STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

JAROD BARTO, JONATHAN CHRISTENSEN, ALEXANDER CORTEZ-DEBONAR, SADIE HELM, KYLE HURLEY, BRADY KIESEL, ELLIOTT KLEVEN, MICHAEL MCFATE, BRYSON PRISBREY, CYNTHIA REVELES, BRAIN WHITE, Complainant, vs. CITY OF LAS VEGAS, Respondent.	CASE NO. A1-046091 ITEM NO. 799 **ORDER**

For Complainant: Jarod Barto, Jonathan Christensen, Alexander Cortez-Debonar, Sadie Helm, Kyle Hurley, Brady Kiesel, Elliott Kleven, Michael McFate, Bryson Prisbrey, Cynthia Reveles, Brian White and their attorney Adam Levine, Esq.

For Respondent: City of Las Vegas and their attorney Jack Eslinger, Esq.

On the 14th day of November, 2014, 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 Local Government Employee-Management Relations Act ("the Act") NRS Chapter 288 and was properly noticed pursuant to Nevada's Administrative Procedures Act. The Board held an administrative hearing on this matter on October 14, 15, 16 and November 12, 2014, in Las Vegas, Nevada.

The complainants in this matter are twelve current and former firefighters employed by Respondent City of Las Vegas. Complainants were all part of the same rookie class of firefighters who entered the Las Vegas Fire & Rescue Recruit Training Academy together in October 2012 as firefighter trainees.[1]

[1] It appears that Firefighter trainee is the official designation, but the documents and witness testimony used the terms trainee and recruit interchangeably, as do we in this order.

Firefighters for the City of Las Vegas, including firefighter trainees, are part of a bargaining unit represented by the International Association of Firefighters, Local 1285.

As part of the training academy, the Complainants were required to test their skills and knowledge pertaining to Hazardous Materials Awareness ("hazmat test"). The complainants were given a hazmat test on January 11, 2013. But in February 2013, on the day before the Complainants' scheduled graduation ceremony from the training academy was to take place, the City cancelled the graduation ceremony, and thereafter, non-confirmed the entire recruit training class, including each of the Complainants, on March 19, 2013.

The reason for the City's actions was the concerns that were raised due to the January 11, 2013, hazmat exam. After the exam had been completed, the State Fire Marshal, who graded the written portion of the exam, notified the City of some possible irregularities in the testing procedure. Thereupon the City began an investigation into the circumstances of the test.

At the hearing before this Board, City Manager Elizabeth Fretwell testified that the City viewed this as a unique situation given that the cheating allegations affected a significant portion of the recruit class, and possibly a member of the training cadre. Ms. Fretwell testified that she consulted with Chief Karen Coyne, who was the Chief of the City's Public Safety Division. At the time of the investigation, Public Safety included Fire and Rescue as well as Detention and Enforcement. Ms. Fretwell ultimately decided to have the investigation conducted by Investigators in the City's Detention and Enforcement Division. The investigation fell to Detention and Enforcement Detective Cheryl Manning.

After interviewing the exam's proctor, who denied that any cheating had occurred, Detective Manning interviewed four of the recruits on February 11, 2013, as witnesses. During that round of interviews, one of the recruits admitted that he had been given an answer to an exam question when the proctor had left the room. The next day, the recruits were notified that their graduation from the training academy was cancelled. Over the two-day period between February 13 and 14, 2013, each of the recruits was interviewed by Detective Manning. These interviews were preceded by written notice on forms referring to NRS Chapter 289. Some of the forms informed recruits that they would have 24 hours to secure union representation and others

specified a 48-hour notice period. The recruits were also issued Garrity warnings. One of the recruits testified at the hearing that he felt intimidated when being investigated by a law enforcement officer with a badge and gun.

Detective Manning conducted a second round of investigatory interviews on February 25, 2013. On March 14, 2013, Detective Manning issued a 33-page report of her investigation and made findings of "sustained" against each of the recruits in the class. Some of the recruits were sustained for cheating, others only for failing to notify their superiors of what had occurred during the exam. On March 19, 2013, each recruit was immediately discharged as being "non-confirmed." No pre-discharge hearing was given to any of the recruits.

