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**STATE OF NEVADA
E.M.R.B.**

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

1	DAVID O'LEARY)	CASE NO. A1-046116
2)	
3	Complainant,)	
4)	ORDER
5	vs.)	
6)	<u>ITEM NO. 803</u>
7	LAS VEGAS METROPOLITAN POLICE)	
8	DEPARTMENT,)	
9)	
10	Respondents,)	

11

12 On the 4th day of May, 2015, this matter came on before the State of Nevada, Local Government

13 Employee-Management Relations Board ("Board") for consideration and decision pursuant to the

14 provisions of the Local Government Employee-Management Relations Act ("the Act") NRS Chapter

15 288. The Board held an administrative hearing on this matter on April 7-9, 2015, in Las Vegas,

16 Nevada.

17 Complainant David O'Leary ("O'Leary") contends that Respondent Las Vegas Metropolitan

18 Police Department ("the Department") committed prohibited labor practices against him related to an

19 internal affairs investigation and the resulting determination from that investigation that demotion was

20 the appropriate level of discipline. O'Leary was a Captain with the Department over the Department's

21 Financial Crimes Bureau and was a member of the bargaining unit represented by the Las Vegas

22 Police Managers and Supervisors Association ("Association"). The Association is not a party to this

23 proceeding.

24 The incident that gave rise to the internal affairs investigation against O'Leary was an August 7,

25 2013, fly-along in the Department's air support helicopter. The fly-along lent itself to some notoriety

26 if only because one of the passengers in that fly-along was Darren Ashba ("Ashba"), a celebrity

27 musician, and because after the fly-along had concluded Mr. Ashba made a marriage proposal to his

28 girlfriend, who was also a passenger in the helicopter fly-along. The fly-along concluded at the

1 Department's Northwest Area Command facility, a facility that includes the Department's academy.
2 After exiting the helicopter at the Northwest Area Command, Ashba and his girlfriend left Department
3 property to go to an adjacent public park where the marriage proposal occurred.

4 O'Leary testified at the hearing that he and Ashba are friends. A few weeks prior to this fly-
5 along, Ashba contacted O'Leary and told O'Leary that he was considering a marriage proposal and
6 asked O'Leary if he knew of any private companies that would fly to the Grand Canyon for that
7 purpose. O'Leary told Ashba that he wasn't aware of any such companies, but that he would check
8 with some of his friends who were pilots to inquire about a referral to such a company. O'Leary then
9 called Ray Horsley, who was a pilot for the Department's air support unit. When O'Leary contacted
10 Horsley he did not ask Horsley about using the Department's helicopter, and instead inquired as to
11 whether Horsley could make a referral to private company to travel to the Grand Canyon. O'Leary
12 explained at the hearing that he had contacted Horsley, because he had been personal friends with
13 Horsley for some time, and because the air support unit was based out of the North Las Vegas air
14 terminal. O'Leary had previously seen a number of signs for private aviation companies also based in
15 the same terminal. O'Leary thought that perhaps Horsley, being based at the same airport, was familiar
16 with one of these companies that might be able to provide the service. Horsley told O'Leary that he
17 would get back to him.

18 A couple of days later Horsley called O'Leary back to let him know that a private company
19 could not land at the Grand Canyon due to aviation restrictions. Horsley then volunteered to take
20 Ashba for a fly-along in the Department's helicopter. This was not unusual as at the time the
21 Department had a fly-along program in place that allowed for civilian observers to ride in the
22 Department's helicopter. In fact, O'Leary and Ashba had taken such a fly-along a few months prior in
23 January of 2013. During that January fly-along the air unit had landed at the same Northwest Area
24 Command where the August fly-along ended. After Horsley had raised the idea of a fly-along in the
25 Department helicopter, O'Leary asked Horsley if it were possible to land at the same Northwest Area
26 Command and Horsley assured O'Leary that it was possible. From that point on, O'Leary's wife
27 worked with Horsley to coordinate the details of the fly along. According to Mrs. O'Leary, the
28 marriage proposal was planned to coincide with the fly-along so that after the fly-along was concluded

1 everything would be in place for the proposal at the Police Memorial Park, which is a public park and
2 is located directly adjacent to the Northwest Area Command.

3 On the day of the fly-along O'Leary did drive Ashba and his girlfriend from their home to the North
4 Las Vegas air terminal to begin the fly-along. O'Leary was on his shift when he drove Ashba and his
5 girlfriend to the airport, but had originally scheduled a doctor's visit during that same time. O'Leary
6 rescheduled his doctor's appointment at the last minute at the request of his wife, who was working to
7 bring the proposal together. O'Leary's shift with the Department ended at 4:00 p.m. that day. After
8 his shift ended O'Leary went home and spoke to his wife, who asked that O'Leary meet Ashba's
9 sister, who was bringing the engagement ring to the public park but was running late and was stuck in
10 traffic. O'Leary agreed and ended up meeting Ashba's sister and drove her to the public park. O'Leary
11 used his Department-issued vehicle to do this. O'Leary's vehicle was unmarked and O'Leary did not
12 use any lights or sirens when driving to the park.

