STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

ERIC KERNS, Individually; LAS VEGAS POLICE MANAGERS AND SUPERVISORS ASSOCIATION, Complainants, v. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Case No. 2017-010 **ORDER** **ITEM NO. 827**

On February 14, 2018, 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 December 11 and 12, 2017. The Board accepted post-hearing briefs in this matter as well.

This case stems from the Bolden Area Command pursuit which occurred on July 22, 2016. Sergeant Kerns became involved in this pursuit, and the Department found that he did not notify communications that the pursuit was on-going and failed to provide any information about the pursuit over the radio. Because Kerns failed to execute his duties as a sergeant and failed to provide the requisite information about the pursuit over the radio, the Department concluded that he placed citizens at risk of significant harm as well as committing other policy violations.

As a result of the underlying incident, an internal investigation was opened. In addition to Kerns, at least 5 other officers were subject employees in the investigation. During the investigation, it became apparent that multiple officers engaged in misconduct, including Kerns. Assistant Sheriff Fasulo extended a deal to Kerns, through his union, on or about February 27, 2017. Specifically, Assistant Sheriff Fasulo engaged in a dialog with Michelle Jotz ("Jotz"), President of the LAS VEGAS

POLICE MANAGERS AND SUPERVISORS ASSOCIATION (the "Association").

In this matter, Complainants argue that Kerns was coerced into early retirement. Specifically, Complainants allege that the LAS VEGAS METROPOLITAN POLICE DEPARTMENT (the "Department") made several unilateral acts in an attempt to circumvent the parties' CBA. Complainants argue that the Department interfered with Kerns' disciplinary and grievance rights by pressuring him into a "plea bargaining deal", requiring he waive his grievance rights or be demoted. Complainants state that Assistant Sheriff Fasulo clandestinely met with Kerns to coerce him into taking the deal, and to make it clear he was leaving K-9 one way or another, either through transfer or demotion. Finally, Complainants alleged that Director Frost violated the parties' CBA, past practice, and NRS 613.200[1] when she issued discipline to Kerns after he retired and denied his alleged right to arbitrate in accordance with the parties' CBA.

The Department argues that this case makes no sense. Specifically, the Department stated that the Complainants filed the instant case seeking to declare informal settlement discussions between a bargaining agent and employer as a mandatory subject of bargaining, despite no authority for such proposition. The Department argues that after the underlying events occurred, it became clear that Kerns did not want to leave his assignment in K-9 and did not want to get disciplined. When the negotiation efforts of Kerns' union (Complainant LVPMSA) did not result in an agreement which left Kerns in K-9, he opted to voluntarily retire rather than face discipline. Kerns retired from the Department with no discipline. The Department argues this case is essentially a dispute on whether it committed a prohibited labor practice by trying to informally work with Kerns' representative to settle the matter. The Department advances that such is not a deviation from a term of the parties' CBA, nor

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[1] The Board notes that its authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the Employee-Management Relations Act. NRS 288.110(2). To the extent Complainants seek this Board to find a violation of NRS 613.200, the Board declines to do so. This is expressly beyond the Board's jurisdiction, which is well established. *See* NRS 288.110(2); *City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474–75, 653 P.2d 156, 158 (1982); *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union,* 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); *City of Henderson v. Kilgore*, 122 Nev. 331, 333, 131 P.3d 11, 12 (2006); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case No. A1-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. A1-04611, Item No. 796 (2014); *see e.g., Flores v. Clark Cty.*, Case No. A1-045990, Item No. 737 (2010); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017); *Serv. Employees Int'l Union, Local 1107 v. So. Nevada Health Dist.*, Case No. 2017-011 (2018).

is it a prohibited labor practice.

DISCUSSION

NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to bargain in bad faith with a recognized employee organization and a unilateral change to the bargained for terms of employment is regarded as a per se violation of this statute. A unilateral change also violates NRS 288.270(1)(a). *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (May 15, 2015). Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002).

A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of conditions of employment have been changed by the employer such that after the occurrence which the subject of the complaint, terms of the employment differ from what was bargaining for or otherwise established. *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (May 15, 2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, Case No. A1-045965 (Oct. 5, 2010); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-010 (2017); *Brown v. Las Vegas Metropolitan Police Dep't*, Item No. 818, Case No. 2015-013 (2016). Typically, a complainant can meet this burden by showing the following 4 elements: (1) the employer breached or altered the CBA or established past practice; (2) the employer's action was taken without bargaining with the union over the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not merely an isolated breach of contract, but amounts to a change in policy (*i.e.* the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment). *O'Leary*, at 7; *California State Employees' Ass'n v. Pub. Employment Relations Bd.*, 51 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d 488, 496 (1996).

