

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

5 STEVEN B. KILGORE,

6 Complainant,

7 vs.

8 CITY OF HENDERSON and  
9 HENDERSON POLICE DEPARTMENT,

10 Respondents.

ITEM NO. 550H

CASE NO. A1-045763

**DECISION**

11 For Complainant: Richard I. Dreitzer, Esq.

12 For Respondent City: William E. Cooper, Esq.

13 **STATEMENT OF THE CASE**

14 On May 5, 2003, Complainant Steven B. Kilgore ("Kilgore") filed with the LOCAL  
15 GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD ("Board") a  
16 Complaint against Respondents HENDERSON POLICE DEPARTMENT ("HPD") and CITY  
17 OF HENDERSON (Respondents are collectively referred to hereafter as "the City"). Kilgore  
18 filed an Amended Complaint on August 7, 2003.

19 Kilgore's Amended Complaint alleges five grounds for relief. Claims numbered (1), (2)  
20 and (4) alleged the following wrongdoing by the City:<sup>1</sup> (1) discrimination based on political  
21 and/or personal reasons and in retaliation for his HPOA-related and protected activities;<sup>2</sup> (2)  
22

23 <sup>1</sup>In his Amended Complaint, claims numbered (3), (4), and (5), Kilgore also brought various  
24 claims against the Henderson Police Officers' Association ("HPOA"); however, Kilgore later  
25 stipulated to the HPOA's dismissal from this action.

26 <sup>2</sup>In his claim numbered (1), Kilgore also set forth claims of negligent and intentional infliction of  
27 emotional distress, civil conspiracy, negligent supervision, civil rights violations and  
28 constitutional due process and equal protection violations. Because this Board's jurisdiction is  
limited to NRS Chapter 288, we cannot consider these claims. See International Ass'n of  
Firefighters, Local 1607 v. City of North Las Vegas, Item No. 108, EMRB Case No. A1-045341,  
at 2 (1981).

1 failing to negotiate mandatory subjects of bargaining and failing to adhere to disciplinary  
2 measures required by the collective bargaining agreement ("CBA") between the City and the  
3 HPOA; and (4) violations of the CBA's prohibition on discrimination against HPOA members.

4 On September 8, 2003, while Kilgore's Complaint was pending before this Board, the  
5 City terminated his employment. On September 24, 2003, we granted a preliminary injunction  
6 and ordered the City to maintain the status quo ante as of September 7, 2003.<sup>3</sup> On September 25,  
7 2003, the City filed its Answer. On December 9, 2003, we ordered that this matter be deferred  
8 for arbitration. However, a disagreement arose between the parties over the commencement of  
9 arbitration proceedings, and Kilgore ultimately moved to place the matter back onto this Board's  
10 hearing calendar. We granted Kilgore's motion on February 17, 2004.

11 This Board's hearing of Kilgore's claims was noticed in accordance with Nevada's Open  
12 Meeting Law, commenced on March 30, 2004, and continued through March 31, April 1 and 2,  
13 June 1 and 2, and September 21 and 22, 2004. The Board heard testimony from twenty-two  
14 witnesses. The parties filed post-hearing briefs on December 8, 2004.

15 On January 5, 2005, and February 23, 2005, the Board conducted deliberations, noticed  
16 in accordance with Nevada's Open Meeting Law. Having now deliberated and considered the  
17 testimony of all witnesses, as well as their physical and verbal reactions while testifying, and  
18 having reviewed all evidence in the record and the parties' post-hearing briefs, we find and  
19 conclude that Kilgore has failed to demonstrate any violation of NRS Chapter 288. Thus, he is  
20 entitled to no relief on his claims before this Board, and the injunction granted September 24,  
21 2003, is lifted and dissolved.

## 22 DISCUSSION

### 23 *Statute of Limitations and Its Application to the Facts*

24 NRS 288.110(4) provides that "[t]he Board may not consider any complaint or appeal  
25 filed more than 6 months after the occurrence which is the subject of the complaint or appeal."  
26

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27  
28 <sup>3</sup>This Board's authority to order this injunctive relief is currently being challenged by the City's  
writ petition to the Nevada Supreme Court.

1 This six-month statute of limitations begins to run when an employee knows or reasonably  
2 should know of the alleged violation of NRS 288. See Clark County Public Employees Ass'n.  
3 SEUI Local 1107 v. Housing Auth., City of Las Vegas, Item No. 270, EMRB Case No. A1-  
4 045478, at 7 (1991); Cone v. Nevada Service Employees Union/SEIU Local 1107, 116 Nev. 473,  
5 477 n.2, 998 P.2d 1178, 1181 n.2 (2000); Galindo v. Stooddy Co., 793 F.2d 1502, 1509 (9th Cir.  
6 1986) (setting forth similar rule for claims under the NLRA). The Complaint in this case was  
7 filed on May 5, 2003. Accordingly, pursuant to NRS 288.110(4), no violation of NRS Chapter  
8 288 may be found unless it occurred, or was not reasonably discovered until, on or after  
9 November 5, 2002.

10 Here, both parties produced testimony and other evidence of events both prior and  
11 subsequent to the November 5, 2002 cut-off date.<sup>4</sup> We have previously recognized that evidence  
12 of conduct which occurs prior to the six-month limitations period may be used as background  
13 evidence to evaluate subsequent conduct that is within the six-month period. See Fralev v. City  
14 of Henderson and Henderson Police Officer's Ass'n, Item No. 547, EMRB Case No. A1-045756,  
15 at 23 (2004); see also Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 416-17, 80 S. Ct. 822, 826-  
16 27 (1960) (recognizing same rule applies in proceedings before NLRB); News Printing Co., 116  
17 NLRB 210, 212, 1956 WL 13970 (1956) (same). "[W]hile evidence of events occurring more  
18 than six months before the filing of a charge may be used to 'shed light' upon events taking place  
19 within the six-month period, the evidence of a violation drawn from within that period must be  
20 reasonably substantial in its own right." NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 33  
21 (9th Cir. 1968). Consistent with this rule, we have considered in this case evidence outside the  
22 statute of limitations period only to the extent it might shed light on events occurring on or after  
23 November 5, 2002, with one exception. Kilgore could not have reasonably known until his  
24 January 2003 meeting with representatives of the City about the investigation that began in April  
25  
26  
27

28 <sup>4</sup>We take this opportunity to remind and caution participants in hearings before this Board that  
where documentary exhibits will consist of more than one page, this Board expects that each  
page will bear a separate consecutive page number.

1 2002, which is discussed more fully below. Therefore, we have considered evidence of and  
2 allegations related to this investigation as timely under NRS 288.110(4).

3 **Undisputed facts relevant to the time period between May 1985 and November 4, 2002**

4 In May 1985, Kilgore began employment as a police officer with HPD. In 1991, he was  
5 promoted to the rank of police sergeant. On November 15, 1999, HPD promoted Kilgore to the  
6 rank of lieutenant.

7 During Kilgore's service as a lieutenant, HPD issued to him two letters of reprimand.  
8 The first letter was dated September 13, 2000, and related to Kilgore's alleged neglect of duty in  
9 taking unauthorized leave from his scheduled shifts. Subsequent to the resolution of this neglect  
10 of duty matter, from January 7, 2001, through March 16, 2001, Kilgore attended, as the City's  
11 chosen candidate, the FBI academy in Quantico, Virginia. Kilgore returned to his regular duties  
12 on March 21, 2001, but one week later, he took a leave of absence pursuant to the Family and  
13 Medical Leave Act ("FMLA"). He again returned to his work duties on June 25, 2001. Shortly  
14 thereafter, HPD appointed Kilgore to serve as acting captain for the West Area of its jurisdiction  
15 from August 27 through September 2, 2001.

16 The second letter of reprimand stemmed from an investigation which was opened on  
17 October 18, 2001, and related to Kilgore's insubordination in using, during the previous month, a  
18 ceremonial flag case belonging to HPD. During this investigation, in December 2001, HPD  
19 appointed Robert Vadasy (now a captain, but at the time, a lieutenant at HPD) to serve as acting  
20 captain for the West Area. About the same time, Michael Garner (also then a lieutenant at HPD)  
21 was leaving to attend the FBI academy, and Kilgore was transferred from his dayshift in the  
22 West Area to a swing shift in the East Area, where Garner had been stationed. Kilgore  
23 complained, with support from his wife Jody's physician, that this transfer caused hardship for  
24 his family due to Jody Kilgore's ongoing medical problems and the supervision needs of the  
25 Kilgore children. HPD later reassigned Kilgore to a dayshift but kept him stationed in the East  
26 Area. On January 22, 2002, HPD issued Kilgore the letter of reprimand relating to the  
27 September 2001 (flag-case) insubordination.

