

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

ERIC BROWN,

Case No. 2015-013

Complainant,

ORDER

v.

ITEM NO. 818

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Respondent.

On November 15, 2016, this matter came before the State of Nevada, Local Government Employee-Management Relations Board (“Board”) for consideration and decision pursuant to the provisions of the Local Government-Management Relations Act (the “Act”); NAC Chapter 288 and NRS Chapter 233B. The Board held an administrative hearing on this matter on August 16 and 17, 2016, in Las Vegas, Nevada. The Board accepted post-hearing briefs in this matter.

Complainant Eric Brown (“Brown”) contends that Respondent Las Vegas Metropolitan Police Department (“the Department”) committed prohibited labor practices against him related to a transfer out of the Traffic Bureau. Brown has been a police officer with the Department for 11 years and was assigned to the Traffic Bureau, which is primarily responsible for enforcing traffic laws in Clark County. Brown alleged that for years, the Department had an unwritten policy of engaging in discriminatory enforcement of pedestrian violations by not issuing citations to members of the Nation of Islam (“NOI”). Brown has long complained that this “hands-off” approach to the NOI is discriminatory and unlawful.

On or about March 10, 2015, the Department’s Traffic Bureau launched a pedestrian safety campaign to reduce pedestrian fatalities by increasing enforcement of pedestrian laws. Lieutenant David Jacoby (“Lt. Jacoby”) testified that pedestrian fatalities had become a “pandemic” in Las Vegas, Nevada. Traffic officers were advised of the initiative and were ordered to increase pedestrian stops and issue citations to persons who violated pedestrian traffic laws.

1 During a briefing with Brown's squad, one of the traffic officers inquired about issuing citations
2 to members of the NOI. Sergeant Jeffrey Richter ("Sgt. Richter") advised the squad that he would
3 inquire with Lt. Jacoby about the officer's inquiry and get back to the squad with his response.
4 Following a meeting with Lt. Jacoby, Sgt. Richter sent an email to the squad advising them that if they
5 encounter a member of the NOI suspected of violating a pedestrian traffic law, to first issue a warning
6 to get out of the roadway and, if the person refuses, to contact Sgt. Richter for further action.

7 Later that day, Brown sent an email to Sgt. Richter stating that he would not be writing anymore
8 pedestrian citations at all and also that he would be encouraging other officers to do the same. Roughly
9 the same time, Brown also sent a separate email to his squad mates encouraging them to either write
10 tickets to everyone or not write pedestrian tickets at all.

11 On April 2, 2015, Sgt. Richter conducted a squad meeting to discuss a planned enforcement
12 patrol on Maryland Parkway. During this meeting, Brown again reiterated to Sgt. Richter and his squad
13 members that he would not be doing pedestrian enforcement. At the end of the shift of the traffic
14 enforcement operation, Sgt. Richter confirmed Brown did not conduct any pedestrian stops or issue any
15 citations for pedestrian violations. Sgt. Richter also asked Brown if he observed any pedestrian traffic
16 violations and Brown responded that he did but chose not to conduct any pedestrian stops. It appears
17 that Brown decided to instead issue only citations to drivers despite the objective of the planned
18 enforcement and campaign.

19 On or about April 3, 2015, Officer Brown was called to a meeting with Captain Peter Boffelli,
20 Sgt. Richter, and Lt. Jacoby. During this meeting, Captain Boffelli indicated that Brown had been given
21 direct orders and advised Brown that this situation arose to gross insubordination, which is a terminable
22 offense. Officer Brown was asked if he would comply with the order to conduct pedestrian safety and
23 enforcement, and Officer Brown responded that he would comply. Brown was also informed of the two
24 Statement of Complaints ("SOC") currently opened against him. Due in part to his initial refusal to
25 conduct pedestrian traffic law enforcement in the field, Brown was ordered, on April 5, 2015, that he
26 was not to conduct any traffic enforcement and, instead, was ordered to work at the Bureau and assist
27 with search warrants. On April 6, 2015, an administrative transfer request was drafted, outlining the
28 basis for the administrative transfer. Lt. Jacoby noted that the chain of command lost confidence in

1 Brown's ability to be an effective team member in Traffic.

2 When Brown received his administrative transfer notice, he lodged a grievance pursuant to
3 Article 12 of the parties' Collective Bargaining Agreement ("CBA"). On May 11, 2015, the Office of
4 Labor Relations advised Brown that his grievance could not be processed under the CBA because the
5 transfer was labeled as an administrative transfer. Brown was advised to request review of the
6 administrative transfer by his Deputy Chief via Article 23 of the CBA. However, on June 19, 2015,
7 Brown filed the instant complaint with the Board and chose not to dispute the administrative transfer in
8 that regard.

