

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

5 JEFFREY M. BOTT,

6 Complainant,

7 vs.

8 CITY OF HENDERSON; HENDERSON
9 POLICE DEPARTMENT,

10 Respondent.

ITEM NO. 560A

CASE NO. A1-045770

DECISION

11 For Complainant: Richard I. Dreitzer, Esq.

12 For Respondent: William E. Cooper, Esq.

13 STATEMENT OF THE CASE

14 On September 30, 2003, Complainant Jeffrey M. Bott ("Bott") 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").

18 On December 22, 2003, following an unsuccessful Motion to Dismiss, the City filed its
19 Answer. Noticed in accordance with Nevada's Open Meeting Law, the Board heard and
20 deliberated on Bott's Complaint on December 15, 16, and 17, 2004. On July 21, 2005, the Board
21 conducted deliberations on a final decision, also noticed in accordance with Nevada's Open
22 Meeting Law. Having now deliberated and considered the testimony of all witnesses, as well as
23 their physical and verbal reactions while testifying, and having reviewed all evidence in the
24 record, we find and conclude that Bott has failed to demonstrate any violation of NRS Chapter
25 288. Therefore, he is entitled to no relief from this Board.

1 **DISCUSSION**

2 **Claims outside of this Board's jurisdiction**

3 Bott's Complaint alleges two "claims for relief." As his first claim for relief, Bott alleges
4 discrimination based on political and/or personal reasons and in violation of the following: the
5 collective bargaining agreement ("CBA") between the City and the Henderson Police Officers'
6 Association ("HPOA"); HPD Policy; Bott's constitutional due process rights; and his rights as a
7 peace officer under NRS Chapter 289 and Garrity v. State of New Jersey, 385 U.S. 493, 87 S. Ct.
8 616 (1967).

9 Bott's contention that he has been discriminated against for political and/or personal
10 reasons is properly before this Board pursuant to NRS 288.270(1). However, this Board lacks
11 jurisdiction to grant relief for claims which are independent of rights under NRS Chapter 288.
12 See International Ass'n of Firefighters, Local 1607 v. City of North Las Vegas, Item No. 108,
13 EMRB Case No. A1-045341, at 2 (1981); Clark County Teachers Ass'n v. Clark County Sch.
14 Dist., Item No. 44, EMRB Case No. A1-045280 (1975). Thus, to the extent that Bott attempts to
15 allege independent claims of violations of his rights under the CBA or HPD policy, his
16 constitutional rights, or his rights as a peace officer, such independent claims, even if valid, are
17 outside of this Board's jurisdiction.

18 As his second claim for relief, Bott alleges a breach of the CBA by the City's failure to
19 adhere to the CBA's requirements for positive disciplinary procedures. Bott summarily claims
20 that this alleged contractual breach also constitutes a "breach of the duty to treat employees in
21 good faith" and an "unfair and prohibited practice under NRS Chapter 288." Again, this Board
22 has no jurisdiction to consider Bott's independent claim that the CBA has been breach
23 Moreover, Bott's cursory reference to NRS Chapter 288 is insufficient to bring his contractual
24 claim within this Board's jurisdiction. Because Bott's second claim for relief arises, if at all,
25 independently from any right under NRS Chapter 288, we are without jurisdiction to consider it
26 here.

1 Therefore, the only allegations which properly remain before this Board for
2 determination are Bott's claims under NRS 288.270(1). Before we can analyze these claims, we
3 must first determine which of them are timely made.