13 Captain Michael Dalley was the Captain over the academy located at the Northwest Area
14 Command. Apparently the academy had not been notified that the air unit was going to land there that
15 day and Captain Dalley complained about the helicopter landing to Captain Charles Hank. Captain
16 Dalley had seen Captain O'Leary at the Northwest Area Command and had asked O'Leary what was
17 going on when the helicopter landed. Captain Hank then authored a Statement of Complaint on August
18 9, 2013. That same day Sgt. Joe Martin with the Department's internal affairs unit contacted Captain
19 O'Leary to notify him that a complaint had been filed and admonish him not to discuss the incident
20 with anyone. Testimony at the hearing indicated that this admonishment was standard protocol for an
21 internal affairs investigation. O'Leary testified that he initially thought Martin's admonishment was a
22 prank of some sort because the fly-along had been properly authorized.

23 Three days after the fly-along, and the day after Captain O'Leary had been admonished, on
24 August 10, 2013, Ashba posted a statement about the fly-along on social media that thanked the "Las
25 Vegas Police Department" for "the most amazing helicopter private tour over Vegas." The statement
26 also thanked O'Leary personally for bringing Ashba's sister to the park for the proposal by stating that
27 "thank God Dave jumped in his squad car and raced to get her and the ring to headquarters before we
28 landed... We had no idea the ring had its own police escort to the proposal!!"

1 That same day, August 10, 2013, O'Leary received a telephone call from his immediate
2 supervisor, Deputy Chief Al Salinas, concerning Ashba's social media posting. Salinas informed
3 O'Leary that "they are livid" about the posting. O'Leary understood the reference to "they" to mean
4 the highest ranking officials in the Department, anywhere from Assistant Sheriff up to the Sheriff.
5 Salinas instructed O'Leary to ask Ashba remove the posting. O'Leary refused and informed Salinas
6 that he had been admonished not to discuss the incident.

7 The next morning the Las Vegas Review-Journal published an article about the social media
8 posting. The article identified Captain O'Leary specifically and suggested that O'Leary had arranged
9 what it described as a "private tour of Las Vegas in a police helicopter for a wedding proposal." The
10 article also immediately identified the fly-along as an obstacle to the Sheriff's efforts to persuade the
11 Clark County Commission to approve a sales tax increase in the County in order to increase funding
12 for the Department. Within days the story of the fly-along and the Department's investigation made
13 national and even international news. Many of these reports identified Captain O'Leary by name in
14 connection with the fly-along. The opponents of the sales tax increase proposal heralded this fly-
15 along, and the negative perception that it had generated in the media, as a leading argument against the
16 proposed sales tax increase. Deputy Chief Salinas testified that during the County Commission
17 meeting to consider the proposed sales tax increase that both the public and the Commission were
18 constantly referring to this fly-along.

19 On August 11, 2013, O'Leary received another phone call from Deputy Chief Salinas. During
20 this phone call Salinas told O'Leary that he was worried because "they are already talking about
21 demoting you" and was worried that such discipline might prevent O'Leary from receiving his
22 retirement credentials.

23 On August 12, 2013, Assistant Sheriff Greg McCurdy, who was both O'Leary's and Salina's
24 supervisor, called O'Leary and asked O'Leary about retiring with his credentials. O'Leary informed
25 McCurdy that he was not going to retire.

26 On August 13, 2013, O'Leary received yet another phone call from Salinas asking him to meet in
27 order to discuss how best to handle the situation. O'Leary declined, and explained at the hearing that
28 he had been admonished not to discuss the fly-along. Another phone call on August 14, 2013,

1 requested a meeting with O'Leary and Assistant Sheriff McCurdy. Despite being on vacation, O'Leary
2 agreed to this meeting and brought John Aldrich, the attorney for the Association, with him as a
3 representative. During this meeting McCurdy yelled, screamed and swore at O'Leary about the fly-
4 along and the media fallout. Mr. Aldrich testified at the hearing and described this meeting as "the
5 most unprofessional meeting I've ever been to."

6 Meanwhile the internal affairs investigation moved forward. On September 17, 2013, the
7 Department prepared a Notification of Internal Investigation for Captain O'Leary to interview him
8 about the fly-along. The notification stated the allegations against Captain O'Leary as follows: "[i]t is
9 alleged you inappropriately arranged the ride-along and the use of department property for personals
10 reasons and were observed filming the helicopter and the couple while on duty." The notification also
11 alleged that O'Leary had "inappropriately used department equipment to provide a police escort to an
12 associate of the celebrities who possessed the engagement ring but was stuck in traffic." O'Leary was
13 interviewed about the incident on September 26, 2013, by internal affairs. A second Notice of
14 Investigation was generated on October 17, 2013, which alleged O'Leary had been untruthful in his
15 statements during the September 26th interview. The second notice did not include any new
16 allegations stemming from the actual fly-along.

