STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

LAS VEGAS POLICE PROTECTIVE ASSOCIATION METRO, INC., as Collective Bargaining Agent for Commissioned Personnel of the CITY OF LAS VEGAS, Complainant, -vs- CITY OF LAS VEGAS, NEVADA, a Municipal corporation, Respondent.	ITEM NO. 264 CASE NO. A1-045474 **DECISION**

For the Complainant: Aubrey Goldberg, Esq.
GREENMAN, GOLDBERG, RABY & MARTINEZ

For the Respondent: Larry G. Bettis, Esq.
LAS VEGAS CITY ATTORNEY'S OFFICE

For the EMRB: Tamara Barengo, Chairman
Howard Ecker, Vice Chairman
Salvatore C. Gugino, Member

STATEMENT OF THE CASE

On July 6, 1990, the Las Vegas Police Protective Association-Metro, Inc. ("Union") brought this Complaint against the City of Las Vegas ("City") before the Local Government Employee-Management Relations Board ("Board"), alleging that the City unilaterally implemented a program which makes completion of certain "physical agility test" or tests a prerequisite for promotion and continued employment, in violation of the City's duty to bargain pursuant to NRS Chapter 288.

In response, the City contends that:

1. The Union failed to state a claim upon which relief can be granted;

2. The requirement that an employee pass a physical fitness examination as a prerequisite for promotion is a work performance standard and not subject to mandatory negotiations pursuant to NRS Chapter 288;

3. There is a marked difference between an "agility test" and a "physical fitness examination", and it was a "physical fitness examination" program, not an "agility test", which was implemented by the City;

4. The City's physical examination requirements are for promotional purposes only; and

5. The Union is estopped from challenging implementation of physical fitness testing without pr[illegible] negotiation inasmuch as same was approved January 14, 1987, by the Board of Civil Service Trustees, and was not submitted as an item of negotiation by the Union prior to execution of the labor agreement on July 19, 1988.

Further, the City alleges that Article 23 - Waiver of the labor agreement provides that each party voluntarily and unqualifiedly waives the right to bargain collectively with respect to any subject or matter referred to in the labor agreement, and agrees that the other party shall not be obligated to so bargain. The City also alleges that the subject of work performance was referred to in Articles 6 and 22 of said labor agreement.

Subsequently (on November 9, 1990), the City filed

Motion to Dismiss the above-described Complaint, arguing that said Complaint was not filed within six (6) months from the date of adoption of the policy and its implementation for promotional purposes, as allegedly required by NRS 288.110(4).

The parties have stipulated to a decision being reached based on the pleadings on file with the Board, with the following issues to be considered:

a. As a preliminary issue, whether the Union is estopped from bringing the matter to the Board by Article 23 - Waiver of the Labor Agreement.

b. Whether the Union is estopped from bringing the matter to the Board by its failure to raise the issue in negotiation of the current Labor Agreement.

c. Whether the Union is estopped from bringing the matter to the Board by its failure to file the instant complaint within six (6) months of the occurrence of the activity which is complained of; i.e., the City's implementation of the policy in dispute.

d. Whether the City requires successful completion of a physical fitness test or an agility test as a condition of either continued employment or promotion.

e. Whether the completion of a physical fitness test or an agility test as a condition of either continued employment or promotion is a subject of mandatory bargaining pursuant to NRS 288.150(2)(i) and (r).

f. Whether the successful completion of a physical fitness examination as a condition of continued employment is

a work performance standard not within the scope of mandatory bargaining pursuant to NRS 288.150(3)(c).

g. Whether the successful completion of a physical fitness examination as a condition of promotion is a work performance standard pursuant to NRS 288.150(3)(c).

h. Whether the matter covered by EMRB Item No. 83, Henderson Police Officers Association vs. City of Henderson, is controlling in situations of promotion requiring a physical fitness test.