1 While stationed in the East Area, Kilgore was under the supervision of James White (a  
2 captain at the time, now a deputy chief at HPD). White testified that in April 2002, he received  
3 information from his secretary and a crossing guard supervisor that Kilgore had been absent from  
4 duty without leave. Because HPD Chief Michael Mayberry was dealing with serious health  
5 issues, White reported Kilgore's possible unexcused absences to Monty Sparks, who was serving  
6 as HPD's Acting Chief. Sparks conferred with HPD Deputy Chief Richard Perkins, and the two  
7 took the matter to Henderson City Attorney Shauna Hughes.

8 Hughes initiated an investigation to be handled through her office. She retained the  
9 services of the private investigation firm "David Groover and Associates" ("Groover"). Groover  
10 began surveillance of Kilgore on April 19, 2002, and continued this surveillance on April 20, 26  
11 and 27, 2002. On May 1, 2002, Kilgore was approved for FMLA leave as needed through June  
12 7, 2002. However, Groover continued its surveillance on the days that Kilgore worked,  
13 including May 10, 11, 17, and 18. Meanwhile, HPD promoted Garner to serve as captain to  
14 supervise the East Area and reassigned Kilgore to the West Area under the supervision of  
15 Vadasy. At this time, Kilgore's regular weekly shift was from 6:00 a.m. to 4:00 p.m., Friday  
16 through Monday, and Vadasy worked a weekly schedule of Monday through Thursday. On  
17 Vadasy's days off, Kilgore was regularly the highest ranking HPD official scheduled for duty in  
18 HPD's jurisdiction.

19 In early June 2002, Jody Kilgore gave birth and Kilgore took FMLA leave through the  
20 end of July 2002. On August 26, 2002, Vadasy counseled Kilgore regarding being tardy for his  
21 shift on that date. Groover resumed its surveillance of Kilgore on September 13, 2002, and  
22 continued it on September 14, 15, 20, 27, 28, 29, and October 4, 5, and 6, 2002.

23 **Undisputed facts relevant to the time period from and after November 5, 2002**

24 On November 11, 2002, Kilgore announced his candidacy for HPOA president by email  
25 to HPOA members. Meanwhile, Groover's surveillance of Kilgore continued on November 22,  
26 23, 24, and 25, 2002. On December 4, 2002, HPOA elected Kilgore as its President. On  
27 December 9, 2002, Vadasy and Kilgore had a discussion regarding whether Kilgore could freely  
28 leave HPD's jurisdiction to go home for lunch. Kilgore contends that Vadasy acquiesced in

1 Kilgore's repeated departures from the jurisdiction for lunch; Vadasy denies that he gave Kilgore  
2 permission to leave the jurisdiction. Groover continued further surveillance of Kilgore on  
3 December 13, 14, and 20, 2002, and again on January 3, 4, and 5, 2003.

4 Assistant City Attorney Robert Zentz oversaw the City Attorney's investigation of  
5 Kilgore's activities and prepared a recommendation for charges. He relied, in large part, on the  
6 evidence gathered from Groover's surveillance as well as documentary evidence showing the  
7 Von Duprin card reader system's record of Kilgore's entries into HPD's West Area gate. Taken  
8 together, the testimony of Zentz and R. David Groover and the surveillance evidence and Von  
9 Duprin records indicate that Kilgore was tardy to work approximately thirty-eight times between  
10 September 20, 2002, and January 5, 2003, and that on the majority of the days that he was  
11 watched by Groover, Kilgore either was late for his shift at work and/or returned one or more  
12 times during his shift to his home outside the City's jurisdiction while in uniform and in a marked  
13 vehicle and/or abandoned his duties earlier than the normal end of his shift. Further, while on  
14 duty and in uniform, Kilgore used his HPD vehicle to transport a crate and file box on one date,  
15 and to transport his children on another.

16 On January 6, 2003, Kilgore again took FMLA leave. On January 14, 2003, City  
17 Attorney Hughes's assistant contacted Kilgore and requested that Kilgore arrange to meet with  
18 Hughes. Kilgore was unavailable but agreed to meet with Hughes on January 21, 2003. On that  
19 date, Kilgore met with Hughes and other City representatives. Kilgore was provided a package  
20 of documentation relating to the City Attorney's investigation of his activities and its  
21 determination that his employment should be terminated. Hughes offered Kilgore the  
22 opportunity to resign with three months of severance pay and benefits and a letter of  
23 recommendation. She also told him that if he did not resign, he would be placed on  
24 administrative leave without pay and proceedings would commence that would likely result in  
25 the termination of his employment. The meeting was continued for Kilgore's decision. On  
26 January 28, 2003, Kilgore attended a second meeting with Hughes, where he declined to resign.  
27 Pursuant to Hughes's decision, the City then barred Kilgore from accessing HPD's facilities and  
28 email system.

1 On or about February 7, 2003, HPOA's executive board asked Kilgore to step down from  
2 his position as its president. Shortly thereafter, Kilgore resigned from his HPOA presidency. On  
3 February 12, 2003, after Kilgore had returned from FMLA leave, the City served him with notice  
4 of an investigation by HPD's Internal Affairs Bureau ("IAB") and placed him on administrative  
5 leave with pay. In its investigation, IAB relied on and supplemented the previous investigation  
6 by the City Attorney. IAB found numerous violations of HPD Code relating to Kilgore's  
7 unexcused absences and tardiness, use of HPD's vehicle for personal reasons, false reporting of  
8 time, misuse of supervisory authority, improper departure from the City limits, improper  
9 excusing of himself from mandatory shooting qualification, failure to answer calls without  
10 justifiable reason, and improper use of computers. In addition, based on information which came  
11 to light after the surveillance period, IAB also found a violation of HPD Code based on Kilgore's  
12 unauthorized use, in the fall of 2002, of a cemetery prop owned by HPD.

13 On August 11, 2003, Daryl Moore of the City's Human Resources Division  
14 recommended to the City that Kilgore be discharged for the violations of HPD rules found by  
15 IAB. On September 8, 2003, Assistant City Manager Mark Calhoun conducted a pre-termination  
16 hearing. After the conclusion of this hearing, and on the same date, Calhoun sustained the  
17 charges against Kilgore and terminated Kilgore's employment.

### 18 Analysis of Kilgore's Claims

#### 19 1) Discrimination based on political and/or personal reasons and in retaliation for 20 HPOA-related and protected activities

21 In his complaint, Kilgore alleged that the City had violated NRS 288.270(1)(a) and (f) by  
22 discriminating against him. Kilgore's claims of prohibited discriminatory animus fall into the  
23 following categories: (1) intent to discriminate as retaliation or to affect protected HPOA-related  
24 activities; and (2) intent to discriminate for personal reasons.

25 NRS 288.270(1)(a) provides that it is a prohibited practice for a local government  
26 employer or its designated representative to willfully "[i]nterfere, restrain or coerce any  
27 employee in the exercise of any right guaranteed under [NRS Chapter 288]." NRS 288.270(1)(f)  
28 provides that it is a prohibited practice for a local government employer or its designated

1 representative to willfully "[d]iscriminate because of race, color, religion, sex, age, physical or  
2 visual handicap, national origin or because of political or personal reasons or affiliations."  
3 (Emphasis added.)

4 Claims that the City discriminated against Kilgore because of his protected employee-  
5 organization activities are subject to the following test, which is borrowed from case law  
6 addressing similar claims under the NLRB's jurisdiction. First, Kilgore must establish by a  
7 preponderance of the evidence that his protected conduct was a substantial or motivating factor  
8 in the City's adverse-employment decisions; thereafter the burden shifts to the City to prove by a  
9 preponderance of the evidence that it would have reached the same decision absent the protected  
10 conduct. NLRB v. Interstate Builders, Inc., 351 F.3d 1020, 1026-27 (10th Cir. 2003); NLRB v.  
11 Transportation Management Corp., 462 U.S. 393, 398-404, 103 S. Ct. 2469, 2473-75 (1983),  
12 modified on other grounds by Director. Officer of Workers' Comp. Programs v. Greenwich  
13 Collieries, 512 U.S. 267, 114 S. Ct. 2251 (1994); see also Wright Line, 251 NLRB 1083, 1089  
14 (1980).