17 After a thorough investigation, internal affairs issued an Investigative Report of Complaint. That
18 report determined that "[t]he August 7, 2013, Air Support fly-along, in and of itself, was not
19 inappropriate and was within existing Air Support policy and procedure." Instead the report found that
20 the terminus of the fly-along at the Northwest Area Command was not within policy. The report
21 concluded that even though O'Leary was not attached to the air support unit he still should have
22 known that the landing was inappropriate and the resulting publicity brought the Department into
23 "public discredit." The report did not sustain the accusation of untruthfulness against Captain
24 O'Leary, and it did not sustain the accusation that he had driven Code 3 (lights and sirens) to transport
25 Ashba's sister to the public park. Instead the report found a violation of the Department's take home
26 vehicle policy when O'Leary had transported Ashba and his girlfriend from their home to the North
27 Las Vegas airport for the fly-along, and when O'Leary had used his department vehicle to transport

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1 Ashba's sister to the park. The initial notice from internal affairs made no reference to an allegation
2 concerning the transportation of Ashba and his girlfriend.

3 According to testimony at the hearing, once an internal affairs report has been generated that
4 report is supposed to be thoroughly reviewed by the employee's supervisor and, in consultation with
5 the Department's Labor Relations department, an adjudication of the complaint is to be prepared that
6 decides the appropriate level of discipline. Deputy Chief Salinas signed off on O'Leary's adjudication
7 of complaint on December 12, 2013. Within a few days after signing the adjudication of complaint,
8 Salinas contacted O'Leary to meet for lunch at a nearby restaurant. The evidence did not conclusively
9 establish the exact date of this meeting. At this meeting, Salinas informed O'Leary that O'Leary's
10 demotion was imminent. O'Leary became quite upset and testified that Salinas pressured him to
11 immediately retire before receiving the demotion so that O'Leary could keep his retirement
12 credentials, and by asking O'Leary how long he thought he could last working graveyards as a patrol
13 lieutenant if he were to stay and fight a demotion through the ordinary channels. O'Leary promptly
14 retired on December 20, 2013. According to the testimony of Rebecca Johnson, O'Leary's
15 administrative assistant, the retirement was quite unexpected. At the time O'Leary had 24 years and
16 approximately 10 months of service with the Department. Had O'Leary completed a full 25 years, his
17 pension would have increased by approximately \$300/month or 2.47 percent.

18 O'Leary attempted to rescind his retirement by letter dated January 17, 2014, but this request was
19 declined by the Department.

20 21 Unilateral Change

22 NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to
23 bargain in bad faith with a recognized employee organization, and a unilateral change to the
24 bargained-for terms of employment is regarded as a per se violation of this statute. A unilateral
25 change also violates NRS 288.270(1)(a).

26 A party claiming that a unilateral change has been committed must show by a preponderance of
27 the evidence that the actual terms of conditions of employment have been changed by the employer
28 such that after the occurrence which is the subject of the complaint, the terms of employment differ

1 from what was bargained-for or otherwise established. See Service Employees International Union,
2 Local 1107 v. Clark County, Item No. 713A, EMRB Case No. A1-045965 (Oct. 5, 2010). Typically, a
3 complainant can meet this burden by showing (1) the employer breached or altered the collective
4 bargaining agreement, or established past practice; (2) the employer's action was taken without
5 bargaining with the recognized bargaining agent over the change; (3) the change in policy concerns a
6 matter within the scope of representation; and (4) the change is not merely an isolated breach of the
7 contract, but amounts to a change of policy; i.e., the change has a generalized effect or continuing
8 impact on bargaining unit members' terms and conditions of employment. California State
9 Employees' Ass'n. v. Pub. Employment Relations Bd., 51 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d
10 488, 496 (1996).

11 In this case, O'Leary points to the collective bargaining agreement and the negotiated procedures
12 concerning discipline and discharge and claims that the Department departed from those procedures.
13 In particular, O'Leary points to article 5.6 of the agreement, which details the procedures for the
14 Department to investigate the members of the bargaining unit represented by the Association. That
15 article incorporates portions of NRS Chapter 289, commonly referred to as the Peace Officer's Bill of
16 Rights. This article specifies that an officer under investigation must be provided a notice that includes
17 a summary of facts that must address all of the allegations against the officer. The article further
18 provides that if additional misconduct is uncovered during the course of the investigation then a new
19 complaint against the officer must be generated and a new notice of the additional allegations be
20 provided to the officer. The notice provided by the Department against Captain O'Leary alleged that
21 he had improperly arranged for the helicopter ride along. But the report from internal affairs
22 concluded that Captain O'Leary had not acted improperly in arranging the fly-along. Rather the fly-
23 along was suggested to O'Leary by the air unit pilot, and the actual arrangements were made by the
24 pilot, in coordination with O'Leary's wife. Ashba and his girlfriend filled out the Department's
25 paperwork to participate in the fly along, which reflect an approval by a Sgt. Gifford. The internal
26 affairs report concluded that the fly-along in and of itself was within Department policy. Rather, the
27 actual disposition of complaint stated that O'Leary's actions were inappropriate because the fly-along
28 terminated at the Northwest Area Command, and after the fly-along was over the marriage proposal

1 occurred which resulted in an uproar in the media. The other sustained finding against O'Leary was
2 that he had used his department vehicle to transport Ashba and his girlfriend, and Ashba's sister in his
3 department vehicle. The notice to O'Leary alleged only that O'Leary had used his department vehicle
4 to "provide a police escort" to Ashba's sister. O'Leary contends that this was a breach of the written
5 agreement because the findings against him were not within the allegations stated in the notice that he
6 had been provided. Under the agreement, in order to discipline O'Leary for these new allegations
7 uncovered during the investigation the Department was required to generate a new complaint and a
8 new notice. That never happened. We agree that O'Leary has met this first element of a unilateral
9 change claim.

