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1 STATE OF NEVADA

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E.M.R.B.

3 LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
4 RELATIONS BOARD

5
6 MICHAEL YU, Individually; LAS VEGAS POLICE
7 MANAGERS AND SUPERVISORS
ASSOCIATION,

Case No. 2017-025

8 Complainants,

9 v.
10 ORDER

11 LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

Item No. 829

12 Respondent.

13 On April 10, 2018, this matter came before the State of Nevada, Local Government Employee-
14 Management Relations Board (“Board”) for consideration and decision pursuant to the provisions of the
15 Local Government-Management Relations Act (the “Act”), NAC Chapter 288 and NRS Chapter 233B.
16 The Board held an administrative hearing on this matter on February 12 and 13, 2018. The Board
17 accepted post-hearing briefs in this matter as well.

18 PSMA and the Department are parties to a collective bargaining agreement entered into on
19 September 26, 2016, effective July 1, 2016 through June 30, 2018, which covers terms and conditions
20 of employment for supervisors in commissioned classifications at the sergeant, lieutenant, and captain
ranks. The existing CBA contains grievance resolution procedures for both non-disciplinary and
21 disciplinary disputes between the parties.

22 In June of 2017, Sergeant Yu was the senior K-9 sergeant with the Department. On June 13,
23 2017, Lieutenant Yatomi drafted a memo requesting Sgt. Yu be transferred out of the K-9 unit, which
24 was approved by Deputy Chief Jones on June 26, 2017. On June 28, 2017, Sgt. Yu was given notice
25 that he was being administratively transferred to patrol. Because the Department processed Sgt. Yu’s
26 transfer as administrative, as opposed to disciplinary, Sgt. Yu and the PMSA filed a grievance disputing
27 his transfer from K-9 as not meeting the requirements of Article 22 – Transfer of the Agreement, and
28

1 the Department Policy 5/101.06 – Personnel Transfers, under the non-discipline section of Article 12
2 Grievance Procedures. On July 27, 2017, the Department’s Labor Relations Director Jamie Frost
3 denied Sgt. Yu’s grievance. The PMSA was not satisfied with the reasons given by Dir. Frost and thus,
4 on August 18, 2017, pursuant to Step 2, sent a request for binding arbitration to Sheriff Lombardo. On
5 August 21, 2017, Dir. Frost denied Sgt. Yu’s request for arbitration.

6 **DISCUSSION**

7 NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to
8 bargain in bad faith with a recognized employee organization and a unilateral change to the bargained
9 for terms of employment is regarded as a per se violation of this statute. A unilateral change also
10 violates NRS 288.270(1)(a). *O’Leary v. Las Vegas Metropolitan Police Dep’t*, Item No. 803, EMRB
11 Case No. A1-046116 (May 15, 2015). Under the unilateral change theory, an employer commits a
12 prohibited labor practice when its changes the terms and conditions of employment without first
13 bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police*
14 *Dep’t*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass’n*, 118
15 Nev. 889, 59 P.3d 1212 (2002); *Kerns v. LVMPD*, Case No. 2017-010 (2018).

16 A party claiming that a unilateral change has been committed must show by a preponderance of
17 the evidence that the actual terms of conditions of employment have been changed by the employer
18 such that after the occurrence which the subject of the complaint, terms of the employment differ from
19 what was bargaining for or otherwise established. *O’Leary v. Las Vegas Metropolitan Police Dep’t*,
20 Item No. 803, EMRB Case No. A1-046116 (May 15, 2015); *see also Serv. Employees Int’l Union,*
21 *Local 1107 v. Clark County*, Item No. 713A, Case No. A1-045965 (Oct. 5, 2010); *Krumme v. Las*
22 *Vegas Metropolitan Police Dep’t*, Item No. 822, Case No. 2016-010 (2017); *Brown v. Las Vegas*
23 *Metropolitan Police Dep’t*, Item No. 818, Case No. 2015-013 (2016). Typically, a complainant can
24 meet this burden by showing the following 4 elements: (1) the employer breached or altered the CBA or
25 established past practice; (2) the employer’s action was taken without bargaining with the union over
26 the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the
27 change is not merely an isolated breach of contract, but amounts to a change in policy (*i.e.* the change
28 has a generalized effect or continuing impact on the bargaining unit members’ terms and conditions of

1 employment). *O'Leary*, at 7; *California State Employees' Ass'n v. Pub. Employment Relations Bd.*, 51
2 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d 488, 496 (1996).