4 **Statute of limitations at NRS 288.110(4)**

5 Bott complains about an alleged series of actions by the City or its representatives
6 beginning in the year 2000 or 2001. Bott did not file his Complaint with this Board until
7 September 30, 2003. Pursuant to NRS 288.110(4), "[t]he Board may not consider any complaint
8 or appeal filed more than 6 months after the occurrence which is the subject of the complaint or
9 appeal." Accordingly, we will only consider Bott's claims that are based on events occurring on
10 or after March 30, 2003. We do, however, consider evidence of earlier conduct by the parties or
11 their representatives as background evidence to evaluate subsequent conduct that is within the
12 six-month period following March 30, 2003. See Local Lodge No. 1424 v. NLRB, 362 U.S.
13 411, 416-17, 80 S. Ct. 822, 826-27 (1960) (recognizing same rule applies in proceedings before
14 NLRB); News Printing Co., 116 NLRB 210, 212, 1956 WL 13970 (1956) (same). Even so,
15 "while evidence of events occurring more than six months before the filing of a charge may be
16 used to 'shed light' upon events taking place within the six-month period, the evidence of a
17 violation drawn from within that period must be reasonably substantial in its own right." NLRB
18 v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 33 (9th Cir. 1968). Here, the evidence
19 demonstrates the following facts in relation to the statute of limitations period for a cognizable
20 claim.

21 **Facts relevant to the time period between March 1998 and March 29, 2003**

22 When Bott applied to HPD, he was already an experienced professional dog handler. In
23 March 1998, HPD hired Bott as a police officer and assigned him to the Patrol Division. Bott
24 received many positive evaluations during his service with the Patrol Division.

25 In the year 2000, HPD was making efforts to restart its K-9 Unit. In September 2000,
26 HPD announced that it was recruiting for a K-9 officer, and Bott applied for that position. HPD's
27 announcement did not set forth any physical agility requirement. Within HPD, the position of a
28 K-9 officer is a temporary, specialized assignment. HPD Deputy Chief James White, whose

1 testimony we find credible and persuasive in its entirety, testified that all specialized assignments
2 within HPD are temporary positions, and people in those assignments can properly be, and
3 frequently are, transferred based only on management's will. HPD Sergeant Edward Tyndall
4 testified similarly.¹ At the time of Bott's application for the K-9 Unit, HPD requested a two-year
5 commitment from any officer chosen as a K-9 handler. HPD also required officers to provide
6 adequate kennel facilities, at their own expense, and compensated them with a pay differential
7 for their service with and care of their partner dogs.

8 Ultimately, HPD ranked the candidates for the K-9 position, with HPD Officer Shane
9 Lewis being first, and Bott being second, on the eligibility list. HPD selected Lewis for the
10 position. At this time, HPD's K-9 Unit had only one dog -- a narcotics detection dog named
11 "Macie." During Lewis's tenure, the K-9 Unit was moved from HPD's Investigations Division to
12 its Patrol Division and was put under the supervision of Sergeant Bruce Swanson, who had
13 previously served as a HPD K-9 handler.

14 Lewis voluntarily resigned from the K-9 position after a short period of time, due to
15 personal, family-related issues. In February 2001, HPD appointed Bott as Lewis's replacement,
16 effective as of March 2001. Bott trained and became certified as Macie's handler. Bott
17 performed well with Macie on duty and in K-9 competitions. Swanson's evaluation of Bott for
18 the period of March 9, 2001, to March 9, 2002, was generally positive.

19 In 2002, HPD added patrol dogs to its K-9 Unit, and also hired a second K-9 officer,
20 Daniel King. HPD assigned a patrol dog to Bott, and thereafter he handled both Macie and the
21 patrol dog. Coinciding with the addition of patrol dogs to the K-9 Unit, HPD implemented a
22 physical agility test, designed by Swanson. This test used the same physical course used by
23 HPD's S.W.A.T. or S.R.T. officers, but was modified to reflect the different considerations

24
25 ¹The City introduced evidence of its policy with regard to temporary assignments in the
26 form of excerpts from its Policy Manual. However, these excerpts are dated after the date of
27 Bott's assignment to and transfer out of K-9. We do not rely on these excerpts here, except to the
28 extent that they show that the current policy is consistent with the previous policy demonstrated
by other reliable evidence, including the testimony of White and Tyndall and the City's
Personnel Action Form (City's Exh. 38), reflecting Bott's temporary transfer to the K-9 Unit.