10 O'Leary has also presented sufficient evidence to show that the Department's actions were not
11 preceded by negotiations with the Association, but rather were done completely in the context of
12 investigating O'Leary. Further, the Act specifies that discipline and discharge procedures are a
13 mandatory subject of bargaining, and thus we conclude that the second and third elements of a
14 unilateral change claim are met as well.

15 However, we do not see evidence of an actual change in policy given the particular facts in this
16 case. O'Leary did not offer evidence to show a generalized or continuing impact upon the members of
17 the bargaining unit. Rather this appears to be a situation uniquely directed against Captain O'Leary
18 prompted by the high-profile attention that the fly-along generated. Thus, there was no evidence to
19 show a generalized impact on members of the bargaining unit other than Captain O'Leary and there
20 was no indication of a continuing impact in other disciplinary proceedings. Thus, we cannot conclude
21 that the Department's actions in this case reflected an actual change in policy by the Department to the
22 disciplinary process. Consequently we find that the Department did not commit a unilateral change in
23 violation of NRS 288.270(1)(a) or (e).

24
25 Personal/Political Reasons Discrimination

26 O'Leary also claims that he is the victim of discrimination by the Department due to personal
27 and political reasons in violation of NRS 288.270(1)(f). Discrimination of this sort is analyzed under
28 the framework set forth in Reno Police Protective Ass'n v. City of Reno, 102 Nev. 98, 715 P.2d 1321

1 (1986) and later modified in Bisch v. Las Vegas Metro Police Dep't., 302 P.3d 1108 (Nev. 2013).
2 This is a burden-shifting framework that first obligates O'Leary to present credible evidence that
3 supports the inference that personal or political reasons were a motivating factor in the Department's
4 actions against him. If O'Leary is able to meet this burden, then the burden of proof shifts to the
5 Department to show by a preponderance of the evidence that it would have taken the same action
6 against O'Leary even in the absence of the protected personal or political reasons. O'Leary may
7 present evidence to discredit the Department's reasons as pre-text. A respondent does not carry its
8 burden if its proffered reasons do not pass the test of reasonableness in light of the factual
9 circumstances and protected rights at issue in a given case. Reno Police Protective Ass'n, at 101, 715
10 P.2d at 1323.

11 We find the evidence presented by Captain O'Leary to be credible and find that the evidence
12 does support, by a preponderance of the evidence, the inference that political reasons were a
13 motivating factor in the Department's finding of misconduct against O'Leary. We look to the political
14 fallout that ensued as a result of this fly-along. This fly-along, prompted by Ashba's social media
15 posts generated local, national and even international media attention. This media attention was not
16 favorable to the Department. Captain O'Leary was personally identified in connection with this fly-
17 along in many of these media reports. (Exhibit 57). Captain O'Leary was further identified personally
18 in Ashba's social media posting, thus permanently associating Captain O'Leary with this fly-along and
19 its political fallout. Testimony and exhibits at the hearing, including the testimony of Deputy Chief
20 Salinas, referred to the Sheriff's effort to obtain more funding for the Department by asking the Clark
21 County Commission to approve the sales tax increase and the inhibiting effect on that effort that the
22 media reports about this fly-along had generated.

23 We also credit O'Leary's testimony that after the media firestorm hit, he was called personally
24 by Deputy Chief Salinas who pressured O'Leary to retire at that time, stating that "they are talking
25 about demoting you." O'Leary further testified that Salinas had asked him to request that Ashba
26 remove the social media postings. Salinas asked O'Leary to do so because "they are livid." We also
27 look to the August 14, 2013, meeting with Assistant Sherriff McCurdy. The meeting itself seems
28 suspicious because O'Leary had just been admonished a few days prior not to discuss the incident with

1 anyone, and O'Leary was on vacation leave at the time he was summoned to meet with McCurdy. We
2 look to the testimony of John Aldrich about the meeting. Aldrich testified that at that meeting
3 Assistant Sherriff McCurdy berated O'Leary about the fly-along and how it had brought discredit to
4 the agency. Testimony at the hearing indicated that McCurdy's yelling was laden with profanity and
5 was very unprofessional. O'Leary confirmed that this meeting coincided with the time that the public
6 and a member of the County Commission began pointing to the fly-along in opposition to the
7 proposed sales tax increase. The Board finds all of this testimony to be credible. In our view, this
8 indicates that O'Leary had something of a target on his back due the political fallout and
9 embarrassment to the Department caused by this fly-along.