DISCUSSION

The preliminary issue in this dispute is whether the Union is estopped from bringing the matter to the Board by Article 23 - Waiver of the Labor Agreement. Article 23 reads as follows:

> (A) The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the employer and the Association for the life of this Agreement each voluntarily and unqualifiedly waives the right and agrees that the other shall not be obliged to bargain collectively with respect to any subject or matter referred to or covered in this Agreement.
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> (B) Any subject of matter not specifically referred to or covered in this Agreement, even though such subject and/or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement, is not subject to negotiation but may be the topic of discussions between the parties.

In labor terms Article 23, supra, is known as a "Zipper

Clause"; i.e., a provision to keep either side to a collective bargaining agreement from attempting to make new demands after the contract is signed. In effect, by adopting a Zipper Clause, the parties waived any right they may have had to attempt to renegotiate during the term of the contract.

The contention that the Complainant has waived its right to bargain about the particular subject matter is among the arguments often raised in defense of unilateral changes by employers. However, consistent with the traditional common law view of waiver, the National Labor Relations Board ("NLRB") and the courts have construed the waiver doctrine strictly and have been reluctant to infer a waiver. New York Mirror, 151 NLRB 834, 58 LRRM 1465 (1965). Where such an assertion is raised, the test applied has been whether the waiver is in "clear and unmistakable" language. New York Mirror, supra, and Norris Industries, 231 NLRB 50, 96 LRRM 1078 (1977).

In the instant case, implicit in the City's defense is that the Union waived its right to bargain on the subject matter when it agreed to the "clear and unmistakable" language of Article 23, supra. In assessing whether the language of Article 23 meets the "clear and unmistakable" test, however, the Board must consider the bargaining history of Article 23 and the parties interpretation of the language contained therein. Reynolds Elec. & Eng'g Co., General Counsel Advice Memo., Case No. 31-CA-16234, 125 LRRM 1368 (1987). Where an employer relies on contract language as a purported waiver to

establish its right to unilaterally change terms and conditions of employment not contained in the contract, evidence is required that the matter in issue was "fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter." GTE Automatic Elec., 261 NLRB 1491, 110 LRRM 1193 (1982), supplementing 240 NLRB 297, 100 LRRM 1204 (1979). See also NPER OH-21856, City of Huber Heights, Docket No. 89-ULP-09-0508, issued Aug. 17, 1990. No such evidence has been proffered in the instant case.

Further, in order for the Board to reach the conclusion that the Union, after due deliberation and with complete knowledge of the consequences, agreed to waive its right bargain during the term of the contract, it would be required to embrace the following theory: That, after fully discussing and consciously exploring the matter during negotiations, the parties adopted agreement language which, if applied as written, would lead to a direct conflict between the provisions of the labor agreement and the statute under which it was created; i.e., NRS 288.180.

The statute provides and/or contemplates that whenever an employee organization desires to negotiate concerning any negotiable matter, it shall give written notice of that desire to the local government employer. Such notices may (in some instances must) be given prior to expiration of the current labor agreement, e.g., proposals which would have a budgetary

impact must be submitted by February 1, even though the contract normally does not expire until July 1. It further provides and/or contemplates that the negotiations may commence prior to the expiration of the then - current labor agreement, in order to facilitate the completion of said negotiations prior to expiration of said labor agreement and enable a measure of continuity to prevail in the transition from the current labor agreement to the new labor agreement. Accordingly, if by adoption of Article 23 the parties intended to preclude any negotiations during the term of the labor agreement, they thereby made it impossible for the Union to comply with the intent and purpose of NRS 288.150, which by any criteria of contract interpretation must be considered as an absurd result. (Under the rule of reason principle, contract language, if possible, should not be interpreted so as to achieve a result that might be considered peculiar or absurd.)

Under NRS 288.110(2), the Board is permitted to hear and determine any complaint arising out of the interpretation of, or performance under, the provisions of NRS Chapter 288. This includes the jurisdiction to adjudicate unfair labor practices as enumerated under NRS 288.270 even when the resolution of such a charge requires the interpretation of a contractual provision. See Nevada Classified School Employees Association, Chapter One, Clark County vs. Clark County School District, EMRB Item No. 105, Case No. A1-045336 (November 21, 1980).