Although the Board was presented with a significant amount of detail concerning the occurrences that took place during the hazmat test, the actual test is peripheral to the prohibited labor practice charge. The dispute in this case focuses upon the aftermath of that test and in particular the City's handling of the investigation into the recruits' conduct and the resulting discharge.

Complainants take issue with the way in which the City conducted its investigation and in the procedure through which the City discharged Complainants. Complainants assert that the investigation should have followed the positive discipline policy that is established in the collective bargaining agreement between the City and Local 1285. The positive discipline manual was submitted into evidence at the hearing. Positive discipline entails a different procedure than was utilized by the City in this case. Complainants assert that by referring the investigation to Detention and Enforcement, who conducted a law enforcement style investigation, the City unilaterally changed the discipline and discharge process in violation of NRS 288.270(1)(e).

A unilateral change occurs when a local government employer changes a term of employment that affects one of the mandatory subjects of bargaining, and does so without first bargaining with the recognized bargaining agent. City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 59 P.3d 1212 (2002); NLRB v. Katz, 369 U.S. 736, 742-743 (1962). A unilateral

change is regarded as a *per se* refusal to bargain. Las Vegas Police Protective Assoc. v. City of Las Vegas, Item No. 248, EMRB Case No. A1-045461 (Aug. 15, 1990).

The procedure that is used to discipline and discharge a local government employee is a mandatory subject of bargaining. NRS 288.150(2)(i). The bargaining obligation imposed by NRS 288.150 does not mandate that any particular discipline or discharge procedure be adopted. It is rather only an obligation to bargain in good faith over the procedure. Where a local government employer has met this obligation and has bargained over discipline and discharge matters then there is no prohibited labor practice so long as an employer comports with the agreement. This is true even if what has been bargained for may seem at first glance to disproportionately favor the employer at the expense of the employee or a group of employees.

In this case the City did create a new and unique process to address the wide-spread cheating allegations against the class of recruits. However this is not a prohibited labor practice if the City bargained with Local 1285 for the ability to do so. Based upon the language in the collective bargaining agreement, we do find that the City had bargained for the option to utilize whatever process the City deemed necessary to impose discipline or to discharge the probationary employees in the unit.

The operative language is found in article 10-B of the collective bargaining agreement. That section clearly and unambiguously establishes an initial probationary period, allows the City to discipline or discharge a probationary employee at any time during that probationary period and to deprive a probationary employee of the typical grievance procedure. Critically, that section states, "Nothing in this Agreement interferes in any way with the City's right to discharge or discipline any employee prior to the successful completion of an initial probationary period." This language indicates that article 10-B will supersede any other language in the collective bargaining agreement that would inhibit the City's ability to discharge or discipline probationary employees as the City sees fit. While article 9-J does establish a "positive discipline policy" it is evident from the face of the agreement itself, when held up against article 10-B, that the positive discipline process does not apply to probationary employees. Article 9-J only obligates the City to use positive discipline "as established by the parties." The parties have

established in article 10-B that that does not include probationary employees. Thus the agreement separates probationary employees from non-probationary employees, and extends the protections of the bargained-for discipline process only to non-probationary employees, leaving the City free to determine the appropriate procedure to use when discharging or disciplining probationary employees. In light of this language in the agreement we cannot find that Complainants have met their burden to show that the City had made a unilateral change to a mandatory subject of bargaining.

Complainants raise a novel argument that the language in Section 10-B only applies if the discharge does not violate state or federal law, and that in this case the discharge violated federal substantive due process as it was done in public. Complainants point to a bevy of media coverage over this incident in support. However this argument is an invitation for the Board to stray well outside of our statutory authority under the Act. This argument is predicated upon a finding that the City violated the due process rights of the Complainants. That is not a finding that this Board has been empowered to make. That is a question that must be raised before another tribunal. We only note that even if the City did violate the Complainants' due process rights it does not follow that the City was *ipso facto* guilty of a unilateral change.