10 Within days of Ashba's social media posting, the Department was contemplating disciplining
11 O'Leary for the fly-along with a demotion. But the Department had, after the investigation, ferreted
12 out the facts of O'Leary's true involvement in this incident, which is far less sensational than the
13 media reports indicated. O'Leary had only made the rather benign request to Officer Horsley for a
14 referral for a private helicopter tour. Horsley had volunteered the Department helicopter for the
15 occasion. O'Leary had asked a harmless question of Horsley whether landing at the Northwest Area
16 Command was possible, and accepted Horsley's representation that it was. The internal affairs
17 investigation uncovered the fact that O'Leary was not personally involved in arranging the details of
18 the flight, and only concluded that O'Leary was aware that Ashba was planning on proposing at an
19 adjacent public park after the fly-along had ended. The internal affairs investigation also settled on the
20 fact that O'Leary had used his unmarked Department vehicle to pick up Ashba's sister to take her to
21 the park, but despite all efforts, uncovered no evidence that O'Leary improperly used lights or sirens
22 when making his way to the park. While the Department's vehicle policy does contain some
23 restrictions against non-department employees in Department vehicles in some cases O'Leary claimed
24 that personnel of the rank of Captain and above are exempt from the policy, and thus transporting
25 Ashba's sister did not actually violate policy. The Board need not actually decide if this was against
26 policy because even if it were, the Department's selective enforcement of that policy against O'Leary
27 in this case is evidence of discrimination. O'Leary testified, credibly, that it is common within the
28 Department for employees of the rank of Captain, and above, to use their vehicles in similar ways

1 without punishment or repercussion and his use of the vehicle in this way would ordinarily be of no
2 concern to the Department. The Department's selective focus on this fact in this case in order to
3 justify a finding of misconduct against O'Leary tends to reveal that the Department's motivation for
4 doing so was politically driven.

5 The Department's departure from the bargained-for disciplinary process, while not indicative of
6 an actual change in policy as set forth above, does tend to suggest that the Department had unique
7 motives for finding misconduct against O'Leary in this case. When the principal allegations against
8 O'Leary – that he had arranged the fly-along and had driven Code 3 to the park – did not pan out, the
9 Department stretched beyond the noticed allegations of misconduct to conclude that O'Leary's
10 knowledge of the proposal and “the resulting publicity would tend to bring the Department into public
11 discredit” and to conclude that O'Leary had improperly transported civilians in his vehicle.

12 Further, the evidence established that from the time that Ashba's social media post was made,
13 high-ranking members of the Department were upset and had determined to demote O'Leary. Thus, it
14 seems that some finding of misconduct, no matter how tenuous, and a corresponding discipline of
15 demotion were the foreordained conclusions to any internal affairs investigation against O'Leary.

16 This evidence is sufficient under the first step of the Bisch test to raise an inference that political
17 reasons were a motivating factor in the Department's handling of the internal affairs investigation and
18 in its decision that demotion was the appropriate level of discipline.

19 We now consider whether the Department meets its burden under Bisch to show that it would
20 have taken the same action against O'Leary in the absence of the political reasons. We conclude that
21 the Department does not meet this burden. The Department argued at the hearing that discipline
22 against O'Leary was proper because landing the helicopter at the Northwest Area Command was
23 contrary to the air support unit's landing site policy. That policy states in relevant part at Section
24 5/109.00 that “Landing off airports or heliports will be limited to police operational needs. Landing at
25 other than an airport, heliport or Department facility/function for lunch or a coffee break is not
26 authorized.” The Northwest Area Command is a department facility, and thus the policy allowed the
27 landing at that location, and Deputy Chief Salinas so testified at the hearing, if the pilot had only taken
28 a coffee break or used the restroom. Evidence at the hearing also showed that on August 22, 2013,

1 two weeks after the fly-along, personnel in the air support unit were still trying to obtain clarification
2 about landing policies at the academy. Even if the landing was, strictly speaking, against the air unit
3 policy the Department adduced nothing to rationally connect this policy to O'Leary. O'Leary was not
4 over the air support unit, nor had he ever been. It was not within O'Leary's authority to either approve
5 a fly-along or approve of an air s unit's landing location. The same policy specifies that the civilian
6 ride-alongs are at the discretion of the Section Lieutenant or his/her designee. There was no evidence
7 that O'Leary sought to use his rank as Captain to intimidate Officer Horsley or anyone else in the air
8 support unit to land at the Northwest Area Command. The rationale stated in the Internal Affairs
9 findings states that "[e]ven though O'Leary was not assigned to air support, as an LVMPD captain he
10 know or should have known it was inappropriate to have Air Support land his celebrity friends at
11 NWAC to facilitate a marriage proposal." The Adjudication of Complaint similarly stated that "...as a
12 Captain you (O'Leary) know that any ride along or fly-along is intended to address the benefit of the
13 community and the police department, not the personal gratification of the person riding in the unit or
14 helicopter." In doing so, it is rather obvious in our judgment the concern expressed by the Department
15 is the fact that after the flight, Ashba and his girlfriend went to a public park where Ashba proposed,
16 and the Department's dissatisfaction with the way it had been portrayed in the in the media and the
17 political fallout from this fly-along. But these were the actions of private citizens that took place off
18 Department property at a public park after the fly-along had concluded. Even more, the Department
19 presented no credible evidence at the hearing to show that even if O'Leary had opposed the fly-along
20 that he had the actual authority to compel Horsley not to land at the Northwest Area Command, or to
21 compel the air support unit to cancel the fly-along. The credible testimony at the hearing indicated
22 that neither Horsley nor the air support unit were within O'Leary's chain of command.