In determining whether the language of Article 23, supra, meets the "clear and unmistakable" test as to expressing the intentions of the parties, the Board makes the following observation(s): It appears that the language of Article 23 is susceptible of two meanings. On the one hand, the language may be interpreted literally to preclude any negotiation during the term of the labor agreement, notwithstanding the aforementioned conflict with NRS 288.150. On the other hand, the language may be interpreted in context with the statute to preclude any negotiations during the term of the contract, except those negotiations which may be conducted pursuant to NRS 288.150, with any agreed-to revisions or amendments to become effective subsequent to the expiration of the then - current agreement. While the Board makes determination as to the appropriate interpretation to be placed on the contract language in question, there exists a cardinal rule of interpretation to the effect that where an agreement provision or statute is equally susceptible of two meanings, one of which would lead to a sensible result and another to an absurd one, the former will be adopted. Yale & Towne Mfg. Co., 5 L.A. 573; Las Vegas Sun, Inc. vs. Eighth Judicial Dist. Court, 104 Nev. 508, 511 (1988). Suffice it to say in the instant case, however, the fact that the contract language in question is equally susceptible of two meanings merely evidences the failure of said contract language to meet the "clear and unmistakable" test.

In any event, the Board views the preliminary issue as

involving a matter of legislative policy. NRS Chapter 288 sets forth the manner in which that policy is to be conducted and/or administered. NRS 288.180 prescribes the time lines for conducting employee-management negotiations pursuant to that policy. To the extent that the Zipper Clause involved in this case prevents the parties from complying with the time lines prescribed by NRS 288.180, it is in conflict with legislative policy. Where an apparent conflict exists between legislative policy and a labor agreement, as a matter of common law the legislative policy must prevail. Warren Foundry and Pipe Corp., 5 L.A. 282; NL Indus., Inc. vs. Eisenman Chem. Co., 98 Nev. 253, 260, 645 P.2d 976 (1982).

For all the reasons previously set forth in the Board's discussion of the preliminary issue, the Union was not estopped by the Zipper Clause (Article 23 - Waiver) of the labor agreement from bringing the matter to the Board.

As concerns the issue of whether the Union is estopped to bring the matter to the Board by its alleged failure to raise the issue in the negotiations which resulted in the current labor agreement, the Board notes that the City's position in this regard apparently is based on the language of Article 23 - Waiver, previously quoted in these Discussions. The Board, having found that the language of Article 23 fails to meet the "clear and unmistakable" test required in order to reach a determination that the parties waived their rights to bargain during the term of the contract, for the same reason(s) holds that the Union is not estopped from bringing

the matter to the Board by its alleged failure to raise the issue during negotiations.

The next issue to be decided by the Board is the issue of whether the Union is estopped to bring the matter to the Board by its failure to file the Complaint within six (6) months of the event upon which it is based, as required by NRS 288.110(4), which reads as follows:

> The Board may not consider any complaint or appeal filed more than 6 months after the occurrence which is the subject of the complaint or appeal.

In effect, the City contends that the Union waived its right to file the instant Complaint by its failure to file same within six (6) months after the "physical examination program" was approved by the Board of Civil Service Trustees; i.e. January 14, 1987 and implemented in 1988. There is no indication in the record that the Union refutes or disagrees with the factual basis for the City's contentions in this regard.

A "Waiver by Inaction" may be applied where unions receive timely notice of contemplated employer action(s) but fail to seek bargaining about such action(s) in a timely fashion. They are thereby barred from claiming that the employer has refused to bargain about said action(s). American Geri-Care, 278 NLRB 676, 122 LRRM 1240 (1986). However, the "timely notice" of the action(s) contemplated by the employer must include information that allows the union to make an informed decision as to what action it wishes to take on the matter. Coalite, 278 NLRB 293, 122 LRRM 1030 (1986).

In the instant case, uncontested contentions of the City to the effect that the subject program was approved in 1987 and implemented in 1988 must be regarded as timely notice.