15 Kilgore also claims that the City discriminated against him because of personal dislike  
16 for him and/or because of his personal criticism of the administration of the City and HPD.  
17 When NRS 288.270 was first enacted, it expressly forbade discrimination by an employer only  
18 where done "to encourage or discourage membership in any employee organization" or "because  
19 [any employee has] signed or filed an affidavit, petition or complaint or given any information or  
20 testimony under this chapter, or because he has formed, joined or chosen to be represented by  
21 any employee organization." 1971 Nev. Stat., ch. 643, § 11, at 1508-09 (currently codified at  
22 NRS 288.270(1)(c)-(d)). This is consistent with the reach of the similarly worded National  
23 Labor Relations Act at 29 U.S.C. § 158, which ties its prohibition against discrimination to union  
24 membership or activities.

25 In 1975, NRS 288.270 was amended by passage of Assembly Bill 572 to include  
26 subdivisions (1)(f) and 2(c), forbidding employers and employee organizations from  
27 discriminating based on "race color, religion, sex, age, physical or visual handicap, national  
28 origin or because of political or personal reasons or affiliations." 1975 Nev. Stat., ch. 539, § 20,



1 at 924-25. The legislative history of A.B. 572 does not indicate any reasoning or intent behind  
2 the amendment. The policy behind NRS Chapter 288 would undoubtedly prevent discrimination  
3 based on political reasons such as affiliation with, or protected activities related to, employee-  
4 organization membership. But we are left with the task of determining, in the context of this  
5 case and this Board's jurisdiction under NRS 288.270(1)(f), the meaning of "personal reasons or  
6 affiliations."

7 Black's Law Dictionary defines "Personal" to mean "[a]ppertaining to the person;  
8 belonging to an individual. . . ." Black's Law Dictionary 792 (6th ed. 1991). Additionally, the  
9 term "political or personal reasons or affiliations" is preceded in NRS 288.270(1)(f) by a list of  
10 factors, "race, color, religion, sex, age, physical or visual handicap, national origin,"<sup>5</sup> that can be  
11 best described as "non-merit-or-fitness" factors, *i.e.*, factors that are unrelated to any job  
12 requirement and not otherwise made by law a permissible basis for discrimination.<sup>6</sup> The doctrine  
13 of *ejusdem generis* states that where general words follow an enumeration of particular classes of  
14 things, the general words will be construed as applying only to those things of the same general  
15 class as those enumerated. Black's Law Dictionary 357 (6th ed. 1991). Thus, the proper  
16 construction of the phrase "personal reasons or affiliations" includes "non-merit-or-fitness"  
17 factors, and would include the dislike of or bias against a person which is based on an  
18 individual's characteristics, beliefs, affiliations, or activities that do not affect the individual's  
19 merit or fitness for any particular job.<sup>7</sup>

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22 <sup>5</sup>Claims that an employer has discriminated against an employee based on "race, color, religion,  
23 sex, sexual orientation, age, disability or national origin" are firmly within the jurisdiction of the  
Nevada Equal Rights Commission. See NRS 613.330(1)(a)-(b); NRS 613.405.

24 <sup>6</sup>An example of a permissible basis in the law for discrimination is set forth at NRS 179A.190,  
25 which provides that an employer is not liable in an action alleging discrimination where the  
employer acts based on certain information relating to a person's criminal history.

26 <sup>7</sup>We note that this construction is also supported by NRS 281.370, which requires that state,  
27 county and municipal departments take personnel actions based "solely on merit and fitness" and  
28 prohibits them from discriminating based on "race, creed, color, national origin, sex, sexual  
orientation, age, political affiliation or disability, except where based on a bona fide occupational  
qualification."

1 Kilgore's claims of discrimination for personal reasons are not comparable to questions  
2 arising under the NLRB's jurisdiction. Therefore, we treat these as ordinary claims of  
3 discrimination based on Kilgore's characteristics, beliefs, affiliations or activities that do not  
4 touch upon merit-or-fitness, and we apply the test set forth in McDonnell Douglas Corp. v.  
5 Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and its progeny. See Clark County Public  
6 Employees Ass'n v. County of Clark, Item No. 215, EMRB Case No. A1-045425, at 3 (1988)  
7 (applying McDonnell Douglas analysis to claim of discrimination).

8 Under the McDonnell Douglas line of cases, if Kilgore establishes a prima facie case of  
9 discrimination, by proving by a preponderance of the evidence, that the City's actions were  
10 motivated by prohibited discriminatory animus, the burden shifts to the City to produce an  
11 explanation to rebut the prima facie case, *i.e.* to produce evidence that the adverse employment  
12 actions were taken for a legitimate nondiscriminatory reason. See McDonnell Douglas, 411 U.S.  
13 at 802-03, 93 S. Ct. at 1824; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07, 113 S. Ct.  
14 2742, 2746-47 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101  
15 S. Ct. 1089, 1093 (1981). The City can meet this burden by setting forth evidence of reasons  
16 that, if believed by this Board, would support a finding that the unlawful discrimination was not  
17 the cause of the employment actions. See St. Mary's, 509 U.S. at 506-07, 113 S. Ct. at 2747.  
18 After the City has met its burden of production, to prevail, Kilgore must prove by a  
19 preponderance of the evidence that the reason given by the City is unworthy of belief and that  
20 discrimination was the real reason. See *id.* at 516, 113 S. Ct. at 2752 (citing Burdine, 450 U.S. at  
21 255, 101 S. Ct. at 1095); Burdine, 450 U.S. at 253, 101 S. Ct. at 1093. At all times, Kilgore  
22 retains the burden of persuading this Board that the City intentionally discriminated. See St.  
23 Mary's, 509 U.S. at 507, 113 S. Ct. at 2747. A reason cannot be a pretext for discrimination  
24 unless it is shown "*both* that the reason was false, *and* that discrimination was the real reason."  
25 St. Mary's, 509 U.S. at 515, 113 S. Ct. at 2752.

26 Kilgore presents an exhaustive catalog of his alleged protected conduct and his non-  
27 merit-or-fitness-related characteristics, beliefs, affiliations or activities which might have  
28 motivated the City to discriminate against him. Most of the Kilgore's allegations arguably

1 involve both personal and HPOA-related discrimination. Accordingly, out of an abundance of  
2 caution, we have considered all of Kilgore's evidence together under each of the above tests. For  
3 our own ease in addressing the evidence here, we begin with our assessment of the reasons given  
4 by the City for its adverse employment actions.

5 **Evidence relating to the City's grounds for the adverse employment actions**

6 **Charges related to leaving the jurisdiction:** Testimony showed that Kilgore's home is  
7 approximately one to one-and-one-half miles from the jurisdictional limits of HPD. Further, the  
8 applicable HPD Code stated, "An on-duty officer shall not leave the city limits or leave their  
9 assigned beat without authorization by a supervisor except the immediate pursuit of a person to  
10 be arrested or while enroute to an assigned duty." Nonetheless, the evidence here, including  
11 videotape and testimony, demonstrates that during the surveillance period in question Kilgore  
12 repeatedly left the jurisdiction to return to his residence during his shift. Kilgore does not deny  
13 that he left the jurisdiction, and during his testimony he admitted that HPD rules prohibited  
14 leaving the jurisdiction without permission from a supervisor.

15 Kilgore relies, in part, on evidence that indicates that his former supervisor, Monty  
16 Sparks, at one time encouraged officers to eat at T-Bird Lounge which was about fifty feet  
17 outside HPD's jurisdiction. However, the City's evidence showed that Sparks's own supervisor  
18 at the time, Ray Moser, sent an email to HPD Patrol October 2, 2001, stating, "Absent exigent  
19 circumstances and prior supervisor's approval, Patrol personnel will not break or lunch outside  
20 the City of Henderson. No exceptions." Kilgore admitted during his testimony that he received  
21 and was aware of this email and he does not contend that Sparks disregarded this email.

22 Kilgore also claims that, based on his needs to check on or assist his ill wife, Vadasy  
23 gave him permission to go home during his shift. We find Kilgore's testimony to be incredible  
24 and that the great weight of the reliable evidence contradicts Kilgore's claims.