23 It is also significant to the Board that the level of discipline the Department had decided to mete
24 out in this case was exceedingly disproportionate to the true facts of O'Leary's minimal involvement
25 in the fly-along and subsequent marriage proposal. A demotion in rank is classified as a "major"
26 discipline. O'Leary had only contacted Horsley asking for a referral to a private company, accepted
27 the assurances of Horsley that the landing at the Northwest Academy was permissible, and on the day
28 of the fly-along and while off-duty drove Ashba's sister to a public park in his Department vehicle.

1 For this the Department claimed that O'Leary's actions were so egregious that it warranted the major
2 discipline of a demotion for a first offense. This rationale strains credulity beyond the breaking point.
3 O'Leary was a 24-year veteran of the Department, a Captain over the Financial Crimes Bureau, and
4 had over that long career maintained a clean disciplinary record.¹ Even if O'Leary's actions in this
5 case could be construed as technical violations of Department policy, and we remain doubtful that they
6 are, the Department's disciplinary guide contains other applicable categories which seem to fit the
7 findings of the Internal Affairs report and which do not warrant major discipline for a first offense. In
8 comparison that discipline guide details less severe discipline for seemingly more egregious acts. Acts
9 such as an inappropriate use of force, insubordination or using a Department vehicle to travel out of
10 state without permission are offenses that lead to only minor discipline. It is rather obvious that the
11 Department came down on O'Leary in the way that it did in order save face from the political fallout
12 generated by this fly-along. See Exhibit 47.

13 We conclude that the Department's grounds for its actions, and in particular reaching the
14 sustained findings against O'Leary and arriving at the recommended discipline of demotion, do not
15 pass the test of reasonableness in light of the factual circumstances of this case. The Department has
16 not shown that it would have taken the same action against O'Leary even in the absence of the
17 political reasons that are central to this case. As the Department has not met its burden we conclude
18 that the Department's actions in this regard were motivated by unlawful discrimination due to political
19 reasons in violation of NRS 288.270(1)(f). See Reno Police Protective Ass'n., at 101-102, 715 P.2d at
20 1323-1324.

21 When Deputy Chief Salinas met with O'Leary at the off-site restaurant in December, Salinas
22 was, in effect, tipping O'Leary off about the coming discipline. Salinas told O'Leary that if he wanted
23 to leave with his credentials he needed to retire right away. The purpose of this meeting seems clear in
24 light of Salinas' earlier suggestions in September of 2013 to O'Leary that he retire. It was to induce
25 O'Leary to retire. During this meeting, Salinas asked O'Leary that if he stayed with the Department
26 and fought the discipline how long he thought he would last while working patrol graveyards during
27

28 ¹ O'Leary did have one contact report, but it is our understanding that a contact report is not considered discipline.

1 that time. O'Leary took this to refer to some health issues he was experiencing at the time. O'Leary
2 was roughly 2 months shy of having completed 25 years with the department and O'Leary testified
3 that that difference between retiring when he did and retiring two months later with 25 years of credit
4 was nearly 3% of his monthly pension. This does not suggest that O'Leary's December 20, 2013,
5 retirement was O'Leary's own choice. The Board finds that had it not been for the threat of imminent
6 demotion, which as set forth above was the product of unlawful discrimination, O'Leary would not
7 have suddenly retired when he did.

8 Having found that the Department committed a prohibited labor practice by unlawfully
9 discriminating against O'Leary for political reasons, we look next to the appropriate remedy. The
10 Board is authorized to "restore to the party aggrieved any benefit of which the party has been deprived
11 by that action." NRS 288.110(2). The evidence showed in this case that the Department would still
12 have commenced an investigation absent political reasons based upon the complaint of Captain Dalley
13 to Captain Hank. As set forth above, those initial allegations were not sustained based upon the
14 information uncovered during the internal affairs investigation. Instead the political reasons at play in
15 this case motivated the Department to stretch its rationale in order to make some other tenuous
16 findings of misconduct. As the initial allegations were not sustained and as O'Leary has established
17 that the allegations against him that were sustained were motivated by unlawful political reasons, we
18 conclude that O'Leary was deprived of the benefit of a clean disciplinary record and thus the sustained
19 allegations against O'Leary must be expunged from his record. In this case because O'Leary's
20 retirement was impelled by the Department's prohibited labor practice we further find that O'Leary
21 was deprived of the benefit of continued employment with the Department at the rank of Captain.
22 This benefit will be restored to O'Leary along with back pay and all benefits O'Leary would have
23 earned from the date of his retirement on December 20, 2013, until the date of his reinstatement with
24 the Department. The amount of back pay shall be offset by any payments that O'Leary has received
25 from the Public Employees Retirement System, or other income, during that time. We further find that
26 this case presented a legitimate legal dispute and thus an award of costs under NRS 288.110(6) is not
27 warranted.

28 ///

1 Based upon the foregoing, the Board makes the following findings of fact and conclusions of
2 law.

3
4 **FINDINGS OF FACT**

5 1. Prior to December 20, 2013, Complainant David O'Leary was employed by the
6 Department as a Captain over the Department's Financial Crimes Bureau.

7 2. O'Leary's position did not include the air support unit in his chain of command.

8 3. In January of 2013, O'Leary and Darren Ashba participated in a fly-along in the
9 Department's helicopter. That fly-along included a landing at the Northwest Area Command.