Notwithstanding the Union's apparent failure to file its Complaint as required by NRS 288.110(4), a determination by this Board that a union has waived its right to bargain during the term of the contract cannot be made lightly. See Las Vegas Police Protective Assn.-Metro, Inc. vs. City of Las Vegas, EMRB Item No. 248, Case No. A1-045461 (August 15, 1990). In general, the duty to bargain in good faith is a continuing obligation. NLRB vs. Jacobs Manufacturing Co., 196 F.2d 680, 30 LRRM 2098 (1952). Likewise, the refusal to bargain over a unilaterally imposed policy involving a negotiable subject may be a continuing violation of the statutes mandating such bargaining. South Bay Union School District, 11 NPER CA-20080, April 10, 1989. (Also, see Stark County Sheriff, NPER OH-19202, February 9, 1988.)

If the Board were to find that the City's refusal to bargain involved a subject which falls within the scope of mandatory bargaining, pursuant to NRS 288.150, it could properly find that said refusal to bargain constitutes a "continuing violation" of the statute. If a continuing violation existed, then the Union was not required to file its Complaint within six (6) months of the date on which the City unilaterally implemented its physical fitness examination.

In order to determine whether the City's refusal to bargain in this instance constituted a "continuing violation",

the Board must affirmatively conclude that the "physical fitness examination" involved a subject that falls within the scope of mandatory bargaining pursuant to NRS 288.150; this notwithstanding the provisions of NRS 288.110(4).

Since neither "physical examination program" nor "agility test" are listed in NRS 288.150(2) under the scope of matters subject to mandatory bargaining or included in those subject matters listed in NRS 288.150(3) as reserved to the local government employer without negotiation, the Board must look at the purpose of the program and previous decisions involving similar unilaterally imposed employer programs or actions to arrive at a determination as to the negotiability of the subject.

Initially, the Board finds that whether the program in question is characterized by the City as a "physical fitness test" or by the Union as an "agility test" is of no consequence. As indicated previously, it is the purpose of the program or employer-action, not its title, which determines its negotiability.

The City contends that the subject physical fitness examination is a work performance standard which was implemented as a condition for promotions. It states that it has not chosen to use the test results for purposes of determining continued employment, and the Union does not refute the City's contentions in this regard. The Union contends, however, that even if the purpose of the program was to establish a work performance standard as a condition for

promotions and not for purposes of determining continued employment, by virtue of the type of testing involved the City was required to negotiate concerning the matter and could not unilaterally implement the program, citing the Board's Decision in Item No. 83, Henderson Police Officers Association vs. City of Henderson, Nevada, in support of its contentions.

The Union's reliance upon the Board's Decision in Item No. 83 is misplaced. An objective perusal of said Decision will reveal that the Board held that the central issue was "the negotiability of physical agility testing as a condition of continued employment." (Emphasis added.) In Item No. 83, it was established that failure to pass the involved test by a certain date would result in termination. In its Decision, the majority of the Board held, in pertinent part:

> Since physical agility testing, as a condition of continued employment, directly relates to the personal safety of each officer, fellow officers and the general public, such testing is clearly a safety consideration within the purview of NRS 288.150(2)(r) and a mandatory subject of negotiation.
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> Because the matter has been found negotiable under safety, we need not consider whether the subject is also negotiable under discharge and disciplinary procedures.
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> The City of Henderson is directed not to carry out any further physical agility testing as a condition of continued employment until the matter has been negotiated with the Association.
>
> (Emphasis added.)

Likewise, in its Conclusions of Law, the majority of the Board held, in pertinent part:

> 4. That physical agility testing, as a condition of continued employment, is a mandatory

subject of negotiation pursuant to NRS 288.150(2)(r). (Emphasis added.)

The fact that the Decision in Item No. 83 was based on the requirement that the involved test be passed "as a condition of continued employment" is further evidenced by the Dissent to the majority's Decision in said case, quoted in pertinent part below:

> I would find the matter of physical agility testing, as a condition of continued employment, not a mandatory subject of negotiation under NRS 288.150(2). (Emphasis added.)