3 Complainants argue the Department violated Sgt. Yu's rights under the CBA when it refused to
4 process his grievance. Grievance procedures are a mandatory subject of bargaining. NRS
5 288.150(2)(o). In *City of Reno*, the Nevada Supreme Court affirmed that it is a violation of the Act for
6 an employer to depart from the bargained-for processes without first bargaining over the change with
7 the recognized bargaining agent regarding a subject of mandatory bargaining. *City of Reno v. Reno*
8 *Police Protective Ass'n*, 118 Nev. 889, 895, 900, 59 P.3d 1212, 1217, 1220 (2002). Authority arising
9 under the NLRA holds that these types of changes to a CBA violate both section 8(a)(1) and 8(a)(5) of
10 the NLRA. *NLRB v. Southwestern Elec. Co-op., Inc.*, 794 F.2d 276, 278-79 (7th Cir. 1986). This
11 Board has likewise held that this type of conduct violates both NRS 288.270(1)(a) and (1)(e). *Boykin v.*
12 *City of N. Las Vegas Police Dep't*, Item No. 674E, Case No. A1-045921 (2010). When the CBA allows
13 for a grievance to be filed, and the employer then refuses to process that grievance under the negotiated
14 process, the employer violates the Act. *Kallsen v. CCSD*, Item No. 393B, Case No. A1-045598 (1998);
15 *see also Advanced Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007).

16 Article 12 of the Agreement entered into by the parties, defines a grievance and provides the
17 bargained-for procedures as follows:

18 **12.1 Grievance Procedure.**

19 **Purpose.** The purpose of the following provision is to set forth, the methods and
20 procedures for disputes that may arise between the parties hereto. The following
21 provisions shall govern the conditions of a grievance appeal.

22 **Definition:** A grievance shall be defined as a dispute regarding the application or
23 interpretation of the collective bargaining agreement, any Department rules, regulation,
24 policy, or procedure that governs the Department or a disciplinary action of the employee
25 is disputing....

26 **Non-Discipline.**

27 **Step 1.** The grievance shall be hand delivered to and signed by the Deputy Chief ... The
28 reviewer will hold a meeting within 15 calendar days of the filing of the grievance to hear
the dispute. The reviewer shall submit to the grievant and the Association a written
response to the grievance, including a justification for such a response, within 30 calendar
days of the filing of the grievance.

Step 2. If the grievant and the Association Board ... is not satisfied with the response
provided in Step 1, the Association ... may request within 30 calendar days of receipt of
the Step 1 response, that the matter be resolved by an arbitrator....

1 The plain wording of the grievance procedure in Article 12 of the Agreement is clear that
2 employees have the right to file a grievance if the employee has a dispute regarding the application or
3 interpretation of the collective bargaining agreement, any Department rules, regulation, policy, or
4 procedure that governs the Department or a disciplinary action of the employee.¹ The definition itself
5 does not limit a grievance to a disciplinary action.

6 Article 22 of the CBA defines an administrative transfer and how they take place. Specifically
7 Article 22 provides that:

8 ...
9 Administrative transfers occur as a result of an action to enhance operations, further the
10 Department's mission, or improve efficiency and effectiveness. These transfers will also
11 occur where an act compromises the integrity of the individual or unit and/or the conduct
12 of the employee creates an environment where the employee losses effectiveness in the
13 unit. The parties agree these types of transfers from specialized units will be evaluated
14 for necessity.

15 Generally, administrative transfers do not occur as a result of a single event or incident,
16 except where it is determined the transfer is necessary to further the Department's
17 mission.

18 In addition to the CBA, the Department maintains a policy regarding personnel transfers, which
19 states:

20 ADMINISTRATIVE TRANSFERS

21 The Sheriff ... has the authority to order the transfer of a department member ... to serve
22 the best interest of the department.

23 The authority to make involuntary, operational transfers is ... to enhance operations,
24 further the department's mission, and improve efficiency and effectiveness. These
25 transfers may occur where an act compromises the integrity of the individual or unit, and
26 the conduct of the member creates an environment where the member losses effectiveness
27 in the unit. These types of transfers from specialized units will be evaluated for
28 necessity....