1 related to the use of K-9 dogs. On January 22, 2003, Bott tore a muscle while practicing on the
2 wall of the new agility course. A physician determined that Bott should be temporarily placed
3 on light duty. For his light duty, HPD assigned Bott to front desk duty at a substation.

4 On or about February 6, 2003, Bott was summoned to a meeting with Swanson. Also
5 present at the meeting were HPD Captain Robert Vadasy and HPD Lieutenant Joe Kurian.
6 During this meeting, Swanson discussed various issues relating to Bott's performance and gave
7 Bott a written warning for failing to follow HPD's chain-of-command rule by criticizing the K-9
8 Unit's agility course to others, including HPD Sergeant Marc Cassell and Kurian.

9 Bott was returned to regular duty by March 20, 2003. On that date, Swanson served him
10 with notice of an administrative investigation relating to his failure to attend a training class
11 scheduled for the morning of March 17, 2003. Next, on March 24, 2003, Swanson called Bott at
12 home and asked him to report to HPD's Internal Affairs Bureau ("IAB"). Bott did so, and met
13 with Swanson and HPD Lieutenant Hector Mancillas. Swanson informed Bott that effective
14 Monday, March 31, 2003, Bott would no longer be a member of the K-9 Unit. Bott was also
15 provided with a written order returning him to the Patrol Division.

16 **Facts relevant to the time period from and after March 30, 2003**

17 Bott returned to patrol duty on March 31, 2003. He received his annual evaluation, for
18 the period of March 9, 2002, to March 9, 2003, from Swanson on April 15, 2003. In this
19 evaluation, Swanson rated Bott as unacceptable in multiple areas and noted problems with Bott's
20 performance that began around August or September 2002. Recently-created correspondence
21 from HPD Sergeants Bobby Long, Jack Brooks, Robert McCorkle, and Todd Peters was so
22 attached and detailed problems these supervisors had encountered with Bott's performance and
23 attitude. Swanson indicated in the evaluation that Bott was unacceptable as a K-9 officer.

24 Bott appealed this evaluation, but HPD Chief Michael Mayberry upheld it. Bott also
25 filed a grievance challenging his transfer back to patrol. This grievance was denied on June
26 2003, by the City on the grounds that management retained the right to transfer employees from
27 temporary positions, the transfer was not disciplinary or discriminatory, and Swanson's concerns
28 with Bott's performance and attitude constituted a legitimate reason for the transfer.

1 The IAB investigation into Bott's March 17, 2003 failure to attend training resulted in a
2 written reprimand issued on May 28, 2003. Bott also filed a grievance challenging this
3 discipline, but the City denied the grievance on July 30, 2003. In August 2003, Bott also
4 complained to the City's Human Resources ("HR") Department regarding his transfer to the
5 Patrol Division. The HR Department referred the complaint to the Henderson City Attorney's
6 Office, which declined to independently pursue the complaint due to Bott's election to file the
7 instant, substantially similar complaint with this Board.

8 Since Bott's return to patrol duties, he has received additional positive evaluations.
9 HPD's K-9 Unit temporarily suffered after Bott's removal, since it was without the use of his
10 partner dogs for a period of time, and Macie was HPD's only narcotics detection dog. However,
11 Bott has been replaced with another K-9 officer, and according to the testimony of White, the
12 unit has been doing well. Sergeant Peters testified that the unit's responsiveness to calls for K-9
13 assistance is currently improved from when Bott was a K-9 officer. Still, Bott testified that the
14 unit has not won any top agency awards as it had during Bott's service.

15 Analysis of Bott's claims of discrimination

16 Bott alleges various instances of discrimination stemming from Swanson's dislike of or
17 animosity toward Bott related to Bott's actions in seeking appointment to the K-9 Unit, Bott's
18 criticism of the K-9 Unit's agility course, which Swanson designed, and Bott's sustaining of the
19 muscle tear from practicing on the course.