25 At the beginning of the surveillance period, Kilgore was leaving the jurisdiction even  
26 though he was under the supervision of James White. Kilgore presented no evidence  
27 demonstrating that White gave him permission to leave the jurisdiction. Indeed, the City's  
28 evidence, including White's testimony demonstrates that Kilgore did not have such permission

1 and that White and Ray Moser (Kilgore's supervisor until December 2001) each reminded  
2 Kilgore of his duty to remain in the jurisdiction. In addition to the above-described email from  
3 Moser, the City also introduced a note prepared by Moser and dated October 23, 2001, which  
4 summarized a meeting he had with Kilgore and stated, "[N]ot leaving Henderson and specifically  
5 not going home for lunch since he lives in LV was discussed." The City also presented evidence  
6 of an evaluation of Kilgore by White. In this evaluation, White noted that Kilgore must set an  
7 example by coming to work on time and constantly being a visible, dependable presence. White  
8 specifically noted, "Capt. Moser notes that he discussed with Lt. Kilgore lunch breaks and not  
9 going home for lunch, as he does not live in the City of Henderson. This is a rule in patrol." The  
10 evaluation was signed by Kilgore on September 17, 2002. This evidence is inconsistent with  
11 Kilgore having any sort of permission from White to freely leave the jurisdiction.

12 Vadasy denied that he expressly or impliedly gave Kilgore permission to absent himself  
13 from the jurisdiction. In addition, Vadasy testified that he denied a request from Kilgore on  
14 December 9, 2002 for permission to leave the jurisdiction. The City also presented an unsigned  
15 note that Vadasy had written to himself and stating:

16 On 12-9-02 I met with Lt. Kilgore for the purpose of completing a mid-year  
17 progress report. After this discussion Lt. Kilgore asked me if it would be ok for  
18 him to go home for lunch. Lt. Kilgore further stated that he only lives about a  
19 mile from our jurisdiction. I explained to Lt. Kilgore that I would think about it  
20 however, I was inclined not to allow him to do so because of the message that it  
would send to his subordinates. I also stated that if I let him go one mile away  
what would be the harm in allowing someone else to go two miles away, etc. Lt.  
Kilgore also stated that he had thought about calling me at least "100 times" to  
ask permission but decided to "brown bag it."

21 Vadasy testified that he understood the term "brown bag it" to mean that Kilgore would  
22 bring his lunch to work. Kilgore contends that Vadasy's "note to self" misrepresents the  
23 substance of his December 9, 2002 conversation with Vadasy. Kilgore claims that he only  
24 attempted to verify whether it *continued* to be acceptable for him to leave the jurisdiction.  
25 Kilgore contends that Vadasy stated that he would check with Captain Garner to see what he was  
26 doing on his side of town, but that it was not a "big deal" to Vadasy as long as Kilgore was "cool  
27 with it." Vadasy's "note to self" is unsigned and reports a somewhat ambiguous response to  
28 Kilgore's request. Therefore, it does not weigh heavily in our assessment of the evidence.

1 However, we find Vadasy's testimony that he did not give Kilgore permission to leave the  
2 jurisdiction to be credible. We also note that this testimony is partially corroborated by HPD  
3 Captain Michael Garner, who testified that Vadasy came to him and said that Kilgore asked  
4 about leaving the jurisdiction to go home for lunch. Vadasy and Garner determined this was not  
5 a good idea, and because, other officers were denied permission in the past, they would stick  
6 with that policy.

7 In light of the compelling testimony of White and Vadasy, the clear HPD Code, and the  
8 evidence of past counseling on the subject, we are convinced that Kilgore did not have explicit or  
9 implicit permission to leave the jurisdiction for personal reasons on the occasions for which he  
10 was charged with doing so. On those occasions, Kilgore willfully acted in violation of and with  
11 disregard for HPD rules.

12 Furthermore, the evidence does not support Kilgore's claim that he has been singled out  
13 for discipline on the grounds related to HPD's jurisdictional-limits rule. Although Kilgore  
14 presented witnesses who testified that other officers have left the jurisdiction for personal  
15 reasons and have not been investigated or disciplined, no credible testimony or evidence showed  
16 that any specific officer left the jurisdiction, without the appropriate permission from a  
17 supervisor, in temporal proximity or similar frequency to Kilgore's doing so here. Nor does it  
18 appear that the City had knowledge of such activity and failed to treat it as a serious  
19 transgression of HPD rules.

20 Kilgore also presented evidence showing that the boundaries of Henderson are jagged  
21 and officers must routinely leave the jurisdiction to respond to calls and otherwise are allowed to  
22 perform duties outside the jurisdiction. However, such divergences appear to be permissible  
23 under the HPD Code and are not at issue here.

24 **Charges related to tardiness and other absences from duty without leave:** The City  
25 demonstrated that Kilgore was repeatedly tardy and absent from his assigned shift on the dates in  
26 question by ample evidence, including the testimony of R. David Groover, Deputy City Attorney  
27 Zentz, Robert Vadasy, HPD Lieutenant Eric Denison, and HPD Sergeant Jack Brooks, as well as  
28

1 Zentz's report, the Von Duprin records, and surveillance logs, reports, and videotape. Kilgore  
2 admitted to tardiness in his own testimony.

3 Related to the extent of his tardiness, Kilgore disputes the accuracy of the Von Duprin  
4 records and surveillance reports and records. However, we are satisfied from a review of all the  
5 evidence, and especially given the testimony of Zentz and R. David Groover, that any  
6 discrepancies have been adequately explained and that the evidence supports the allegations as to  
7 the times and dates that the City alleged Kilgore was absent from his assigned shifts.

8 Kilgore also contends that his tardiness to work and any absences from his scheduled  
9 shifts were acceptable under HPD's "soft-clock" or "flex-time" policies. To justify his extreme  
10 tardiness during the early part of the surveillance period, Kilgore also relies on his testimony that  
11 a family friend died. However, we find no credible evidence to support Kilgore's assertions that  
12 his tardiness or other absences were excused by policy, mutual understanding, express  
13 permission or other justification.

14 The applicable HPD Code stated, "Members will be punctual and report for their  
15 regularly scheduled shift at the time and place designated . . . ." "No supervisor or person of any  
16 rank is exempt from the rules of the organization simply because of the position held by such  
17 person."

18 Testimony from Brooks and Denison convincingly shows that HPD officers, including  
19 lieutenants, are expected to be present and in uniform at the time their shifts start. The testimony  
20 from Kilgore's supervisors during the relevant time period, White and Vadasy, also shows that  
21 Kilgore was expected to report to work on time and remain on duty during his scheduled shifts,  
22 and that he did not have permission to be absent for the dates and times at issue. The  
23 documentary evidence corroborates their testimony. Again, the aforementioned evaluation,  
24 prepared by White and signed by Kilgore in September 2002, states that Kilgore "must set an  
25 example by *coming to work on time* and constantly being a visible dependable presence."  
26 (Emphasis added.)  
27  
28

1        Additionally, the City introduced as its Exhibit 57 a note, which Vadasy testified that he  
2 wrote and Kilgore signed, documenting Vadasy's August 26, 2002 counseling session with  
3 Kilgore. This note states:

4        On 8-26-02 I met with Lt. Kilgore in reference to coming in to work late. Lt.  
5 Kilgore arrived for work at 0613 hours and was due in at 0600 – ready for work.  
6 I explained to Lt. Kilgore that this was unacceptable and that it sets a bad example  
for his subordinates. Lt. Kilgore stated that it wouldn't happen again.

7        Exhibit 58 is another note, which according to Vadasy's testimony, he wrote to himself to  
8 further document the counseling session. Although Kilgore disputes whether he actually signed  
9 Exhibit 57, he does not dispute signing his December 9, 2002 progress report prepared by  
10 Vadasy. This progress report also refers to the counseling session regarding Kilgore's tardiness  
11 on August 26, 2002, and to Kilgore's statement to Vadasy that "it would not happen again."  
12 Despite this, the evidence demonstrates that Kilgore continued to arrive late to work during the  
13 surveillance period following the counseling session.

14        Numerous witnesses testified regarding HPD's unofficial "flex-time" policy. The  
15 witnesses agreed that an unofficial flex-time policy existed which allowed officers to take time  
16 off for overtime earned based on informal agreements between supervisors and subordinates.  
17 This policy was abandoned by HPD when Kilgore sought to use it to justify his absences in this  
18 case.

19        Kilgore presented no proof that he had any agreement with White to use flex-time on the  
20 days that he was absent from work and under White's supervision. Kilgore contends, however,  
21 that he had standing permission from Vadasy to be absent from his shift to use flex-time.  
22 Kilgore explained that Vadasy had stated that he was not concerned about the time that  
23 lieutenants took off from work, so long as the streets were "covered," meaning that another  
24 supervisor was in place. Kilgore claimed that he kept track of the flex-time he used by verbal or  
25 email exchanges with Vadasy. We find Kilgore's testimony unworthy of belief.