It is clear from the foregoing that "physical agility testing" was determined by the majority of the Board in Item No. 83 to be a mandatory subject of negotiation, not only because of safety considerations, but also because said tests were being carried out as a condition of continued employment In the instant case, the tests being carried out are for promotional purposes only, not as a condition of continued employment. This important distinction prevents the Board from finding that the physical fitness test involved in the instant case is a mandatory subject of negotiation by virtue of any alleged analogy with the facts prevailing in Item No. 83.

Further, as concerns the Union's contentions to the effect that the program is a mandatory subject of bargaining because it involves "safety", it is true that "Safety of the employee" is within the scope of mandatory bargaining pursuant to NRS 288.150(2)(r). Likewise, "safety considerations" can alter the non-negotiability of certain subjects listed under

NRS 288.150(3) as being not within the scope of mandatory bargaining. However, "safety considerations" inherent in an employer-enacted program are not in and/or of themselves sufficient to require mandatory bargaining. The existence of a significant and/or sufficient relationship between the enactment of the program and the safety of the employee(s) must be shown. In the instant case, however, the Union has established neither that a sufficient relationship exists between the physical fitness tests and the safety of the employee(s) nor that a sufficient relationship exists between the "work performance standards" created by the program involved and the "safety considerations" alluded to in NRS 288.150(3)(c)(1), to warrant a finding that said program is subject to mandatory bargaining. The Union's citation of the Board's Decision in Item No. 83 falls far short of establishing, prima facie, the existence of such relationship(s). Under the criteria established by 9 NPER WA-18010, City of Richland vs. IAFF, Local 1052 (September 29, 1986), therefore, the program cannot be considered within the scope of mandatory bargaining pursuant to NRS 288.150(2)(r) and/or the exception set forth in NRS 288.150(3)(c)(1).

While "safety of the employee" is a mandatory subject of bargaining pursuant to NRS 288.150(2)(r), "safety" as alluded to in NRS 288.150(3) is subject to mandatory bargaining only where such bargaining will not infringe upon the public

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employer's management prerogatives and rights. Clark County vs. International Association of Fire Fighters, EMRB Item No. 146, Case No. A1-045357 (October 29, 1982). Since no relationship between the physical fitness program and "safety" has been shown to exist in the instant case, it is not possible to determine whether bargaining with respect thereto would have infringed upon the City's rights and prerogatives pursuant to NRS 288.150(3).

The Union also contends that the subject program falls within the purview of NRS 288.150(2)(i), covering "Discharge and disciplinary procedures." However, the City has stipulated that it has not chosen to use the program for purposes of determining continued employment, and the Union has not established a sufficient relationship between the program and "Discharge and disciplinary procedures." Accordingly, the Board finds no basis for finding in favor of the Union on this point.

As indicated previously, the City contends that it implemented the subject physical fitness examination for promotion purposes and, as such, thereby created a work performance standard. The Union essentially has stipulated to the accuracy of the City's contentions in this regard, although it has questioned the relevancy of said contentions in the light of the Board's decision in Item No. 83. Under the facts and circumstances of record, the Board finds that the City's "physical fitness examination" created "work performance standards" for promotion purposes. Work

performance standards are specifically included in those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation, pursuant to NRS 288.150(3)(c)(1). Further, this Board has consistently held that "promotional requirements" and "promotional examinations" are not subjects of mandatory bargaining. City of Sparks vs. International Association of Firefighters, EMRB Item No. 103, Case No. A1-045332 (September 15, 1980), and Clark County vs. International Association of Fire Fighters, EMRB Item No. 146, Case No. A1-045357 (October 29, 1982).

For all the reasons previously set forth, the Board finds no basis for considering the City's "physical fitness examination" a subject of mandatory bargaining. Since the City was not required to negotiate regarding the subject matter, there could be no "continuing violation" of NRS 288.150 as a result of the City's refusal to negotiate. The Board, therefore, concludes that the Union's failure to file the instant claim within six (6) months after the occurrence on which it was based (the City's implementation of its physical fitness examination) as required by NRS 288.110(4), supra, is of no consequence and a moot issue.