20 NRS 288.270(1)(f) provides that it is a prohibited practice for a local government
21 employer or its designated representative to willfully "[d]iscriminate because of . . . political or
22 personal reasons or affiliations." We apply to ordinary claims of political or personal
23 discrimination the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct.
24 1817 (1973), and its progeny. See Kilgore v. City of Henderson, Item No. 550H, EMRB Case
25 No. A1-045763, at 10 (2005); Clark County Public Employees Ass'n v. County of Clark, Item
26 No. 215, EMRB Case No. A1-045425, at 3 (1988).

27 Under the McDonnell Douglas line of cases, if Bott establishes a prima facie case of
28 discrimination, by proving by a preponderance of the evidence that the City's actions were

1 motivated by prohibited discriminatory animus, the burden shifts to the City to produce an
2 explanation to rebut the prima facie case, *i.e.* to produce evidence that the adverse employment
3 actions were taken for a legitimate, nondiscriminatory reason. See McDonnell Douglas, 411
4 U.S. at 802-03, 93 S. Ct. at 1824; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07, 113
5 S. Ct. 2742, 2746-47 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-
6 53, 101 S. Ct. 1089, 1093 (1981). The City can meet this burden by setting forth evidence of
7 reasons that, if believed by this Board, would support a finding that the unlawful discrimination
8 was not the cause of the employment actions. See St. Mary's, 509 U.S. at 506-07, 113 S. Ct. at
9 2747. After the City has met its burden of production, to prevail, Bott must prove by a
10 preponderance of the evidence that the reason given by the City is unworthy of belief and that
11 discrimination was the real reason. See id. at 516, 113 S. Ct. at 2752; Burdine, 450 U.S. at 253,
12 101 S. Ct. at 1093. At all times, Bott retains the burden of persuading this Board that the City
13 intentionally discriminated. See St. Mary's, 509 U.S. at 507, 113 S. Ct. at 2747. A reason cannot
14 be a pretext for discrimination unless it is shown "both that the reason was false, and that
15 discrimination was the real reason." St. Mary's, 509 U.S. at 515, 113 S. Ct. at 2752.

16 Assessing all of the evidence here under the above test, we find and conclude that Bott
17 failed to carry his burden of demonstrating that any representative of the City took any
18 complained-of action against him based on prohibited discriminatory animus. Instead, the great
19 weight of the reliable evidence demonstrates that the City and its representatives acted for
20 legitimate, nondiscriminatory reasons. We now turn to discuss Bott's specific claims, some of
21 which are not timely raised in these proceedings.

22 **Claims that are barred as untimely under NRS 288.110(4) and other background evidence**

23 Many of the instances of discrimination alleged by Bott relate to events that occurred
24 before March 30, 2003. Specifically, he claims that his rights to be free from political and/or
25 personal discrimination were violated by his assignment to the front desk after his injury; the
26 treatment of him and written warning issued to him at the February 6, 2003 meeting with
27 Swanson, Vadasy and Kurian; the treatment of him at the March 20, 2003 meeting, wherein
28 Swanson notified Bott of the IAB investigation related to Bott's unapproved change of schedule;

1 and the treatment of him at the March 24, 2003 meeting, wherein Swanson notified Bott of the
2 decision to reassign him to the Patrol Division. We find and conclude that each of these claims
3 is barred as untimely by NRS 288.110(4). Therefore, we will only consider them as background
4 evidence that might support Bott's timely claims, and we address them here in conjunction with
5 Bott's other allegations as to evidence of prohibited animus, including his allegations relating to
6 his initial appointment to the K-9 Unit, his criticism of the unit's agility course and subsequent
7 injury, and Swanson's personality traits and other conduct. Having considered all of Bott's
8 evidence, we further find and conclude that neither the evidence relating to events occurring
9 before March 30, 2003, nor the other evidence offered to show prohibited animus demonstrates
10 that any representative of the City harbored any improper animus toward Bott, or acted based on
11 such animus, during the statute of limitations period for a cognizable claim.