26        The evidence shows that Kilgore took unreported leave from work. No credible evidence  
27 shows that for this unreported time, the City owed him any time off. Further, Vadasy testified  
28 persuasively that he did not have any understanding or agreement with Kilgore whereby Kilgore  
was free to use flex-time at his own discretion so long as the streets were "covered." Vadasy's

1 policy for all lieutenants under his supervision was that they could take time off, if another  
2 supervisor was on duty, if the lieutenants let Vadasy know, either by paperwork or a phone call.  
3 Vadasy did not need to personally give his permission for use of leave, and lieutenants could  
4 obtain permission from another captain if they left documentation for Vadasy. This testimony  
5 was corroborated by the credible testimony of Denison and HPD Lieutenant Joe Kurian, who  
6 were, like Kilgore, lieutenants under Vadasy's supervision during the relevant time period.

7 ~~The City also introduced evidence of email exchanges between Kilgore and Vadasy.~~

8 This evidence shows that on December 10, 2002, Kilgore wrote to Vadasy:

9 I'll be off on Sunday, December 15 and Monday December 16 for in lieu and vacation.

10 To this, Vadasy responded:

11 Steve, I know we talked about Sunday (off in lieu on Tuesday) which I approved.  
12 The Monday vacation day sounds more like a demand than a request, which I  
13 have not yet approved. I not trying to be overbearing, *but normally I am*  
14 *consulted about my Lieutenant's requested leave.* Please advise.

15 (Emphasis added.) In response, Kilgore wrote on December 12, 2002,

16 My apologies Bob, I actually forgot the email and hurriedly threw it out on my  
17 way out the door. If it's ok with you, I'd like to take it comp for OT today (Lts  
18 mtg) and I have a couple of hours owed. I'll still owe you about two hours after  
19 this. I'll get with you before the mtg to get your opinion.

20 This exchange corroborates Vadasy's testimony that he expected Kilgore to request  
21 permission for leave and refutes Kilgore's claim that he did not understand as much. It also  
22 suggests that Kilgore was not owed overtime as of December 12, 2002, though the surveillance  
23 evidence shows that he continued to be absent from his shift after that date. Additional evidence  
24 consisting of email from Kilgore to Vadasy regarding leave from work also corroborates  
25 Vadasy's testimony that Kilgore was expected to inform him regarding any absences. See, e.g.,  
26 City's Exhibits 54, 56, and 62.

27 We also place importance on the evidence of the July 2000 neglect of duty IAB case  
28 against Kilgore. According to the credible testimony of Mayberry, after Kilgore had been  
promoted to lieutenant, Monty Sparks and James White came to Mayberry and told him that they  
had received complaints that Kilgore was not working his scheduled four, ten-hour weekly shifts.  
Mayberry directed IAB to investigate the matter, and IAB Sergeant Stillson conducted



1 surveillance of Kilgore from July 22 to July 30, 2000. Stillson's testimony before this Board,  
2 along with his report, demonstrates that during the five days of surveillance, Kilgore's actual  
3 time spent on duty was only twenty-six hours and fifty-five minutes, although he was scheduled  
4 to work forty hours. As a result of the investigation, Kilgore was charged with, *inter alia*,  
5 neglecting his duties by arriving to work late, leaving work early, taking unapproved lengthy  
6 lunches and working in civilian clothing.

7 ~~Furthermore (and not coincidentally, we think),~~ Kilgore claimed during that investigation  
8 that he was merely using leave time which the City owed to him; that his supervisor, Sparks, was  
9 "real loose" about accounting for dates and times off; and, that lieutenants have the right to make  
10 a decision on taking time off that is owed to them. Sparks denied to the IAB investigators that  
11 Kilgore had permission to be absent from his shift, and Kilgore was unable to show that he was  
12 entitled to leave for the time in question. According to credible testimony from Hughes and  
13 Mayberry, Kilgore promised to change his ways. On August 7, 2000, Kilgore also wrote a  
14 memorandum that stated, in part, "I will submit overtime slips in the future and will complete the  
15 necessary Personnel Action Forms when taking time off." Thus, Mayberry opted for lenient  
16 discipline, despite the seriousness of Kilgore's misconduct, and on September 13, 2000,  
17 Mayberry issued a letter of reprimand to Kilgore. Nevertheless, Mayberry told Kilgore to keep  
18 close records in the future, as Kilgore admitted during his testimony before this Board.

19 In sum, we find no credible evidence that the City should have excused Kilgore's  
20 tardiness or other absences from duty because a supervisor had approved such absences or  
21 because of any "soft-clock" or "flex-time" policy or other justification. Moreover, the City  
22 demonstrated that it properly relied upon Kilgore's tardiness and unreported absences as grounds  
23 to justify the adverse employment actions here.

24 Remaining grounds for discipline: Kilgore does not dispute that HPD Code prohibits  
25 the use of HPD vehicles and property for personal benefit. Likewise, he does not dispute that he  
26 used his HPD vehicle for personal benefit, and we find that he has failed to demonstrate that the  
27 City improperly relied on this ground in taking its adverse employment actions against him.  
28 Additionally, although Kilgore presented some evidence showing that other HPD officers have

1 used their HPD vehicles for personal errands, such as banking and picking up laundry, no  
2 testimony showed that any specific officer did so for purposes similar to Kilgore's own, in  
3 temporal proximity to Kilgore's doing so, with the knowledge of the City, and without suffering  
4 discipline commensurate to the seriousness with which the City treated Kilgore's misconduct.

5 Next, in December 2002, HPD Sergeant Kirwan noticed that a cemetery prop, which  
6 belonged to HPD and was used for a teaching program, was missing. Kilgore admits that he had  
7 the prop and used it at his home for a Halloween decoration, but he claims that he obtained  
8 permission to borrow it from HPD Officer Frank Simmons in October 2002. However,  
9 according to the evidence gathered during the IAB investigation, Frank Simmons denied that he  
10 had given Kilgore permission to borrow the prop and reported that he told Kilgore to seek  
11 permission from Lieutenant Ronald Averett. When Averett testified before this Board, he stated  
12 that he had received a call from Sergeant Kirwan who said that Kilgore and another officer both  
13 wanted to use the prop for Halloween. Averett denied the request. Kilgore presents only his  
14 own self-serving testimony to prove that he had permission to borrow the prop, along with some  
15 vague testimony from Averett, who stated that he "understood from one sergeant that Frank  
16 Simmons had made mention to him that they had loaned it out to somebody." Here again, we do  
17 not find Kilgore to be a credible witness. We also reject Averett's comparison of Kilgore's use of  
18 the prop to other officers' use of new digital cameras, which use was encouraged by the  
19 Department. A ready distinction exists between encouraging the personal use of a new type of  
20 photographic equipment for encouraging familiarity, and the unapproved use of the prop for  
21 purely personal reasons. Accordingly, we agree that the City properly relied on the cemetery  
22 prop matter as grounds for the adverse employment actions here.

23 Kilgore was also disciplined for charges relating to his attempt to excuse himself from  
24 mandatory shooting qualification, failure to respond to calls, and failure to dock in his vehicle or  
25 use the MDT (a computer system which silently dispatches calls). The City presented testimony  
26 and documentary evidence to show Kilgore's violation of HPD rules relating to these grounds,  
27 including testimony and documentary evidence. Kilgore presented no persuasive evidence to  
28

1 challenge these grounds for discipline, and we are convinced that City properly relied on these  
2 grounds for its adverse employment actions against Kilgore.

3 Finally, the City presented evidence demonstrating that the above-identified misconduct  
4 by Kilgore constitutes grounds for termination under HPD's disciplinary matrix, and we are  
5 satisfied that the City took the adverse employment actions at issue for a legitimate reason, i.e.,  
6 Kilgore's repeated violations of HPD rules.