Complainants point to our prior decision in Boykin v. City of North Las Vegas, Item No. 674E, EMRB Case No. A1-045921 (Nov. 12, 2010). In Boykin we found a prohibited labor practice when a local government employer had adopted a new procedure in order to discipline and non-confirm a probationary police officer. In Boykin, the collective bargaining agreement did not discriminate between probationary and non-probationary employees, a fact we specifically noted in our decision. In contrast, the agreement in this case does discriminate between probationary and non-probationary employees in section 10-B. This is the critical distinction between Boykin and this case.

The Complainants' pre-hearing statement also asserted allegations of retaliation against some of the recruits for filing the complaint with this Board under NRS 288.270(1)(d), but the Board heard no evidence suggesting retaliation. Therefore we find in favor of the City on this charge as well.

Based upon the foregoing, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Complainants Jarod Barto, Jonathon Christensen, Alexander Cortez-DeBonar, Sadie Helm, Kyle Hurley, Brady Kiesel, Elliot Kleven, Michael McFate, Bryson Prisbey, Cynthia Reveles, Brian White and Cal Henrie Jr. were at the times relevant to this complaint employed by the City of Las Vegas as firefighter trainees. Complainants were at all relevant times probationary employees.

2. The City of Las Vegas is a party to a collective bargaining agreement between the City and the International Association of Firefighters, Local 1285. Firefighter trainees are included within the bargaining unit covered by this agreement.

3. Article 10-B of the collective bargaining agreement states that employees in the bargaining unit are subject to a probationary period and during that probationary period the City has the right to discipline or discharge an employee at any time.

3. On February 11, 2013, the City, through Detention and Enforcement Detective Cheryl Manning interviewed four of the firefighter trainees concerning irregularities on the January 11, 2013 hazmat exam.

4. On February 11, 2013, one of the interviewees admitted that there had been some exchanging of answers on the exam.

5. Detective Manning interviewed each of the recruits in the academy class between February 13-14, 2013, and again on February 25, 2013.

6. Detective Manning conducted the investigation as a law enforcement-style investigation.

7. Following her investigation Detective Manning issued a report sustaining violations against each of the firefighter trainees in the academy training class.

8. Although not every trainee was found to have cheated, each trainee had at least one finding of misconduct sustained in Detective Manning's report.

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9. On March 19, 2013, the entire academy class of firefighter trainees was non-confirmed by the City.

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

CONCLUSIONS OF LAW

1. Pursuant to NRS 288.110(2) the Board has exclusive jurisdiction to hear and determine disputes arising out of the interpretation of or performance under the provisions of the Local Government Employee-Management Relations Act.

2. Discipline and discharge procedures are a mandatory subject of bargaining.

3. The City has bargained with the recognized bargaining agent over discipline and discharge procedures.

4. The collective bargaining agreement in place between the City and Local 1285 distinguishes between probationary and non-probationary employees in matters of discipline and discharge.

5. The agreement requires the City to follow the positive discipline process for non-probationary employees.

6. The agreement does not bind the City to follow any particular discharge or discipline process for probationary employees and does not inhibit the City's ability to act as it sees fit when doing so.

7. As Complainants were probationary employees, the City was not obligated to follow the positive discipline process in this case.

8. Complainants did not show that the City committed a unilateral change when it used Detention and Enforcement Personnel to investigate the Complainants.

9. Complainants did not show that the City committed a unilateral change when it conducted the investigation into the January 11, 2013 hazmat examination.

10. Complainants did not show that the City committed a unilateral change when it non-confirmed Complainants' employment on March 19, 2013.

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11. The City acted within the scope of the discipline and discharge process that had been bargained for under article 10-B.

12. This Board does not have authority to adjudicate whether the City's actions violated Complainants' due process rights.

13. The complaint against the City in this case is not well-taken.

14. An award of costs to the prevailing party is not warranted in this case.

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

ORDER

Based upon the foregoing, it is hereby ordered that the Board finds in favor of Respondent City of Las Vegas as set forth above.

It is further ordered that each party shall bear its own fees and costs incurred in this matter.