12 **Evidence relating to Bott's 2001 appointment to the K-9 position**

13 According to Bott, prior to Lewis's request to be transferred from K-9, in December 2000
14 or January 2001, Swanson called a meeting with Bott. Bott alleges that during this meeting,
15 Swanson told Bott that Lewis was vacating the K-9 position and that Bott should begin preparing
16 his backyard to get ready for Macie. Swanson then asked Bott to pretend as if the conversation
17 never happened. A few days later, although Bott had already begun preparations for taking
18 custody of Macie, Swanson circulated an email recruiting to fill the K-9 vacancy created by
19 Lewis's departure. The email was admitted into evidence and reflects that the K-9 Unit was
20 being expanded to include patrol dogs, and that a new eligibility list for K-9 officers would be
21 created. Among other requirements for the K-9 position, candidates would be expected to pass a
22 physical fitness test. Bott went to his supervisor, Vadasy, and told him that Swanson had
23 indicated to Bott that he would be appointed to the K-9 position. Later, Swanson was extremely
24 upset, and telephoned Bott, yelling at him for having gone to Vadasy.

25 Swanson testified that he recruited to create a new eligibility list because the K-9 handler
26 position had moved to the Patrol Division and was to include patrol dogs, the handling of which
27 presented greater physical demands. Swanson claims that he only advised Bott that he should
28 make himself the best possible candidate for the K-9 Unit position by doing things such as

1 getting his yard ready to go, the kennels up, and his spouse in line. Swanson had given the same
2 advice to other officers interested in the position. Later, HPD Captain Moser asked Swanson
3 whether he had promised the position to Bott, and Swanson denied having done so. Swanson
4 testified that he neither supported Bott for the position nor denied support for Bott, since
5 selection of the new K-9 officer was not for him to decide. Nonetheless, Moser indicated that
6 Bott would be the next K-9 officer, and Swanson looked forward to working with Bott. Swanson
7 also testified that he had a good relationship with Bott subsequent to Bott's appointment to the K-
8 9 unit and that he did not have an agenda to get rid of Bott.

9 We think that the evidence in the record demonstrates a misunderstanding between
10 Swanson and Bott as to whether Swanson had promised Bott the K-9 position. We are also
11 persuaded that Swanson is a rather direct person and was probably upset that Bott had gone to
12 Vadasy about the new recruitment. However, we are convinced by Swanson's credible
13 testimony, which is corroborated by his positive evaluation of Bott a year after Bott's
14 appointment to the K-9 Unit, that Swanson did not harbor any resentment or animosity toward
15 Bott for the circumstances surrounding his appointment.

16 *Evidence relating to Bott's criticism of the K-9 agility course and his injury sustained*
17 *while practicing that course*

18 Bott claims that he was discriminated against when he was singled out with discipline for
19 failing to follow the chain of command by criticizing the agility course. He also claims that
20 Swanson resented him for his criticism of the course and for his injury sustained on the course.

21 The record shows that on January 18, 2003, Bott, along with K-9 Officer King and HPD
22 Sergeant Marc Cassell, who is not in Bott's direct chain of command, attended a K-9 training
23 class in Las Vegas. During a lunch break, the three officers discussed HPD's K-9 Unit. Bott and
24 King expressed their concerns regarding the agility course and the height of its wall. Cassell had
25 helped design the course, for the use of S.W.A.T. officers, and he had also worked with Swanson
26 to modify the course for the use of K-9 officers. Bott believed that the course's wall was too
27 high, presenting a danger to K-9 officers and dogs, and that the training for the course had been
28 inconsistent. King and Bott also discussed the fact that Swanson was not very receptive, but did

