did not discriminate against Nicole Wilson due to any disability.

Personal Reasons Discrimination

13. The evidence of Wilson's reputation following the overtime incident, as well as her general reputation and the City's failure to investigate her truthfulness before deciding to move to a non-confirmation board are sufficient to support the inference that the City discriminated against Wilson due to personal reasons.

14. Once Wilson has demonstrated sufficient evidence to support the inference of discrimination, the City bears the burden to present a legitimate explanation for its actions against Wilson and to demonstrate that it would have taken the same actions against Wilson even in the absence of personal dislike or bias.

15. The City met its burden by claiming that Wilson acted contrary to the department's policy on truthfulness based upon Officer Chimenti's testimony and memorandum indicating that Wilson had actually stated that she had run the driver and the driver came back as being a valid Class C with A restrictions, as well as Wilson's conceivably inconsistent account of when she first realized her mistake.

16. Based upon the information available to the City, the City would have taken the same action against Wilson even in the absence of any personal dislike or bias.

17. When the City presents a legitimate explanation, the burden of proof shifts back to Wilson to demonstrate that the City's stated legitimate reason is not the true reason for the adverse employment action and was merely pre-text for unlawful discrimination.

18. The non-confirmation panel was not acting as a "cats-paw" for Wilson's supervisors.

19. Wilson did not present any credible evidence to support her burden to show that the City's stated reason was merely pre-text.

20. The City did not discriminate against Wilson due to personal reasons.

Retaliation

21. Pursuant to NRS 288.270(1)(d) it is a prohibited labor practice for an employer to discriminate against any employee, including prospective employees, because the employee has filed a complaint with this Board.

22. As stated above, Nicole Wilson has presented sufficient evidence to support the inference that the City refused to process her application for Deputy Marshal because Wilson had filed an EMRB complaint.

23. Because Wilson has met her initial burden, the burden of proof shifts to the City to demonstrate that it would have taken the same action against Wilson even in the absence of an EMRB complaint.

24. The City's claim that the hiring authority was not aware of the EMRB Complaint is not credible and cannot satisfy the City's burden to present a legitimate explanation for its actions.

25. If the City rejects an application for employment based upon prior misconduct, it is required to notify the application of the rejection and the reasons for the rejection pursuant to North Las Vegas Municipal Code § 2.68.180 (2008).

26. The City's claim that Wilson's application for Deputy Marshal was rejected due to her non-confirmation for untruthfulness is contradicted by the City's own Civil Service Ordinance at the time, as well as the testimony presented by the City and therefore does not present a legitimate explanation for the City's actions.

27. The City did not truly reject Nicole Wilson's application for Deputy Marshal due to her prior non-confirmation with the police department.

28. The City has failed to meet its burden of proof that it would have taken the same actions against Wilson in the absence of her EMRB complaint.

29. Therefore, the City committed a prohibited labor practice under NRS 288.270(d) by retaliating against Nicole Wilson because she had filed a complaint with this Board.

30. The City's actions deprived Nicole Wilson of the opportunity to work for the City as a Deputy Marshal.

ORDER

Based upon the foregoing, and the finding that the City has committed a prohibited labor practice under NRS 288.270(1)(d), it is hereby ordered that within 60 days of the date of this Order, the City shall offer Nicole Wilson employment as a Deputy Marshal, or an equivalent position.

It is further ordered that the City shall, within 14 days after receipt, post copies of the attached notice. Copies of the notice shall be posted by the City, and maintained for 60

consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the City to ensure that the notices are not altered, defaced, or covered by any other material.

It is further ordered that within 21 days after posting the attached notice, the City shall file with the Commissioner of the EMRB, a sworn certification of a responsible official attesting to the steps that the Respondent has taken to comply with this order.

DATED this 26th day of August, 2010.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: _____
SEATON J. CURRAN, ESQ., Chairman

BY: _____
SANDRA MASTERS, Vice-Chairman

BY: _____
JAMES E. WILKERSON, JR. Board Member

STATEMENT OF DISSENT

I dissent from the Board's ultimate findings regarding Nicole Wilson's discrimination claim for personal reasons. I believe that the evidence showed that Wilson's superiors did not like her, due in large part to her overtime request in the academy, as well as her personality. I do not accept the City's purported legitimate non-discriminatory reason of untruthfulness. Wilson's charge of untruthfulness was clearly fabricated by the City in order to get rid of an employee that was not well-liked by her superiors. Nicole Wilson was not untruthful in the traffic stop incident. She simply made a mistake. For the City to seize upon her mistake as they did and immediately move to non-confirm her is wholly unreasonable and taken contrary to the City's own policy on truthfulness. This is, I believe, a clear case of discrimination based on personal reasons. Because Nicole Wilson offered direct and substantial evidence that personal dislike and personal bias were motivating factors in her non-confirmation, and the City did not state any legitimate reason for her non-confirmation, I would find that Wilson has proved her claim that the City discriminated against her.

Sandra Masters

SANDRA MASTERS, Vice-Chairman

STATEMENT OF DISSENT

I dissent from the Board's decision to require the City to offer Ms. Wilson a job as Deputy City Marshal or an equivalent position. I would only order the City to process her application for Deputy Marshal.

SEATON J. CURRAN, ESQ., Chairman

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NICOLE WILSON, Complainant, vs. NORTH LAS VEGAS POLICE DEPARTMENT, Respondents.	CASE NO. A1-045925 **NOTICE OF ENTRY OF ORDER**

To: Nicole Wilson

To: Noel Eidsmore, Esq.
North Las Vegas City Attorney's Office

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on August 26, 2010.

A copy of said order is attached hereto.

DATED this 26th day of August, 2010.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____
ANDY ANDERSON, Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 26th day of August, 2010, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

Nicole D. Wilson
6098 Hidden Rock Dr.
North Las Vegas, NV 89031
Complainant Pro Se

Noel E. Eidsmore
Deputy City Attorney
2200 Civic Center Dr.
North Las Vegas, NV 89030
Attorney for Respondent

ANDY ANDERSON, Commissioner