9 During this time, the Internal Affairs Bureau ("IAB") was investigating the allegations of
10 misconduct lodged against Brown. On January 20, 2016, Brown received an Adjudication of Complaint
11 ("AOC") outlining the findings from the internal investigation and recommending discipline for the
12 sustained findings. Specifically, it was found that Brown violated the Department's Harmony and
13 Cooperation regulation as well as its Obedience and Insubordination regulation. As a result of the
14 sustained findings, Brown was then disciplinarily transferred from Traffic and given a written
15 reprimand.

16 Brown then grieved his discipline pursuant to the CBA. On April 14, 2016, the grievance was
17 heard by a five-member Labor-Management Board ("LMB"). At the conclusion of the hearing, the
18 LMB modified the grievance, holding that the Department did not demonstrate clear and convincing
19 evidence that Brown violated the Obedience and Insubordination regulation because Sgt. Richter did
20 not give Brown prior warning of discipline. However, the LMB did find clear and convincing evidence
21 that Brown violated the Harmony and Cooperation regulation. The remedy issued was that Brown was
22 to receive a contact report and be returned to Traffic. The LMB found that Brown was not entitled to an
23 award of back pay.

24 Unilateral Change

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

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

14 The Department enjoys a contractual right to transfer and assign officers per the parties' CBA as
15 well as per NRS 288.150(3)(a). However, this right may conflict with a mandatory subject of
16 bargaining or established past practice – though the Board notes that Brown was eventually disciplinary
17 transferred from Traffic, given a written reprimand, and grieved his discipline pursuant to the CBA.
18 The Board was not presented with sufficient evidence of an actual change in policy given the particular
19 facts of this case. Brown did not carry his burden in this regard to show a generalized or continuing
20 impact upon the members of the bargaining unit. Rather this appears to be a situation uniquely directed
21 against Officer Brown prompted by his refusal to issue any pedestrian citations whatsoever. Thus, we
22 cannot conclude that the Department's actions in this case reflected an actual change in policy by the
23 Department to the disciplinary process. Consequently, we find that the Department did not commit a
24 unilateral change in violation of NRS 288.270(1)(a) or (e).

25 Personal/Political Reasons Discrimination

26 Brown also claims that he was a victim of discrimination by the Department due to personal and
27 political reasons in violation of NRS 288.270(1)(f). Discrimination of this sort is analyzed under the
28 framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986)

1 and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108
2 (2013).

3 An aggrieved employee must make a prima facie showing sufficient to support the inference that
4 the protected conduct was a motivating factor in the employer's decision. Under the revised
5 framework, "it is not enough for the employee to simply put forth evidence that is capable of being
6 believed; rather, this evidence must actually be believed". *Bisch*, 302 P.3d at 1116. Once this is
7 established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that
8 the same action would have been taken place even in the absence of the protected conduct. *Id.* The
9 aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is
10 merely pretextual. *Id.*

11 The Board finds that Brown did not meet his initial burden to support the inference that his
12 protected conduct was a motivating factor in the Department's decision. Moreover, even if Brown had
13 met his initial burden, the Board finds that sufficient evidence was produced and presented by the
14 Department to satisfy its burden regarding its nondiscriminatory justification – evidence that was not
15 shown as a false pretext per *Bisch*.

16 The Board heard testimony and saw evidence that Officer Brown was initially transferred
17 because he rendered himself ineffective in Traffic and because the chain of command lost confidence in
18 his abilities in Traffic. Brown refused to conduct any pedestrian traffic enforcement and encouraged his
19 peers to cease all pedestrian enforcement (instead of, for example, simply giving NOI member
20 citations). As such, based on the credibility of the testimony presented as further detailed below, the
21 Board finds Brown failed to provide evidence sufficient to establish a prima facie case that the
22 Department's actions were personally or politically motivated. Instead, evidence demonstrated that the
23 Department's actions were due to Brown's refusal to conduct any pedestrian traffic enforcement
24 whatsoever and encouragement of his fellow officers in this regard. In the same vein, the Department
25 presented evidence to satisfy its burden regarding nondiscriminatory justification. Lt. Jacoby offered
26 testimony that any officer who refused to do a primary function of Traffic would warrant a transfer,
27 regardless of the NOI and not specifically related to Brown.