1 not speak negatively about Swanson in personal terms. Bott testified that King was the more
2 vocal one as to concerns about the wall; King testified that he was equally vocal to Bott. Cassell
3 testified that Bott was the more outspoken officer in expressing that wall should not be part of
4 the course. To Cassell, Bott seemed more negative than King and seemed to be trying to get out
5 of doing the wall, whereas King did not like the wall but was trying to figure out how to do it.
6 Bott and King both characterized the lunch conversation with Cassell as shop talk and not a
7 formal complaint about the agility course. Cassell had just been promoted to the rank of sergeant
8 and admitted during his own testimony that he was having difficulty determining when he was
9 "one of the guys," versus acting as a sergeant. Cassell testified that he decided to tell Swanson
10 about Bott's comments after he learned that Bott hurt himself on the wall. Cassell questioned the
11 validity of Bott's injury because it seemed too coincidental and Cassell had never heard of
12 anyone being hurt on the wall before. When Cassell told Swanson about Bott's comments,
13 Swanson appeared frustrated but did not elaborate on his feelings.

14 King testified that he was called into Swanson's office and Swanson said that he and the
15 lieutenant were going to talk to Bott and that "it's not going to happen anymore," referring to
16 Bott going to other supervisors. King stated in response that he and Bott had not understood that
17 they were talking to a "supervisor" when they spoke with Cassell -- they knew Cassell before he
18 was a sergeant. King also told Swanson that it was not fair for Bott to be the only person to
19 suffer discipline for the lunch conversation and that King had participated in the comments at
20 lunch. But Swanson said that Bott had previously talked or complained to other people. During
21 his own testimony, Bott admitted that he might have made innocuous comments to Kurian
22 relating to the agility course wall.

23 Bott also testified that in late January 2003, when Bott was on light duty, Cassell asked
24 Bott whether he was faking his injury. From the tone of the conversation, Bott surmised that
25 Swanson must have indicated to Cassell that Bott was ~~faking~~, even though Bott had provided
26 HPD with documentation proving the injury.

27 We view the evidence relating to the lunch conversation, and Swanson's response to
28 learning of it, as proof only that HPD officers might not want to trust Cassell as a person with

1 whom they should informally discuss job-related issues. Any indication by Swanson that he was
2 initially suspicious of Bott's injury most likely stemmed from Cassell's report to Swanson and the
3 timing of the injury in relation to Bott's criticism, and not from any discriminatory intent by
4 Swanson toward Bott. In any case, we find and conclude that the evidence fails to demonstrate
5 that Bott was singled out for different treatment just for going outside the chain of command
6 during the lunch conversation. Instead, the evidence, including Swanson's credible testimony,
7 shows that Swanson's response to Bott's conduct was based on Swanson's sincere belief that Bott
8 had repeatedly violated HPD's chain-of-command rule. Even assuming Bott did not actually
9 violate the chain-of-command rule as it ought to be construed, the evidence is insufficient to
10 demonstrate that Swanson or any City representative resented Bott or had any animosity toward
11 him because of his criticism of the agility course. Likewise, no credible evidence shows that
12 Swanson or any City representative resented Bott or had animosity toward him because of his
13 injury.

14 Assignment of Bott to desk duty

15 Bott complains that Swanson assigned him to desk duty to make an example of him for
16 having suffered an injury on the agility course. Bott states that he felt humiliated by this
17 assignment because he was not in uniform, had to take reports and assist people, had never
18 worked the desk before, and had no real access to handcuffs or his primary weapon or ability to
19 shoot. Bott also asserts that he had very limited interaction with his unit during this assignment.
20 Bott testified that he had never seen officers from a specialized unit be assigned to the desk
21 because of injuries, and he believed that such officers usually stayed with their units.