29 The Board finds that Sgt. Yu's grievance meets the definition of a grievance as defined by the
30 parties' CBA. *See* PMSA Exhibit 3. While the bargained-for definition is seemingly quite broad, the
31 parties negotiated the terms of the CBA, agreed, and entered into it. Moreover, Lt. Yatomi admitted in

32 ¹ The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether
33 or not a unilateral change has been committed. *Boykin v. City of N. Las Vegas Police Dept.*, Item No.
34 674E, Case No. A1-045921 (2010), citing *NLRB v. Strong Roofing & Ins. Co.*, 393 U.S. 357 (1969),
35 *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967), *Jim Walter Resources*, 289 NLRB 1441, 1449
36 (1988); *Kerns v. LVMPD*, Case No. 2017-010 (2018).

1 testimony that she agrees a dispute is defined broadly by the parties, which the Board finds credible.
2 Dir. Frost and Russ Wood provided similar testimony.

3 As the Department refused to accept the grievance, it committed a unilateral change under the
4 Act. Read as a whole, the grievance clearly disputes not only the application or interpretation of the
5 collective bargaining agreement (specifically Article 22 as provided for above) but also the
6 Department's policy (as also provided for above) and the procedures related thereto. As such, based on
7 the facts of this case, the Department was obligated to accept Sgt. Yu's timely submitted grievance.
8 While the Department argues that by accepting Yu's grievance it would have given up a management
9 right, the Department entered into the terms of the CBA with PMSA, including the definition of a
10 grievance. Moreover, accepting the grievance does not in itself mean the Department was not
11 allowed to, or improperly, administratively transferred Sgt. Yu – it simply meant it was processing the
12 grievance and would proceed to arbitration if the parties complied with Article 12's related provisions.
13 Indeed, we generally assign common or normal meanings to words in a contract. *Am. First Fed. Credit*
14 *Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015); *Tompkins v. Buttrum Constr. Co. of*
15 *Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983). Furthermore, “[a] court should not interpret a
16 contract so as to make meaningless its provisions,” and “[e]very word must be given effect if at all
17 possible.” *Mendenhall v. Tassinari*, 403 P.3d 364, 373 (Nev. 2017). A “dispute” is simply defined as
18 “to engage in argument”. *Merriam-Webster's Online Dictionary* (2018).

19 The Board finds that the Department breached or altered the CBA without bargaining with the
20 union over the change which concerned a matter within the scope of representation. The Board further
21 finds that the change is not merely an isolated breach of contract, but amounts to a change in policy (*i.e.*
22 the change has a generalized effect or continuing impact on the bargaining unit members' terms and
23 conditions of employment). Dir. Frost testified that moving forward she will continue to deny
24 grievances regarding transfers unless they are processed as disciplinary by the Department. The Board
25 finds this credible.

26 Based on the above, we do not reach the issue of whether the transfer was factually
27 administrative or disciplinary as the decision is not necessary to the Board's determination. *Allstate Ins.*
28 *Co. v. Fackett*, 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *Gaxiola v. State*, 121 Nev. 638, 651, 119

P.3d 1225, 1234 (2005); *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 600, 260 P.3d 408, 412 (2011).

Remedy

The Board “may order ... to restore to the party aggrieved any benefit of which the party has been deprived by that action.” NRS 288.110(2). *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 681, 119 P.3d 1259, 1263 (2005) (holding that “[u]nder NRS 288.110(2) the Board only had the authority to restore [Complainant] to her previous status” before the violation). As such, the Board orders the Department to accept Sgt. Yu’s grievance and process it in compliance with the parties’ contractually agreed upon terms and bargained-for procedures as set forth in Article 12 of the CBA (Grievance Procedures). *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (“The task of the Board in devising a final remedy is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.”); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1366 (9th Cir. 2011) (“Very often, the most effective way to protect the Board’s ability to recreate such relationships and restore the status quo will be for the [Board] itself to order a return to the status quo.”).

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

FINDINGS OF FACT

1. PSMA and the Department are parties to a CBA entered into on September 26, 2016, effective July 1, 2016 through June 30, 2018.

2. The existing CBA contains grievance resolution procedures for both non-disciplinary and disciplinary disputes between the parties.

3. In June of 2017, Sgt. Yu was the senior K-9 sergeant with the Department.

4. On June 13, 2017, Lt. Yatomi drafted a memo requesting Sgt. Yu be transferred out of the K-9 unit, which was approved by Deputy Chief Jones on June 26, 2017.