28 ///

1 While Brown indicated, in the April 2015 meeting with his superiors, that he would comply with
2 the order to conduct pedestrian safety and enforcement (as well as testifying in roughly the same manner
3 at the hearing before the Board), the Board does not find Brown's assertions to be credible. Officer
4 Brown testified that his issue with not ticketing NOI members went far back and later testimony
5 revealed that he broached this issue with numerous supervisors he had in Traffic, requesting that this
6 policy be put into writing. Indeed, Brown eventually testified that that "[i]t went back to late 2005, sir,
7 when I was in training and wrote a ticket to them". Brown also claims he is an "idealist" and the law
8 applies equally to everyone and this informal policy never sat right with him. Brown consistently
9 testified that the he would not stop objecting to the inconsistent application of the rules towards NOI
10 members. Indeed Brown testified that he "brought it [NOI enforcement issue] to [his] supervisors, and
11 [he] chose to not obey the law or the unlawful order". Brown further described a process whereby he
12 rationalized that he could write up no pedestrian tickets but rather write up exclusively a high number of
13 vehicle tickets and keep the same quota of tickets written. As such, the Board does not find credible
14 Brown's testimony that he would simply all of a sudden change course. As the Nevada Supreme Court
15 held, "it is not enough for the employee to simply put forth evidence that is capable of being believed;
16 rather, this evidence must actually be believed". *Bisch*, 302 P.3d at 1116.

17 Moreover, in the same vein, we find Lt. Jacoby's testimony regarding the Department's lost
18 confidence in Brown to be credible. Lt. Jacoby was questioned by counsel for Brown regarding why
19 Brown was put on administrative duty pending transfer despite Brown's statement that he would
20 comply with the order. Lt. Jacoby testified that this was an area where "it was related to everyone that
21 while this was going on, we had lost confidence in him. And due to that, we were unsure of placing
22 him back into the workforce, pending the administrative transfer and issue." Lt. Jacoby testified that he
23 was well aware of Brown's displeasure with the way that the policy, with respect to the NOI, was
24 carried out since at least 2009. Lt. Jacoby further clarified that it was "a combination of everything"
25 including his concentration with the NOI "coupled with [Brown's] refusal of [their] direction, of the
26 sergeant's orders that day. And what really concerned me was his attempt to influence the rest of the
27 squad to follow his lead." Lt. Jacoby noted the seriousness of the challenges the Traffic Division faces
28 repeatedly and that "pedestrians in particular" was "becoming a pandemic". Finally, while the Board is

1 not bound by the findings of the LMB, the Board notes that the LMB did find clear and convincing
2 evidence that Brown violated the Harmony and Cooperation regulation.

3 As such, we find that the Brown did not meet his initial burden to support the inference that any
4 protected conduct was a motivating factor in the Department's decision. Moreover, the Board finds that
5 even if Brown had met his initial burden, the Department established a nondiscriminatory reason for
6 discipline – a reason which was not shown as merely pretextual. Finally, based on the facts in this case
7 and the issues presented, the Board declines to award costs and fees in this matter.

8 FINDINGS OF FACT

9 1. Complainant Eric Brown is an Officer employed by the Department and was assigned to
10 the Traffic Bureau.

11 2. In March 2015, the Department's Traffic Bureau launched a pedestrian safety campaign
12 to reduce pedestrian fatalities by increasing enforcement of pedestrian laws.

13 3. Traffic officers were advised of the initiative and were ordered to increase pedestrian
14 stops and issue citations to persons who violated pedestrian traffic laws.

15 4. When an officer inquired about issuing citations to members of the NOI, Sgt. Richter
16 advised the squad that he would inquire with Lt. Jacoby about the officer's inquiry and get back to the
17 squad with his response.

18 5. Sgt. Richter sent an email to the squad advising them that if they encounter a member of
19 the NOI suspected of violating a pedestrian traffic law, to first issue a warning to get out of the roadway
20 and, if the person refuses, to contact Sgt. Richter for further action.

21 6. Brown sent an email to Sgt. Richter stating that he would not be writing anymore
22 pedestrian citations at all and also that he would be encouraging other officers to do the same as well as
23 sending a separate email to his squad mates encouraging them to either write tickets to everyone or not
24 write pedestrian tickets at all.

25 7. On April 2, 2015, Sgt. Richter conducted a squad meeting to discuss a planned
26 enforcement patrol on Maryland Parkway, at which time Brown again reiterated to Sgt. Richter and his
27 squad members that the he would not be doing pedestrian enforcement.