Assistant Sheriff Fasulo and Jotz engaged in informal resolution discussions in an effort to mitigate the potential discipline the Department expected would be forthcoming based upon the

findings of IAB. Specifically, Kerns' chain of command was considering a demotion as the recommended discipline for Kerns. On February 27, 2017, Jotz texted Assistant Sheriff Fasulo indicating she got a response from Kerns and wanted to call Assistant Sheriff Fasulo. On February 28, 2017, the two spoke and Assistant Sheriff Fasulo told Jotz he had an "expedited offer" for Kerns. Jotz was confused because traditionally expedited offers were made prior to a subject employee being interview. Jotz testified that she explained this was not the normal course for an expedited but they were "willing to hear [Fasulo] out". Jotz reached out to Kerns who indicated he was willing to entertain anything the Department wanted to bring forward. Jotz then requested the expedited offer be sent over. Assistant Sheriff Fasulo indicated he didn't have it written yet as they were waiting on a response from Jotz. Assistant Sheriff Fasulo explained to Jotz what the contents of the offer would essentially be (including a disciplinary transfer, rather than a demotion). Jotz requested it be in writing so Kerns could better understand. The Department then sent this settlement agreement for consideration.

Jotz received the settlement offer on February 28, 2017 and said she was confused as it was entitled a settlement agreement and not an expedited offer. Assistant Sheriff Fasulo explained they do these on a settlement agreement, he would see about an expedited officer instead, but they were essentially the same thing in this case, as the same terms would apply. Jotz indicated that the settlement agreement may come off as a threat and didn't want Kerns to see it in that form. Jotz later indicated that Vice Chairman of the Association, Russ Wood, thought it was now a waste of time changing the title of the document and the Association should just present the settlement offer to Kerns. Assistant Sheriff Fasulo told Jotz he already has the Director of Labor Relations, Jamie Frost, working on the expedited offer. Jotz confirmed that Kerns was definitely open to considering the offer on the table.

On March 2, 2017, the Association was presented with an expedited offer, which called for a disciplinary transfer as the parties had negotiated. Within hours of receiving this offer, Kerns voluntarily submitted his retirement paperwork.

At no point in the 50 or so text messages and calls between Jotz and Assistant Sheriff Fasulo, did Jotz object to the concept or practice of informal settlement discussions. To the contrary, Jotz actively engaged in the discussions and even made suggestions towards reaching a resolution. As indicated, Jotz even requested the expedited offer in writing to show Kerns, among other active conduct

as detailed above. Moreover, the Board was presented with credible evidence that the past practice of the parties was such that informal settlement discussions were not out of the ordinary. As such, the Board does not find a unilateral change in this regard or a failure to bargain in good faith concerning a mandatory subject of bargaining. Informal settlement discussions are not listed as a mandatory subject of bargaining. The parties' CBA does not prohibit either party from attempting to resolve an issue informally. Moreover, it is not consistent with the basic notions of labor relations, and the fundamental purposes of the EMRA, to prevent a party from engaging in settlement/resolution discussions at such a stage of an investigative process.

The Department eventually completed its internal investigation into the pursuit and drafted an AOC for the findings related to Kerns. The AOC is the form the Department uses to document discipline for employees. However, Kerns had already voluntarily retired before the AOC was drafted and circulated. Director Frost testified it has been the past practice before her employment with the Department, to include an AOC for employees who were sustained for misconduct, but separated from employment prior to the completion of the discipline process. Frost essentially explained that the Department can't just abandon an investigation because an employee voluntarily retires, and the Board received evidence of multiple examples of instances when the Department completed an AOC after an employee was separated. The Board finds this testimony credible.[2] Consistent with the CBA, Kerns submitted a rebuttal statement to the AOC which was placed in his personnel file. Indeed, '"[d]iscipline" means "to punish"', and the evidence established that the AOC did not contain as such (no written reprimand, suspension, disciplinary transfer, demotion, or termination was issued) and was in accordance with the parties' CBA. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1220 (2002). The Board further finds Frost's testimony credible in this regard indicating that the AOC itself is not discipline, and Kerns was not disciplined or intended to be punished in this case. The Board also finds the testimony of Assistant Sheriff Fasulo and Peter Bofelli credible in this regard.

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[2] Indeed, an employer may create, by practice over a substantial period of time, a term of condition of employment which it is obligated to continue, subject to negotiation. *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220.