7 **Kilgore's allegations of discriminatory intent, generally**

8 We now turn to address Kilgore's specific allegations as to individuals with animosity  
9 against him and as to other evidence which he contends demonstrates discriminatory intent or  
10 pretext. Kilgore basically contends that he is the victim of a covert plan to discriminate against  
11 him or to punish him for or affect his HPOA-related activities. He names as the principal actors  
12 or conspirators Deputy Chief James White, Chief Michael Mayberry, City Attorney Shauna  
13 Hughes, retired Deputy Chief/former Acting Chief Monty Sparks, Deputy Chief Richard Perkins,  
14 and Captain Robert Vadasy. We find that Kilgore has failed to substantiate his claims with any  
15 persuasive direct or circumstantial evidence showing that any of these people, individually or  
16 jointly, acted out of any animosity toward him with respect to any adverse employment action  
17 here. In addition, we find no reliable evidence that any City employee, who was responsible for  
18 the decisions relating to the investigation against Kilgore or the termination of his employment,  
19 was motivated, even in part, by an intent to discriminate against him based on any non-merit-or-  
20 fitness factor or based on his HPOA activities.<sup>8</sup>

21 Kilgore's witnesses gave their personal opinions that Kilgore was not favored by HPD's  
22 administration and that he had been discriminated against for being perceived as disloyal to the  
23 administration. These witnesses testified that other officers who are perceived as loyal to the  
24 administration are likely to be treated preferentially in disciplinary matters. Kilgore presented  
25 evidence of his favorable traits and work history with HPD. He also presented testimony to  
26

27 <sup>8</sup>The City's witnesses conceded that former Police Chief Tommy Burns might have had such  
28 animus; however, Burns left the Department long before the statute of limitations cut-off dates  
for Kilgore's instant claims. Furthermore, it appears to us that the City made every effort to right  
any wrong to Kilgore when it promoted him to lieutenant subsequent to Burns's retirement.

1 show that despite his value as an officer and supervisor, the City had treated him unfairly. For  
2 instance, HPD Officer David Wilson testified that Kilgore had been "going down in flames" ever  
3 since 1990 or 1991 when he voiced his opinion about the direction that HPD was going.  
4 (Ironically, Kilgore was promoted to the rank of lieutenant in 1999 and was appointed as acting  
5 captain in 2001.) Kilgore also testified that his problems with the administration began in 1993  
6 when, as an HPOA member and former officer, he refused to support Tommy Burns when Burns  
7 sought the appointment as police chief. Burns, however, did have the support of James White  
8 and was ultimately appointed to the chief's position. Further, Kilgore asserts that he supported a  
9 survey of HPOA membership that was controversial and thereby offended members of HPD's  
10 administration.

11 We are not persuaded by this evidence, which amounts to no more than: a listing of  
12 reasons why Kilgore should have been treated well or *might* have been at odds with members of  
13 HPD's administration at various points in his career; and naked and unconvincing statements of  
14 personal belief and opinion. Kilgore has failed to present any convincing direct or circumstantial  
15 evidence that any City representative harbored animosity toward Kilgore and acted upon that  
16 animosity to discriminate against Kilgore during the statute of limitations period.

17 Kilgore also alleges that he was targeted for discriminatory adverse employment actions  
18 because he was generally an outspoken critic of HPD's administration and its policies, either in a  
19 personal or HPOA-related capacity. The evidence did tend to show that Kilgore openly  
20 criticized or challenged the decisions of HPD's administration, both during on-duty  
21 conversations with other officers, including subordinates, and in relation to HPOA activities. It  
22 also shows that White expressed his concerns about Kilgore being openly critical of the  
23 administration's decisions in front of his subordinates while he was acting in the role as  
24 lieutenant. However, from the evidence, it appears that White was legitimately concerned that  
25 Kilgore's comments might tend to cause disharmony and division within HPD. We find no  
26 persuasive evidence that White or any other City employee caused or contributed to the adverse  
27 employment actions here because of Kilgore's tendency to criticize HPD's administration or its  
28 policies.

1 Kilgore also relies on evidence showing that in December 2001, in Mesquite, he had a  
2 "frank" discussion with Mayberry regarding the problems with HPD and shortly thereafter he  
3 was transferred to East Area swing shift. He also points to his own testimony that Richard  
4 Perkins suggested that Kilgore hurt Mayberry's feelings during the Mesquite conversation.  
5 However, Mayberry credibly testified that he never shared the conversation with anyone prior to  
6 Kilgore's transfer, and we doubt the veracity of Kilgore's testimony on the subject. Also, White  
7 credibly testified that Kilgore's transfer was solely for the purposes of meeting the needs of  
8 HPD. When Kilgore requested an accommodation and presented evidence that the transfer to  
9 swing shift created hardship for his family, he was subsequently returned to a day shift.

10 Kilgore also suggests that White and Mayberry held a grudge against him because he  
11 initially declined to support Mayberry's bid for police chief, when White and Mayberry  
12 requested his help. Kilgore notes that in May 2000, within months of Mayberry's appointment  
13 as police chief, an internal investigation was opened against him for the July 2000 neglect of  
14 duty. However, White credibly denied in his testimony that he and Mayberry sought Kilgore's  
15 support. Moreover, we find no persuasive evidence that Mayberry or White harbored any ill will  
16 toward Kilgore subsequent to this time period. Instead, Mayberry treated Kilgore favorably  
17 during subsequent disciplinary matters, imposing less than the recommended discipline, even in  
18 the July 2000 neglect of duty case; Mayberry intervened on Kilgore's behalf to secure his  
19 promotion to lieutenant; and Mayberry did not revoke the privilege of attending the FBI  
20 Academy in Quantico, even after Kilgore had been disciplined for the July 2000 neglect of duty.  
21 Kilgore has failed to show any persuasive evidence that the July 2000 neglect of duty case was  
22 the result of anything other than his own misconduct.

23 Kilgore also points to evidence of two IAB investigations: a cell phone use investigation  
24 and a range investigation, both relating to events in 1998 and 1999. However, testimony from  
25 Hughes and Mayberry showed that, because former Chief Tommy Burns might have treated  
26 Kilgore unfairly during these investigations, they requested that the City create a new  
27 lieutenant's position for Kilgore, and Kilgore was promoted into that position in November  
28

1 1999. Thus, these investigations do not tend to show any motive to discriminate or act of  
2 discrimination within the statute of limitations period here.

3 Kilgore also attempts to show that the 2001 insubordination case is somehow indicative  
4 of a discriminatory motive on the part of the City. However, Kilgore did not deny that he was  
5 aware of the order from his supervisor, Ray Moser, that City property not be used to give a flag  
6 case to a private citizen. Nor does Kilgore deny that he "borrowed" the City's flag case for that  
7 prohibited purpose. Further, even though the IAB investigation resulted in a recommended  
8 discipline of two days suspension, Mayberry reduced this to a written reprimand on January 22,  
9 2002. The evidence on this matter fails to demonstrate any intent to discriminate or previous  
10 discrimination against Kilgore.

11 Kilgore also points to the City's extraordinary handling through the City Attorney's  
12 Office of the investigation in the instant matter. He notes that as early as the January 21, 2003  
13 meeting at Hughes's office, the City had rushed to judgment and tainted the subsequent IAB  
14 investigation, as shown by statements to him that he would immediately be placed on  
15 administrative leave without pay until his employment could be terminated. He claims that the  
16 normal disciplinary process involves an IAB investigation prior to the decision to move toward  
17 termination and also involves leave with pay pending the outcome of disciplinary proceedings.  
18 Kilgore also characterizes the Groover surveillance as an overreaction and argues he should have  
19 been given an opportunity to correct his behavior. However, even accepting Kilgore's position  
20 on the normal disciplinary process, we are not convinced that the City's response to concerns  
21 about Kilgore's conduct is indicative of any improper intent.

22 Hughes testified credibly that Kilgore had requested her assistance in the past regarding  
23 issues he had with HPD and that she had interceded on his behalf. Because of her past  
24 relationship with Kilgore, she decided to conduct the instant investigation out of her office to  
25 ensure impartiality for Kilgore. When Hughes provided Kilgore with documents indicating that  
26 he would be placed on administrative leave and terminated, it was because she wanted Kilgore to  
27 appreciate the severity of his situation. Furthermore, she believed that leave without pay would  
28 be appropriate because the investigation was basically complete at that point, even though IAB

1 had not been involved. Given the evidence of the 2000 neglect of duty and all the circumstances  
2 shown here, including the evidence obtained during the City Attorney's investigation, we think  
3 Hughes was reasonable in assessing the severity of Kilgore's situation. Kilgore has failed to  
4 substantiate his allegation that the manner of investigation and related conduct by City officials  
5 indicates improper motives.