The Board, having concluded that the subject of the instant Complaint is not subject to mandatory bargaining, finds that the remaining issues, to the extent that they have not been addressed in the Board's Discussion, are moot.

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FINDINGS OF FACT

1. That the Complainant, Las Vegas Police Protective Association-Metro, Inc., is a local government employee organization.

2. That the Respondent, the City of Las Vegas, Nevada, is a local government employer.

3. On January 14, 1987, the Board of Civil Service Trustees for the City of Las Vegas approved a "physical fitness examination program", which was implemented in 1988.

4. By written agreement dated July 19, 1988, the parties adopted Article 23 - Waiver, a so-called "Zipper Clause".

5. That on July 6, 1990, well beyond six (6) months from the date of implementation, Complainant filed the instant complaint, alleging that the "physical fitness examination program" unilaterally implemented by the City is a subject of mandatory negotiation or bargaining, pursuant to NRS 288.150(2)(i) and/or NRS 288.150(2)(r).

6. That a local government employer is required by NRS 288.150 to negotiate in good faith concerning mandatory subjects of bargaining with the designated representatives of the recognized employee organization, if any, for each appropriate bargaining unit among its employees.

CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board has jurisdiction over the parties and the subject matter of this Complaint, pursuant to the provisions

of NRS Chapter 288.

2. That the Complainant, Las Vegas Police Protective Association-Metro, Inc., is a recognized employee organization as defined by NRS 288.040.

3. That the City of Las Vegas, Nevada, is a recognized local government employer as defined by NRS 288.060.

4. That the City of Las Vegas unilaterally implemented a "physical fitness examination program" in 1988, as provided in NRS 288.150(3)(c)(1).

5. That the provisions of Article 23 - Waiver of the parties' Labor Agreement, do not preclude negotiations pursuant to NRS 288.180.

6. That, pursuant to NRS 288.150, Complainant was not estopped from bringing the matter to the Board by its alleged failure to raise the issue during negotiations.

7. That Respondent was not precluded from unilaterally implementing the subject "physical fitness examination program" by NRS 288.150.

8. That the subject "physical fitness examination program" established work performance standards which fall within the purview of subject matters which are reserved to the local government employer without negotiation, pursuant to NRS 288.150(3)(c)(1).

9. That the subject "physical fitness examination program" was established for promotional purposes, and the Board has consistently held that promotional requirements do not fall within the scope of mandatory bargaining required by

NRS 288.150(2).

10. That Complainant failed to establish the existence of a sufficient relationship between the subject "physical fitness examination program" and "discharge and disciplinary procedures" to require considering the program as falling within the purview of the subject of mandatory bargaining set forth in NRS 288.150(2)(i).

11. That Complainant failed to establish the existence of a sufficient relationship between the subject "physical fitness examination program" and "safety" to require considering the program as falling within the purview of either the subject of mandatory bargaining set forth in NRS 288.150(2)(r) or the exception alluded to in NRS 288.150(3)(c)(1); i.e., except for "safety considerations" th right to determine work performance standards is not within the scope of mandatory bargaining.

12. That under the facts prevailing in this case the Board is not required to find that the Decision of the Board in Item No. 83 is controlling as to the determination of negotiability pursuant to NRS 288.150.

13. That, inasmuch as the Board has found that the City's physical fitness examination program is not a subject which is subject to mandatory bargaining under NRS 288.150, all remaining issues, to the extent that they have not been addressed in the Board's Discussions, are moot.

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DECISION AND ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Union's Complaint regarding the City's unilateral implementation of an alleged "physical agility test" (referred to by the City as a "physical fitness examination program") without negotiation, is denied; and

2. That each party is to bear its own costs and fees in the above-entitled matter.

DATED this 30th day of May, 1991.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By Tamara Barengo
TAMARA BARENGO, Chairman

By
HOWARD ECKER, Vice Chairman

By
SALVATORE C. GUGINO, Member