Kerns attempted to grieve the AOC (and eventually proceed to arbitration); however, the Board finds that as he was no longer an employee, he did not have a right to do so.[3] Complainants sent the Department a request for arbitration pursuant to Art. 12 of the parties' CBA "to evaluate the propriety of an alleged violation of LVMPD Critical Procedure 6/014.00 Vehicle Pursuit." The parties CBA contains a very specific definition of an "employee". Kerns was no longer an employee as defined in the CBA after his voluntary retirement became effective. The plain language of the CBA defines an employee as a person having regular commissioned Civil Service appointment, which Kerns did not possess when he requested arbitration for the AOC. Moreover, the CBA contains a specific definition for "discipline", including in regards to grievances. As indicated above, Kerns was not disciplined in this matter. As such, the Department followed the parties' CBA and thus did not commit a unilateral change in this regard. *See Douglas Cnty. Support Staff Org. v. Douglas Cnty. Sch. Dist.*, Case No. A1-046105, Item No. 797 ("A party that adheres to the terms of a collective bargaining agreement does not commit a unilateral change for the self-evident reasons that nothing is actually changed from what has been negotiated."). Moreover, the Board finds Frost's testimony credible that that past practice of the Department is to look at the date the grievance is filed.

Additionally, the Board finds that Kerns was not coerced into retirement, and indeed voluntarily did so. While these negotiations were occurring, Assistant Sheriff Fasulo, by happenstance, ran into Kerns at a retirement function at Mt. Charleston. While Assistant Sheriff Fasulo and Kerns gave different recollections of their conversation outside of the function, the Board finds Assistant Sheriff Fasulo's testimony credible in this regard. Assistant Sheriff Fasulo testified that he didn't know Kerns was there and out of a very genuine intent to find out how he was doing, they engaged in what eventually became an emotional conversation for Kerns. Kerns indicated to Assistant Sheriff Fasulo that he wanted to retire, Assistant Sheriff Fasulo told him that he didn't feel that was the best thing for him, he didn't want Kerns to retire, and thought his career was salvageable. Kerns became emotional

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[3] The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed. *Boykin v. City of N. Las Vegas Police Dept.*, Item No. 674E, Case No. A1-045921 (2010), *citing NLRB v. Strong Roofing & Ins. Co.*, 393 U.S. 357 (1969), *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967), *Jim Walter Resources*, 289 NLRB 1441, 1449 (1988).

and explained he was embarrassed in front of his kids over what had occurred. Assistant Sheriff Fasulo relayed to the Board that Kerns appeared to be overly invested in his K-9 position. Assistant Sheriff Fasulo said that in his opinion retirement was not that best option for Kerns for a variety of reasons. The Board also finds the testimony from Sergeant Brandon Conk credible that the two investigative reports did not exist.

While Kerns may have made a bad choice to retire, and thus lost his ability to grieve and arbitrate the dispute, Kerns made this decision and was represented by his Association when doing so. Indeed, had Kerns not accepted the offer and choose not to voluntarily retire, he would have received whatever discipline the chain of command recommended and would have had the opportunity to grieve any discipline in accordance with the CBA. Kerns, however, elected to forfeit his grievance rights by prematurely retiring.

Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter.

FINDINGS OF FACT

1. Assistant Sheriff Fasulo and Jotz engaged in informal resolution discussions in an effort to mitigate the potential discipline the Department expected would be forthcoming based upon the findings of IAB.

2. Kerns' chain of command was considering a demotion as the recommended discipline for Kerns.

3. On February 27, 2017, Jotz texted Assistant Sheriff Fasulo indicating she got a response from Kerns and wanted to call Assistant Sheriff Fasulo.

4. On February 28, 2017, the two spoke and Assistant Sheriff Fasulo told Jotz he had an "expedited offer" for Kerns.

5. Jotz reached out to Kerns who indicated he was willing to entertain anything the Department wanted to bring forward.

6. Jotz then requested the expedited offer be sent over.

7. Assistant Sheriff Fasulo explained to Jotz what the contents of the offer would essentially be (including a disciplinary transfer, rather than a demotion).

8. Jotz requested it be in writing so Kerns could better understand.

9. Jotz received the settlement offer on February 28, 2017 and said she was confused as it was entitled a settlement agreement and not an expedited offer.

10. Jotz indicated that the settlement agreement may come off as a threat and didn't want Kerns to see it in that form.

11. Jotz confirmed that Kerns was definitely open to considering the offer on the table.

12. On March 2, 2017, the Association was presented with an expedited offer, which called for a disciplinary transfer as the parties had negotiated.

13. Within hours of receiving this offer, Kerns voluntarily submitted his retirement paperwork.

14. At no point in the 50 or so text messages and calls between Jotz and Assistant Sheriff Fasulo, did Jotz object to the concept or practice of informal settlement discussions.

15. Jotz actively engaged in the discussions and even made suggestions towards reaching a resolution.

16. The Board was presented with credible evidence that the past practice of the parties was such that informal, settlement discussions were not out of the ordinary.