5. On June 28, 2017, Sgt. Yu was given notice that he was being administratively transferred to patrol.

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6. Sgt. Yu and the PMSA filed a grievance disputing his transfer from K-9 as not meeting the requirements of Article 22 – Transfer of the Agreement, and the Department Policy 5/101.06 – Personnel Transfers, under the non-discipline section of Article 12 grievance procedures.

7. Other than the subject grievance, PMSA has not submitted an administrative transfer grievance since Dir. Frost took over labor relations.

8. On July 27, 2017, Dir. Frost denied Sgt. Yu's grievance.

9. The PMSA was not satisfied with the reasons given by Dir. Frost and thus, on August 18, 2017, pursuant to Step 2, sent a request for binding arbitration to Sheriff Lombardo.

10. On August 21, 2017, Dir. Frost denied Sgt. Yu's request for arbitration.

11. The definition of a grievance itself does not limit a grievance to a disciplinary action.

12. Article 22 of the CBA defines an administrative transfer and how they take place.

13. In addition to the CBA, the Department maintains a policy regarding personnel transfers.

14. Sgt. Yu's grievance meets the definition of a grievance as defined by the parties' CBA.

15. A dispute is defined broadly by the parties.

16. Read as a whole, the grievance disputes not only the application or interpretation of the CBA (specifically Article 22) but also the Department's policy and the procedures related thereto.

17. Dir. Frost testified that moving forward she will continue to deny grievances regarding transfers unless they are processed as disciplinary by the Department.

18. 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.

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

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

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

14 7. Grievance procedures are a mandatory subject of bargaining. NRS 288.150(2)(o).

15 8. When the CBA allows for a grievance to be filed, and the employer then refuses to
16 process that grievance under the negotiated process, the employer violates the Act.

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

19 10. Article 12 of the Agreement entered into by the parties defines a grievance and provides
20 the bargained-for procedures.

21 11. The plain wording of the grievance procedure in Article 12 of the Agreement is clear that
22 employees have the right to file a grievance if the employee has a dispute regarding the application or
23 interpretation of the collective bargaining agreement, any Department rules, regulation, policy, or
24 procedure that governs the Department or a disciplinary action of the employee.

25 12. As the Department refused to accept the grievance, it committed a unilateral change
26 under the Act.

27 13. Based on the facts of this case, the Department was obligated to accept Sgt. Yu's timely
28 submitted grievance.

14. The Department breached or altered the CBA without bargaining with the union over the change which concerned a matter within the scope of representation.

15. The change is not merely an isolated breach of contract, but amounts to a change in policy.

16. The complaint filed in this matter is well-taken.

17. 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 Complainants Sgt. Yu and PMSA as set forth above. The Department shall accept Sgt. Yu's grievance and process it in compliance with the parties' contractually agreed upon terms and bargained-for procedures as set forth in Article 12 of the CBA (Grievance Procedures).

DATED this 23 day of April, 2018.

LOCAL GOVERNMENT EMPLOYEE- MANAGEMENT RELATIONS BOARD

By: BRENT ECKERSLEY, ESQ., Chair

By: CAM WALKER
CAM WALKER, Board Member

By: Gary A. Cottino
GARY COTTINO, Board Member

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Brent Eckersley, Esq., Chair, agrees, concurring.

I agree with the analysis of the majority opinion including that, based on the above, we do not need to reach the issue of whether the transfer was factually administrative or disciplinary as the decision is not necessary to the Board's determination. However, I write separately to note that I would have found that the administrative transfer was proper. "Discipline" means "to punish", and the evidence established that Sgt. Yu was not disciplined. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1220 (2002). Article 22 sets forth the parameters for transfer under the CBA. Sgt. Yu admitted fault for a majority of the items outlined in the memo, many of which occurred as a result of single events or incidents, as provided for by Article 22. The transfer was not disciplinary in nature but complied with the parties bargained-for terms indicating that administrative transfers are permissible if they meet the requirements of Article 22 and the Department's policy related thereto (*i.e.*, to enhance operations, further the Department's mission, or improve efficiency and effectiveness; or an act that compromises the integrity of the individual or unit and/or the conduct of the employee creates an environment where the employee losses effectiveness in the unit).

DATED this 23 day of April, 2018.

LOCAL GOVERNMENT EMPLOYEE- MANAGEMENT RELATIONS BOARD

By:

BRENT ECKERSLEY, ESQ., Chair