10 4. In the summer of 2013, Ashba contacted O'Leary asking about possible flights on private
11 companies to the Grand Canyon for the purpose of a marriage proposal.

12 5. O'Leary contacted Ray Horsley to inquire about private companies that might be able to
13 fly to the Grand Canyon for this purpose.

14 6. Horsley informed O'Leary that private companies could not fly to the Grand Canyon and
15 land due to aviation restrictions. Horsley did offer to take Ashba for a fly-along in the Department's
16 air support unit.

17 7. O'Leary did not actively participate in arranging the details of the fly-along or the
18 ensuing marriage proposal.

19 8. O'Leary did not invoke his rank as Captain to influence or coerce any employee of the
20 Department to grant the fly-along.

21 9. O'Leary justifiably relied upon the representations of Horsley that landing at the
22 Northwest Area Command was acceptable.

23 10. The Department's air support unit was not in O'Leary's chain of command.

24 11. At the time of this incident, and for some time prior to this incident, the Department had
25 established a fly-along program that allowed civilians to ride along in Department helicopters.

26 12. The passengers to the August 7, 2013, fly-along filled out the paperwork required by the
27 Department to participate in the fly-along program.

28 ///

1 13. The Department's internal affairs investigation concluded that this fly-along, in and of
2 itself was not inappropriate and was within existing air support policy and procedure.

3 14. O'Leary has no control over a helicopter pilot's decision where to land the helicopter.

4 15. On August 7, 2013, O'Leary used his Department vehicle to transport Ashba and his
5 girlfriend from their home to the North Las Vegas air terminal for this fly-along.

6 16. On August 7, 2013, while off-duty, O'Leary met Ashba's sister and transported her to
7 Police Memorial Park in his department vehicle.

8 17. O'Leary's vehicle is not marked as a police vehicle and O'Leary did not use lights or
9 sirens to transport Ashba's sister to the park.

10 18. Police Memorial Park is a public park located adjacent to the Northwest Area Command.

11 19. On August 9, 2013, O'Leary was admonished by Sgt. Joe Martin about the internal
12 affairs investigation and instructed not to discuss the fly-along with anyone.

13 20. On August 10, 2013, Ashba made a social media post about the fly-along.

14 21. On August 10, 2013, O'Leary was contacted by Deputy Chief Salinas about the social
15 media posting. Salinas informed O'Leary that higher ranking officials at the Department were livid
16 about the posting and Salinas asked O'Leary to ask Ashba to remove the posting. O'Leary refused to
17 do so.

18 22. On August 11, 2013, the Las Vegas Review-Journal published an article about the fly-
19 along that identified O'Leary by name and connected the fly-along with the Sheriff's efforts to
20 persuade the Clark County Commission to approve a sales tax increase.

21 23. On August 11, 2013, O'Leary was contacted by Salinas. During this conversation Salinas
22 informed O'Leary that "they" were already talking about demoting O'Leary due to this fly-along.

23 24. On August 12, 2013, Assistant Sheriff McCurdy contacted O'Leary and asked O'Leary
24 about retiring and keeping O'Leary's retirement credentials.

25 25. On August 14, 2013, while O'Leary was on vacation leave, O'Leary was summoned to
26 meet with McCurdy and Salinas. O'Leary brought Association attorney John Aldrich to this meeting.
27 During this meeting McCurdy berated O'Leary about the fly-along and the negative media attention
28 that had been drawn by the fly-along and the effect on the possible sales tax increase.

1 26. The first internal affairs notice to O'Leary specified the allegations against him as: "it is
2 alleged you inappropriately arranged the ride-along and the use of department property and equipment
3 for personal reasons and were observed filming the helicopter and the couple while on duty. It is
4 further alleged that prior to the landing, you inappropriately used department equipment to provide a
5 police escort to an associate of the celebrities who possessed the engagement ring but was stuck in
6 traffic."

7 27. The second internal affairs notice alleged only untruthfulness during the first interview
8 and did not make any new allegations against O'Leary concerning the fly-along.

9 28. The Internal Affairs report found that the fly-along in and of itself was within Department
10 policy.

11 29. The internal affairs report found that O'Leary did not use lights or sirens when driving
12 Ashba's sister to the park.

13 30. The internal affairs report did not sustain the allegation against O'Leary of
14 untruthfulness.

15 31. The internal affairs report sustained O'Leary on the basis that the marriage proposal that
16 occurred after the fly-along and the ensuing media attention brought the Department into discredit and
17 on the basis that he used his department vehicle to transport passengers.

18 32. Per the credible testimony of O'Leary it is common for Captains and above to use their
19 department vehicles for personal or nonbusiness reasons and ordinarily the transporting of passengers
20 in his department vehicle would not have been a concern for the Department.

21 33. O'Leary had worked for the Department for approximately 24 years and 10 months.
22 During his career O'Leary had maintained a clean disciplinary record.

23 34. Before the internal affairs report was complete, the Department had pre-determined to
24 demote O'Leary for this fly-along incident.

25 35. The Department would not have found misconduct against O'Leary and would not have
26 settled on demotion as the appropriate level of discipline if the political reasons (the fly-along's
27 adverse effect on the proposed sales tax increase) were absent from this case.
28

1 36. But for the Department's findings of misconduct and attempt to demote O'Leary, he
2 would not have suddenly retired from the Department.