17. The parties' CBA does not prohibit either party from attempting to resolve an issue informally.

18. The Department eventually completed its internal investigation into the pursuit and drafted an AOC for the findings related to Kerns.

19. Kerns had already voluntarily retired before the AOC was drafted and circulated.

20. It has been the past practice before her employment with the Department, to include an AOC for employees who were sustained for misconduct, but separated from employment prior to the completion of the discipline process.

21. The Department can't just abandon an investigation because an employee voluntarily retires, and the Board received evidence of multiple examples of instances when the Department completed an AOC after an employee was separated.

22. Consistent with the CBA, Kerns submitted a rebuttal statement to the AOC which was

placed in his personnel file.

23. "'Discipline" means "to punish"', and the evidence established that the AOC did not contain as such (no written reprimand, suspension, disciplinary transfer, demotion, or termination was issued) and was in accordance with the parties' CBA.

24. The AOC itself is not discipline, and Kerns was not disciplined or intended to be punished in this case.

25. Kerns attempted to grieve the AOC (and eventually proceed to arbitration); however, the Board finds that as he was no longer an employee, he did not have a right to do so.

26. Kerns was no longer an employee as defined in the CBA after his voluntary retirement became effective.

27. The plain language of the CBA defines an employee as a person having regular commissioned Civil Service appointment, which Kerns did not possess when he requested arbitration for the AOC.

28. The CBA contains a specific definition for "discipline", including in regards to grievances.

29. Kerns was not coerced into retirement, and indeed voluntarily did so.

30. While Assistant Sheriff Fasulo and Kerns gave different recollections of their conversation outside of the function, the Board finds Assistant Sheriff Fasulo's testimony credible in this regard.

31. Assistant Sheriff Fasulo testified that he didn't know Kerns was there and out of a very genuine intent to find out how he was doing, they engaged in what eventually became an emotional conversation for Kerns.

32. Kerns indicated to Assistant Sheriff Fasulo that he wanted to retire, Assistant Sheriff Fasulo told him that he didn't feel that was the best thing for him, he didn't want Kerns to retire, and thought his career was salvageable.

33. Assistant Sheriff Fasulo said that in his opinion retirement was not that best option for Kerns for a variety of reasons.

34. The past practice of the Department is to look at the date the grievance is filed.

35. Two investigative reports did not exist.

36. Kerns made the decision to retire and was represented by his Association when doing so.

37. Kerns, however, elected to forfeit his grievance rights by prematurely retiring.

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

CONCLUSIONS OF LAW

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

2. The Board has exclusive jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS Chapter 288.

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

4. Under the unilateral change theory, an employer commits a prohibited labor practice when its changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent.

5. A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of conditions of employment have been changed by the employer such that after the occurrence which the subject of the complaint, terms of the employment differ from what was bargaining for or otherwise established.

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

7. To the extent Complainants seek this Board to find a violation of NRS 613.200, the Board declines to do so. This is expressly beyond the Board's jurisdiction, which is well established.

8. Informal settlement discussions are not listed as a mandatory subject of bargaining.

9. It is not consistent with the basic notions of labor relations, and the fundamental purposes of the EMRA, to prevent a party from engaging in settlement/resolution discussions at such a stage of an investigative process.

10. The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed.

11. The Department followed the parties' CBA and past practice and thus did not commit a unilateral change in this regard.

12. The complaint filed in this matter is not well-taken.

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

ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondent LVMPD as set forth above. Complainants shall take nothing by way of their Complaint.

DATED this 20th day of March, 2018.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
PHILIP LARSON, Board Member

By: _____
GARY COTTINO, Board Member

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

ERIC KERNS, Individually; LAS VEGAS POLICE MANAGERS AND SUPERVISORS ASSOCIATION,

Complainants,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,

Respondent.

Case No. 2017-010

NOTICE OF ENTRY OF ORDER

To: Complainants and their attorney of record Jay R. Roberts, Esq, and Tara M. Roberts, Esq., of the Las Vegas Police Managers and Supervisors Association;

TO: Respondent and their attorneys of record Nick D. Crosby, Esq. and Marquis Aurbach Coffing.

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on March 20, 2018.

A copy of said order is attached hereto.

DATED this 20th day of March 2018.

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 20th day of March 2018, I served a copy of the foregoing NOTICE OF ENTRY OF ORDER by mailing a copy thereof, postage prepaid to:

Jay R. Roberts
Tara M. Roberts
801 S. Rancho Drive, Suite A-1
Las Vegas, NV 89106

Nick D. Crosby, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145

MARISU ROMUALDEZ ABELLAR
Executive Assistant