DATED this 9th day of December, 2014.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: _____
PHILIP E. LARSON, Chairman

BY: _____
BRENT ECKERSLEY, ESQ., Vice Chairman

BY: _____
SANDRA MASTERS, Board Member

Concurring Statement

I write separately to highlight a matter of personal concern. When introduced as a witness for the Complainant, Ms. Cynthia Reveles, under direct examination by her Attorney, Adam Levine on October 15, 2014, seemed to have no difficulty recalling events that had previously

occurred with respect to the 2013 Academy. These included but were not limited to the following:

- The month and year that she applied for the 2013 Academy, the number of applications (1,500) received and the fact that she was the second person to file her application – Tr. Pg. 285
- The month, day and year that the 2013 Academy began – Tr. Pg 285.
- Whether any of the test/s she took were group or individual tests – Tr. Pg. 290-291.
- A very thorough recollection of events leading up to as well as events related to the taking of a test on January 11, 2013 - Tr. Pgs 306-312.
- A very thorough recollection of the events occurring on February 13th and February 14th, 2013, the latter date being their scheduled graduation date. Tr. Pgs. 313-321.

Now if we fast forward from the events of February 13th and February 25th, 2013, when the two investigatory meetings were conducted to the hearing for this case before the EMRB on October 15, 2014, a span of twenty (20) months, Ms. Reveles seems to have a great deal of difficulty recalling the simple fact of whether or not a Union Representative was in attendance with herself and Ms. Cheryl Manning of Detention and Enforcement during the investigatory meeting/s conducted on February 13th and 25th, 2013. Some examples of this are noted below:

- Reveles says she was given a "Garrity Statement" to sign and states "We went into a room where it was just her (Manning) and myself for my investigation". Tr. Pg. 324.
- Reveles states at least twice that no Union Representative was present during her meetings (2) with Cheryl Manning. Tr. Pgs. 317-319.
- Under cross examination by Mr. Curtis, Ms. Reveles testifies that it was just her and Cheryl Manning in the room for the investigatory meeting. Tr. Pg. 353.
- Under further questioning by Mr. Curtis, Ms. Reveles testifies that she disagrees with the assertion that Union President Scott Johnson was present in the room when she was questioned by Cheryl Manning of D & E.

On October 15, 2014, members of the EMRB heard the two (2) audio tapes of the investigatory meetings conducted on February 13th and 25th, 2013, between Cynthia Reveles and

Cheryl Manning and it becomes readily apparent that a Union Representative was present during Ms. Reveles' two (2) hearings as well as the meetings of other members of the 2013 Academy who were being investigated. Thus, Ms. Reveles was given five (5) specific opportunities under testimony before this board to state whether or not a Union Representative was present for these meetings conducted on February 13th and February 25th, 2013, and it would appear that she only recants her earlier testimony that a Union Representative was not present after she has heard the audio tapes made by the City of these meetings.

BY: _____
PHILIP E. LARSON, Chairman

I agree with Chairman Larson's Concurring Statement.

BY: _____
SANDRA MASTERS, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

JAROD BARTO, JONATHAN CHRISTENSEN, ALEXANDER CORTEZ-DEBONAR, SADIE HELM, KYLE HURLEY, BRADY KIESEL, ELLIOTT KLEVEN, MICHAEL MCFATE, BRYSON PRISBREY, CYNTHIA REVELES, BRAIN WHITE, Complainant, vs. CITY OF LAS VEGAS, Respondent.	CASE NO. A1-046091 ITEM NO. 799 **NOTICE OF ENTRY OF ORDER**

To: Jarod Barto, Jonathan Christensen, Alexander Cortez-Debonar, Sadie Helm, Kyle Hurley, Brady Kiesel, Elliott Kleven, Michael McFate, Bryson Prisbrey, Cynthia Reveles, Brian White and their attorney Adam Levine, Esq.

To: City of Las Vegas and their attorney Jack Eslinger, Esq.

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on December 9, 2014.

A copy of said order is attached hereto.

DATED this 9th day of December, 2014.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____

MARISU ROMUALDEZ ABELLAR,
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 9th day of December, 2014, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

Adam Levine, Esq.
530 South Las Vegas Blvd., Suite 300
Las Vegas, NV 89101

Jack Eslinger, Esq.
City Attorney
City of Las Vegas
495 South Main Street, 6th Floor
Las Vegas, NV 89101

MARISU ROMUALDEZ ABELLAR,
Executive Assistant