22 However, the evidence demonstrates that the desk assignment actually came from Vadasy
23 and not Swanson. Moreover, White credibly testified that it is not unusual to assign someone,
24 who is on light duty status, to work at the front desk. According to White and Swanson, the
25 same assignment had been given to other injured officers and might have been given to pregnant
26 officers. White testified that an officer on light duty and stationed at the front desk is told to
27 dress in civilian clothing so that the public cannot identify him as an officer. This protects the
28

1 officer from the normal anxieties and angers the public might direct at the police. Bott admitted
2 that civilian employees also work in the area and dress in civilian clothing.

3 Based on the evidence here, we find and conclude that Bott has failed to demonstrate that
4 the front desk assignment constituted an act of discrimination or that any representative of the
5 City acted toward Bott with improper motive in ordering this assignment.

6 **The February 2003 meeting**

7 Bott describes the February 2003 meeting with Swanson, Vadasy, and Kurian as an
8 ambush and complains that he was entitled to a Garrity warning regarding the meeting and union
9 representation. Bott also complains that during the meeting, he was "dressed down" for
10 performance issues and demeaned by accusations about his lack of integrity, poor work ethic,
11 and laziness, and by Swanson's questioning of the authenticity of his medically-diagnosed and
12 documented injury. According to Bott, Swanson stated, "You know what Jeff? I'm not a doctor,
13 but I'm having a hard time of understanding what's going on with your muscle injury." Vadasy
14 was silent during the meeting, and Kurian told Bott to refer to Swanson as "Sergeant Swanson,"
15 even though Bott was being called "Jeff." Also, Swanson placed the written warning for failure
16 to follow the chain of command before Bott and asked him to sign it. Bott signed the document
17 after a direct order to do so from Vadasy. Bott suggests that the conduct and content of this
18 meeting shows improper animus toward him, since his procedural rights were violated and there
19 was no real basis for the written warning given to him or the accusations made against him.

20 However, according to the believable testimony of Swanson, the meeting was meant to
21 be a coaching and counseling session, and Vadasy and Kurian were present at the meeting
22 because Bott had earlier approached Swanson and asked why Swanson was trying to get rid of
23 him. Swanson also felt that Bott needed to understand that HPD administration was in
24 agreement with Swanson's handling of the issues with Bott. As we have already noted above,
25 Swanson credibly testified as to his belief that Bott had violated HPD's chain-of-command rules
26 on more than one occasion. Swanson also testified credibly as to concerns raised to him by other
27 supervisors regarding Bott's resistance to responding to calls for K-9 assistance. The great
28 weight of the evidence, including the credible testimony of Sergeants Long, Peters, and

1 McCorkle, corroborates Swanson's testimony regarding complaints from other supervisors. The
2 evidence also shows that Swanson acted based on a legitimate motive of correcting Bott's
3 unsatisfactory performance or behavior. Even if the protocol followed during the meeting or the
4 issuance of a written warning resulted in a violation of Bott's procedural rights, Bott has failed to
5 show that Swanson or any other City representative acted with an improper motive or in
6 knowing or willful disregard of his rights, as might indicate that actions taken by City
7 representatives within the statute of limitations period were discriminatory.

8 **The March 20 and 24, 2003 meetings**

9 Bott complains that at the March 20, 2003 meeting, wherein he was told of Swanson's
10 decision to open an IAB investigation related to the unapproved change of schedule, Swanson
11 showed, but did not give, to Bott a copy of the notice of investigation, though Bott requested
12 one. Bott also complains that at this meeting, Swanson told Bott that he had thirty days to pass
13 the agility course, even though, according to Bott, his doctor indicated that a muscle tear requires
14 ninety days to heal. As to the March 24, 2003 meeting, Bott complains that Swanson held this
15 meeting with Mancillas instead of the lieutenant or another supervisor who was in Bott and
16 Swanson's direct chain of command. Further, Bott claims that Swanson simply told him that he
17 was going to be transferred because he was out of line with HPD and unit goals and for the
18 betterment of the department, and referred Bott to his upcoming annual evaluation for any
19 further explanation.