28 *///*

1 8. During the traffic enforcement operation, at the end of the shift, Sgt. Richter confirmed
2 Brown did not conduct any pedestrian stops or issue any citations for pedestrian violations.

3 9. Sgt. Richter asked Brown if he observed any pedestrian traffic violations and Brown
4 responded that he did but chose not to conduct any pedestrian stops.

5 10. On or about April 3, 2015, Officer Brown was called to a meeting with Captain Peter
6 Boffelli, Sgt. Richter, and Lt. Jacoby.

7 11. Officer Brown was asked if he would comply with the order to conduct pedestrian safety
8 and enforcement, and Officer Brown responded that he would comply.

9 12. Brown had a long standing issue with a failure to cite members of the NOI.

10 13. On April 5, 2015, Brown was ordered to not conduct any traffic enforcement and,
11 instead, was ordered to work at the Bureau and assist with search warrants.

12 14. On April 6, 2015, an administrative transfer request was drafted, outlining the basis for
13 the administrative transfer, and Lt. Jacoby noted that the chain of command lost confidence in Brown's
14 ability to be an effective team member in Traffic.

15 15. On January 20, 2016, Brown received an Adjudication of Complaint ("AOC") outlining
16 the findings from the internal investigation and recommending discipline for the sustained findings.

17 16. As a result of the sustained findings, Brown was then disciplinarily transferred from
18 Traffic and given a written reprimand.

19 17. Brown then grieved his discipline pursuant to the CBA which was heard by a five-
20 member LMB on April 14, 2016.

21 18. At the conclusion of the hearing, the LMB held that the Department did not demonstrate
22 clear and convincing evidence that Brown violated the Obedience and Insubordination regulation
23 because Sgt. Richter did not give Brown prior warning of discipline.

24 19. The LMB found clear and convincing evidence that Brown violated the Harmony and
25 Cooperation regulation.

26 ///

27 ///

28 ///

1 9. Discrimination due to personal and political reasons is analyzed under the framework set
2 forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later
3 modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108 (2013).

4 10. An aggrieved employee must make a prima facie showing sufficient to support the
5 inference that the protected conduct was a motivating factor in the employer's decision.

6 11. Under the revised framework, "it is not enough for the employee to simply put forth
7 evidence that is capable of being believed; rather, this evidence must actually be believed ...". *Bisch*,
8 302 P.3d at 1116.

9 12. Once this is established, the burden shifts to the employer to demonstrate by a
10 preponderance of the evidence that the same action would have been taken place even in the absence of
11 the protected conduct.

12 13. The aggrieved employee may then offer evidence that the employer's proffered
13 legitimate explanation is merely pretextual.

14 14. Brown did not meet his initial burden to support the inference that his protected conduct
15 was a motivating factor in the Department's decision.

16 15. Even if Brown had met his initial burden, sufficient evidence was produced and
17 presented by the Department to satisfy its burden regarding its nondiscriminatory justification.

18 16. Brown failed to show the Department's nondiscriminatory reason for its actions were
19 merely pretextual.

20 17. The complaint filed by Brown in this matter is not well-taken.

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

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 ORDER

2 Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondent Las
3 Vegas Metropolitan Police Department as set forth above. Complainant Eric Brown shall take nothing
4 by way of his Complaint.

5 DATED this 7th day of December, 2016.

6 LOCAL GOVERNMENT EMPLOYEE-
7 MANAGEMENT RELATIONS BOARD

8
9 By: 
PHILIP LARSON, Chairman

10
11 By: 
12 BRENT ECKERSLEY, ESQ., Vice-Chairman

13
14 By: 
15 SANDRA MASTERS, Board Member

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

5 ERIC BROWN,

6 Complainant,

7 v.

8 LAS VEGAS METROPOLITAN POLICE
9 DEPARTMENT,

10 Respondent.

Case No. 2015-013

NOTICE OF ENTRY OF ORDER

11 To: Eric Brown and his attorneys, Adam Levine, Esq. and Law Office of Daniel Marks,

12 To: Las Vegas Metropolitan Police Department and its attorney, Nick D. Crosby, Esq.

13 PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on
14 December 8, 2016.

15 A copy of said order is attached hereto.

16 DATED this 8th day of December 2016.

17
18 LOCAL GOVERNMENT EMPLOYEE-
19 MANAGEMENT RELATIONS BOARD

20 BY 

21 MARISU ROMUALDEZ ABELLAR,
22 Executive Assistant
23
24
25
26
27
28