6 Kilgore also points to evidence of his low rankings in the 2000 and 2002 promotional  
7 exams for captains' positions. He complains that the process was subjective and that the only  
8 basis for his low rankings was discrimination against him. Further, he claims that in 2000,  
9 Sparks, who was one of the persons scoring candidates, indicated that Moser would be the next  
10 captain. However, we do not find Kilgore's testimony regarding Sparks's comments to be  
11 persuasive. Fluctuations in rankings of candidates from pool to pool would normally be  
12 expected based on the changes between applicants and factors affecting individual performance.  
13 The mere change of testing to a more subjective method, or the higher ranking of another  
14 candidate, does not sufficiently demonstrate discrimination against Kilgore. Also, City  
15 Employment Supervisor Patty Page testified as to the evenhandedness of the exams in question,  
16 and we are persuaded by her testimony that the results of these exams were not affected by any  
17 improper intent toward Kilgore or his HPOA-related activities.

18 Kilgore also notes that in the March 2002 application, he criticized HPD for being  
19 arrogant, and he testified that during a meeting with Mayberry, Sparks, and Perkins in April  
20 2002, he was chastised for this criticism. After this meeting, he met with White and Averett, and  
21 he discussed his concerns about HPD's administration and the promotional process for captains  
22 and requested to see Assistant City Manager Mark Calhoun. Shortly thereafter, the surveillance  
23 at issue here was initiated. To Kilgore, this sequence of events indicates a motive to punish him  
24 for his criticism. However, even assuming that this criticism is a protected activity, we think  
25 Kilgore's conclusion is unwarranted. The testimony of HPD Secretary Carol Tanda and White  
26 convinces us that the investigation of Kilgore was initiated because of notice received by White  
27 that Kilgore had been absent from duty. The surveillance evidence shows that from the start,  
28 Kilgore was, in fact, absent from work.

1 Kilgore also contends that the City intended to affect his protected activities, including  
2 his candidacy for, or activities as, HPOA president. He contends that his aggressiveness in  
3 protecting officers' rights, including the rights of HPD Officers Thomas Fraley and Eron  
4 Bushnell, Kilgore's independence from the administration, and his possible agenda as HPOA  
5 president offended members of the City administration and/or presented a threat to the City.  
6 However, even assuming all of Kilgore's activities are protected conduct, Kilgore has failed to  
7 adequately demonstrate any intent by the City to interfere with these activities or to punish  
8 Kilgore because of them. No evidence demonstrated that any individual in the administration  
9 was even aware of Kilgore's candidacy until the late summer or fall of 2002, long after the  
10 surveillance at issue began. Hughes admitted she considered Kilgore's candidacy during the  
11 investigation, but only in relation to whether the surveillance should continue after the election.  
12 She testified credibly that she did not want to affect Kilgore's candidacy and that she hoped after  
13 the election was over, Kilgore would better adhere to HPD's rules. Still, Kilgore notes that  
14 immediately after he spoke with HPOA Attorney Thomas Beatty on January 14, 2003, about  
15 filing a complaint with this Board on behalf of HPD Officer Thomas Fraley, Kilgore was  
16 contacted by Hughes's assistant to schedule the meeting for Hughes to inform him of the  
17 impending termination of his employment. We do not find the timing of the call for a meeting  
18 suspicious, however, since the evidence shows that Deputy City Attorney Zentz completed his  
19 report on the City Attorney's investigation on January 13, 2003. Although Kilgore also testified  
20 that he was told that negotiations would be delayed a month (from March to April 2003) if he  
21 were elected as HPOA president, the weight of the evidence, including testimony from HPD  
22 Sergeant Thomas Chiello and HPD Officer David Burns, indicates that no City official had  
23 stated that such a delay would occur, and the rumors of delay were based on speculation. We  
24 note that negotiations did not start until May 2003, even though Kilgore had stepped down from  
25 his presidency. In sum, there is no reliable evidence that the City intended to affect Kilgore's  
26 HPOA candidacy, presidency, or activities, or that any City representative or employee acted out  
27 of anti-employee-organization animus or other improper motive in taking any adverse  
28



1 employment actions against him. Kilgore's HPOA activities do not insulate him from  
2 appropriate discipline for his misconduct. See Wright Line, 251 NLRB at 1086.

3 Kilgore also relies on the evidence that the City denied him access to departmental  
4 facilities after he declined to resign from his employment. He alleges that the CBA between the  
5 City and the HPOA requires that the HPOA president be given access to departmental facilities.  
6 However, we have no jurisdiction to interpret CBA provisions. See Clark County Teachers  
7 Ass'n v. Clark County Sch. Dist., Item No. 44, EMRB Case No. A1-045280 (1975).  
8 Furthermore, Kilgore has failed to demonstrate that the City's decision to bar him access from  
9 departmental facilities stemmed from any improper motive to discriminate against him  
10 personally or as an HPOA member or officer, or to affect any protected HPOA-related activities.

11 We also reject Kilgore's attempts to paint Richard Perkins as a person who acted out of  
12 improper animus toward him or his HPOA-related activities. Kilgore claims that Perkins  
13 maintained animosity toward him because Kilgore offered to step into Perkins's role as HPOA  
14 president when Perkins was going to serve in the Nevada Legislature, and Perkins viewed this as  
15 an attempt to take over the HPOA. Kilgore reports that Perkins stated, "Steve, you know me  
16 better than that. You know I won't go down without a fight." However, it is arguable whether  
17 this comment suggests animosity at all, and it is insufficient to demonstrate any improper intent  
18 by Perkins during the time period in question here. We do not find any other evidence presented  
19 by Kilgore as to prohibited animus by Perkins to be trustworthy, and we reject Kilgore's claim  
20 that Perkins held any animosity toward Kilgore or acted to cause any adverse employment action  
21 based on discrimination against Kilgore because of non-merit-or-fitness-related reasons or  
22 because of any HPOA-related activities.

23 Kilgore also claims that Robert Vadasy not only has animosity toward him but has also  
24 lied during the IAB investigation and the proceedings before this Board on the issues of: whether  
25 Vadasy gave Kilgore permission to leave the jurisdiction or take leave from work; whether  
26 Vadasy knew that Jody Kilgore was ill; and, whether Vadasy made derogatory comments about  
27 Kilgore. For example, Kilgore presented testimony from HPD Sergeant Thaddeus Yurek, who  
28 claimed that Vadasy criticized Yurek by accusing him of drinking from the "Kilgore Kool-Aid."

1 Yurek also testified that after Kilgore was informed in January 2003 that he would be placed on  
2 administrative leave, Vadasy held briefings with officers at which he required the officers to  
3 state whether they were loyal to the administration and on "Team Mayberry," or whether they  
4 were instead on "Team Kilgore."

5 Evidence presented by the City, including the testimony of HPD Sergeant David  
6 McKenna, indicates that the briefings in question were conducted to suppress the "horrible  
7 dissension" that was caused by the January 27, 2003 email which Kilgore had sent to HPOA  
8 members. That email was admitted into evidence here as the City's Exhibit 114. In this email,  
9 Kilgore complained to HPOA members about the level of intrusion and waste of taxpayers'  
10 dollars that HPD's surveillance of him involved. In any event, Mayberry testified that when he  
11 became aware that certain briefings involved asking officers to declare their loyalties, he put a  
12 stop to such briefings. Moreover, during Vadasy's testimony before this Board, he clarified to  
13 our satisfaction any conflict between his statements to IAB investigators and his testimony  
14 regarding whether and when he knew that Jody Kilgore was ill. Even if Vadasy was angry or  
15 frustrated with, or had some animosity toward, Kilgore, we find Vadasy's testimony to be  
16 credible on the matters of whether he gave Kilgore permission to leave the jurisdiction or take  
17 leave from his scheduled shift. Further, the evidence shows that Vadasy was not involved in the  
18 decision to initiate surveillance of Kilgore. We believe Vadasy's testimony that he was unaware  
19 of the surveillance until the end of August 2002, and we find no reliable evidence that Vadasy  
20 took any improper action that affected the City's decision to take any adverse employment action  
21 against Kilgore.

22 Kilgore also contends that animosity toward him is shown by the City's denial of his  
23 request for outside employment pending the outcome of disciplinary proceedings in the instant  
24 matter. Yet, Kilgore presented no evidence to show that such requests are generally granted  
25 under similar circumstances, and we cannot determine from the evidence presented on this issue  
26 that the City acted with any improper purpose.

27 Next, Kilgore attempts to show improper motives by the City through evidence showing  
28 some irregularities in his paychecks and medical benefits that occurred after this Board ordered

1 the injunctive relief in his favor. However, such occasional irregularities might commonly or  
2 inadvertently occur and are insufficient to demonstrate an offensive motive by any City  
3 representative.