3 37. O'Leary's retirement was not voluntary, but was coerced by the Department.

4 38. If any of the foregoing findings is more appropriately construed a conclusion of law, it
5 may be so construed.

6
7 **CONCLUSIONS OF LAW**

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

10 2. The Board has exclusive jurisdiction over the parties and the subject matters of the
11 Complaint on file herein pursuant to the provisions of the Act.

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

15 4. A complainant can demonstrate a unilateral change by showing: (1) the employer
16 breached or altered the collective bargaining agreement, or established past practice; (2) the
17 employer's action was taken without bargaining with the recognized bargaining agent over the change;
18 (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not
19 merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a
20 generalized effect or continuing impact on bargaining unit members' terms and conditions of
21 employment.

22 5. O'Leary did show that the Department breached the collective bargaining agreement
23 when it made sustained findings against O'Leary that were not noticed in accordance with Article
24 5.6(C) and (E) of the agreement.

25 6. The Department did not bargain with the Association concerning the notices provided to
26 O'Leary.

27 7. Discipline and discharge procedures are a mandatory subject of bargaining.

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1 8. The Board did not receive evidence to show a generalized impact or continuing effect on
2 the members of the bargaining unit represented by the Association.

3 9. The Department's actions in this case were an isolated breach of the agreement rather
4 than an actual change to policy or discipline procedures.

5 10. The Department did not commit a unilateral change.

6 11. NRS 288.270(1)(f) prohibits a local government employer from discriminating against an
7 employee for political reasons.

8 12. O'Leary has presented credible testimony that establishes by a preponderance of the
9 evidence an inference that political reasons were a motivating factor in the Department's findings of
10 misconduct against O'Leary and its decision to impose demotion as discipline against O'Leary based
11 upon the evidence discussed above.

12 13. The Department has not met its burden of proof to show that it would have taken the
13 same action against O'Leary absent the political reasons at issue in this case, as set forth above.

14 14. The Department's proffered reasons for its actions against O'Leary do not pass the test of
15 reasonableness in light of the factual circumstances and protected rights at issue in this case.

16 15. The Department discriminated against David O'Leary for political reasons in violation of
17 NRS 288.270(1)(f).

18 16. As a result of the Department's violation of NRS 288.270(1)(f), O'Leary was deprived of
19 the benefits of a clean disciplinary record and of continued employment with the Department as a
20 Captain.

21 17. The remedies identified in this decision and order are intended to effectuate the policies
22 and purposes of the Act.

23 18. An award of costs is not warranted under NRS 288.110(6).

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

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1 **ORDERS**

2 Based upon the foregoing, and as stated above, it is hereby ordered that the Las Vegas
3 Metropolitan Police Department shall:

- 4 1. Cease and desist from discriminating against its employees for political reasons; and
5 2. Take the following affirmative action necessary to effectuate the policies and purposes of
6 the Act:
- 7 a. Expunge the sustained findings of misconduct against David O'Leary from his
8 record with the Department;
- 9 b. Reinstatement the employment of David O'Leary at the rank of Captain;
- 10 c. Compensate O'Leary for lost back pay accruing from the date of his retirement on
11 December 20, 2013, to the effective date of O'Leary's reinstatement pursuant to this order. The
12 Department may offset any back pay against any income including PERS benefits received by
13 O'Leary during this same time frame. The Department shall also restore to O'Leary all benefits that
14 would have accrued to him during this time frame.

15 DATED the 15th day of May, 2015.

16 LOCAL GOVERNMENT EMPLOYEE-
17 MANAGEMENT RELATIONS BOARD

18 BY: 
19 PHILIP E. LARSON, Chairman

20 BY: 
21 BRENT C. ECKERSLEY, Vice-Chairman

22 BY: 
23 SANDRA MASTERS, Board Member
24
25
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27
28

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

4 DAVID O'LEARY) CASE NO. A1-046116
5)
6 Complainant,)
7 vs.) **NOTICE OF ENTRY OF ORDER**
8) **ITEM NO. 803**
9 LAS VEGAS METROPOLITAN POLICE)
10 DEPARTMENT,)
11 Respondents,)
12)

12 To: David O'Leary, by and through his attorneys, Adam Levine, Esq. and the Law Office of Daniel
13 Marks;

14 To: Las Vegas Metropolitan Police Department, by and through their attorneys, Nick D. Crosby, Esq.
15 and Marquis Aurbach and Coffing.

16 PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on May 15,
17 2015.

18 A copy of said order is attached hereto.

19 DATED this 15th day of May, 2015.

20 LOCAL GOVERNMENT EMPLOYEE-
21 MANAGEMENT RELATIONS BOARD

22 BY: 
23 MARISU ROMUALDEZ ABELLAR
24 Executive Assistant
25
26
27
28

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 15th day of May, 2015, I served a copy of the foregoing ORDER by mailing a copy thereof, postage prepaid to:

LAW OFFICE OF DANIEL MARKS
DANIEL MARKS, ESQ.
ADAM LEVINE, ESQ.
610 South Ninth Street
Las Vegas, Nevada 89101

Nick D. Crosby, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145



MARISU ROMUALDEZ ABELLAR
Executive Assistant

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