4 In summary, even assuming that Kilgore's HPOA-related conduct constituted protected  
5 conduct, he has failed to meet his burden of establishing that his activities were a substantial or  
6 motivating factor in the City's adverse employment decisions within the statute of limitations  
7 period. He also failed to present any reliable evidence showing that the City discriminated  
8 against him within the statute of limitations period for non-merit-or-fitness-related reasons, even  
9 assuming he met his prima facie burden under the McDonnell Douglas test. In addition, the City  
10 has proved by strong and convincing evidence that its adverse employment actions taken within  
11 the statute of limitations period were actually done for legitimate reasons (the proven repeated  
12 violations of HPD rules by Kilgore) and were not motivated by any intent to discriminate against  
13 Kilgore because of his HPOA-related activities or for non-merit-or-fitness-related characteristics,  
14 beliefs, affiliations or activities of Kilgore. Kilgore produced no credible evidence showing that  
15 the City's legitimate reasons are not worthy of credence or were a pretext for discrimination.  
16 Indeed, our firm perception from all of the evidence is that Kilgore purposely and inexcusably  
17 disregarded and violated HPD rules and that the City's adverse employment actions were based  
18 solely upon Kilgore's misconduct and were not based, even in part, on any prohibited  
19 discriminatory intent.

20 **Claim No. 2: Failing to negotiate mandatory subjects of bargaining and failing to adhere to**  
21 **disciplinary measures required by the CBA**

22 Kilgore claims that the City failed to negotiate the code of conduct, class designations,  
23 and sanction matrix incorporated into the HPD Policy and Procedure Manual, and that these  
24 matters constitute mandatory subjects for bargaining. However, the substantial evidence,  
25 including the testimony from Sergeant Brooks, showed that the matters at issue were fully  
26 negotiated. Kilgore further claims that the City failed to follow the CBA with respect to  
27 disciplinary measures; however, we are without jurisdiction to address claims that the City  
28

1 breached the CBA. See Clark County Teachers Ass'n v. Clark County Sch. Dist., Item No. 44,  
2 EMRB Case No. A1-045280 (1975).

3 **Claim No. 4: Violations of the CBA's prohibition on discrimination against HPOA members**

4 Kilgore claims that the City violated Article 11 of the CBA, which prohibits  
5 discrimination against employees based on personal and/or political reasons. However, as this  
6 claim is raised as a violation of the CBA and not under NRS Chapter 288, we are without  
7 jurisdiction to address it. See id.

8 **FINDINGS OF FACT**

- 9 1. Kilgore is a member of the HPOA, which is an "employee organization" as defined by  
10 NRS 288.040.
  - 11 2. The City is a "local government employer" as defined by NRS 288.060.
  - 12 3. Kilgore is a "local government employee" as defined by NRS 288.050.
  - 13 4. This Board has jurisdiction over Kilgore's claims under NRS 288.270(1) of  
14 discrimination for political and/or personal reasons or as retaliation for his HPOA-related  
15 and protected conduct.
  - 16 5. Kilgore filed his complaint with this Board on May 5, 2003, and claims arising on or after  
17 November 5, 2002 are within six-months of May 5, 2003, and are timely.
  - 18 6. Kilgore could not have reasonably known of the City's investigation against him which  
19 began in April 2002, until his meeting with City Attorney Hughes and other City officials  
20 in January 2003, and claims relating to this investigation are timely.
  - 21 7. As set forth in the preceding discussion, Kilgore's testimony and other evidence  
22 presented in support of his claims was not credible or persuasive.
  - 23 8. As set forth in the preceding discussion, the City's witnesses testified credibly on the  
24 issues in dispute between the parties.
  - 25 9. As set forth in the preceding discussion, the City established by strong and convincing  
26 evidence that Kilgore repeatedly and willfully violated HPD rules and that such  
27 violations constituted grounds for termination under HPD's sanction matrix.
- 28

1 10. As set forth in the preceding discussion, Kilgore failed to demonstrate that the City or any  
2 of its designated representatives willfully interfered with, restrained or coerced Kilgore in  
3 the exercise of any right guaranteed under NRS Chapter 288.

4 11. As set forth in the preceding discussion, and considering evidence outside the statute of  
5 limitations period, Kilgore failed to establish that his HPOA-related conduct was a  
6 substantial or motivating factor in the City's decisions to take any adverse employment  
7 actions within the limitations period, even assuming that such conduct is protected by  
8 NRS Chapter 288.

9 12. As set forth in the preceding discussion, the City proved by strong and convincing  
10 evidence that it would have reached the same decisions with respect to the adverse  
11 employment actions here regardless of Kilgore's HPOA-related conduct and that the  
12 City's decisions were based on Kilgore's repeated and willful violations of HPD rules  
13 and were not affected, even in part, by any discriminatory intent to affect or punish  
14 Kilgore's HPOA-related activities.

15 13. As set forth in the preceding discussion, the City proved by strong and convincing  
16 evidence that its adverse employment actions were taken for legitimate,  
17 nondiscriminatory reasons, and Kilgore failed to present any reliable or persuasive  
18 evidence, even considering evidence outside the statute of limitations period, that the  
19 City's reasons for its adverse employment decisions within the limitations period were  
20 pretextual and were actually based upon any characteristics, beliefs, affiliations or  
21 activities of Kilgore that did not affect Kilgore's merit or fitness for employment.

22 14. To the extent that any factual determination in the preceding discussion section of this  
23 Decision is not separately set forth in this section, it is hereby incorporated as a finding of  
24 fact.

25 15. To the extent that any of these findings of fact might be more properly stated as  
26 conclusions of law, they should be considered as such.

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28 ///

## CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and Kilgore's claims arising under NRS Chapter 288.
2. Pursuant to NRS 288.110(4), any claim arising more than six months before Kilgore's filing of the Complaint on May 5, 2003, is not cognizable by this Board, unless Kilgore did not know or could not reasonably have known of the existence of such a claim prior to November 5, 2002.
3. This Board properly considered evidence of conduct occurring prior to the limitations period as background evidence to evaluate subsequent conduct that is within the limitations period.
4. Discrimination for "personal reasons" under NRS 288.270(1)(f) means discrimination based on factors other than merit or fitness which are not established by law as disqualifications for employment. Non-merit-or-fitness factors would include any type of characteristics, beliefs, affiliations or activities which do not affect an individual's merit or fitness for a particular job.
5. No credible or persuasive evidence demonstrates that the City violated NRS 288.270(1)(a).
6. No credible or persuasive evidence demonstrates that the City violated NRS 288.270(1)(f).
7. Kilgore failed to carry his burden of proving that the City failed to negotiate mandatory subjects of bargaining when it adopted into the HPD Policy and Procedure Manual or implemented its code of conduct, class designations or sanction matrix.
8. This Board has no jurisdiction over Kilgore's claims of negligent and intentional infliction of emotional distress, civil conspiracy, negligent supervision, civil rights violations, constitutional due process and equal protection violations, or claims that the CBA was violated.

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1 9. To the extent that any legal determination in the preceding discussion section of this  
2 Decision is not separately set forth in this section, it is hereby incorporated as a  
3 conclusion of law.

4 10. To the extent that any of these conclusions of law might be more properly stated as  
5 findings of fact, they should be considered as such.

6 **ORDER**

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT for the above-stated  
8 reasons, the City is entitled to judgment in its favor.

9 IT IS FURTHER ORDERED that, the injunction this Board issued on September 24,  
10 2003, is hereby lifted and dissolved.

11 IT IS FURTHER ORDERED that, for the benefit of employee-management relations, the  
12 Respondents CITY OF HENDERSON and HENDERSON POLICE DEPARTMENT shall post  
13 copies of this Decision at conspicuous locations, which are accessible to HPD's employees  
14 within separate HPD facilities, for a period of thirty (30) days.

15 IT IS FURTHER ORDERED that each party shall bear its own attorney's fees and costs  
16 in this matter.

17 DATED this 30<sup>th</sup> day of March, 2005.

18 LOCAL GOVERNMENT EMPLOYEE-  
19 MANAGEMENT RELATIONS BOARD

20 BY:   
21

JANET TROST, ESQ., Chairman

22 BY:   
23

TAMARA E. BARENGO, Vice-Chairman

24 BY:   
25

26 JOHN E. DICKS, ESQ., Board Member  
27  
28