20 Even accepting all of these allegations as true, they do not demonstrate improper motive
21 by any representative of the City. The fact that Swanson did not provide Bott with a copy of the
22 written notice of investigation is not enough, in itself, to show prohibited animus toward Bott.
23 We also note that ninety days from the date of Bott's injury would have been April 22, 2003; if
24 Bott were required to pass the course within thirty days from March 20, i.e., by April 19, 2003,
25 this would have been a mere three days earlier than the expected healing time. More
26 importantly, we accept Swanson's testimony that he would not have required Bott to pass the
27 agility course until fully healed. Further, the testimony of White and Tyndall shows that the
28 lieutenant in Bott's direct chain of command was unavailable at the time of the March 24

1 meeting, and White testified that he instructed Swanson to have Mancillas present at that
2 meeting. Finally, no improper intent by Swanson is proven by the mere fact that he did not
3 further explain to Bott at the March 24 meeting the reasons for his transfer out of the K-9 Unit.

4 **Evidence of Swanson's personality traits and other conduct**

5 Bott attempted to show that Swanson is the type of person who would have discriminated
6 against him for prohibited reasons. For instance, Bott testified that Swanson is "very egotistical"
7 and as someone who gets upset "at the drop of a dime."² Bott also presented King's testimony
8 that around January 2003, King and Bott were having many disagreements with Swanson, and
9 these disagreements all seemed to blend together. It seemed to King that Swanson would
10 unexpectedly get angry at Bott and King and was not "that approachable" or receptive. But King
11 could not say that Swanson harbored animosity toward Bott at the time of Bott's removal from
12 the K-9 Unit. Bott also presented documentary evidence showing that a female HPD
13 investigator had complained to the City's HR Department, in December 2001, that Swanson
14 yelled at her in a menacing way and had previously yelled at another female investigator;
15 although, the HR Department investigated that complaint and found no evidence of gender
16 discrimination or a hostile work environment.

17 In contrast, Cassell testified that Swanson was tough but fair as a sergeant and did not
18 have a short fuse. White testified that he had never seen Swanson display or express any
19 animosity and that Swanson is very direct. Further, Swanson was given the difficult task of
20 forming a K-9 Unit after the City had been without one for ten years. Swanson is very focused
21 on his mission of seeing the K-9 Unit succeed. Lewis similarly testified that Swanson is
22 passionate about the success of the K-9 program.

23 Lewis also testified that while he was assigned to the K-9 Unit, he never had problems
24 with Swanson. However, Swanson was not happy when Lewis resigned after serving
25

26
27 ²In his Complaint, Bott also stated that Swanson called him "fatty" and singled him out
28 by berating him for making a schedule change on some unspecified date. However, Bott failed
to prove these assertions by presenting any reliable evidence of the same at the hearing before
the Board.

1 approximately eight months. The unit was still in fledgling status and had just moved into the
2 Patrol Division. Also, Swanson got the news of Lewis's resignation from a captain, and Lewis
3 did not personally tell Swanson about it. According to Lewis, after Swanson got the news, the
4 two had a telephone conversation. During this conversation, Swanson said to Lewis something
5 like, "Let's meet and settle this like men." Lewis took Swanson's statement as a challenge to
6 fight. Subsequent to this, Lewis was denied a position on the Bike Unit and was given the
7 explanation that he could not stay in a specialized unit before. Lewis challenged this denial, and
8 it was ultimately reversed. Lewis would not currently have a problem working under Swanson,
9 but probably would have earlier.

10 Lewis's testimony was partially disputed by Swanson, who testified that before Lewis left
11 the K-9 Unit, he told Swanson that he was having problems, and Swanson thought the two of
12 them had worked out the issues. Still, Moser called Swanson the next day and said that Lewis
13 had resigned. When Swanson called Lewis, Lewis was screaming and yelling, and Swanson
14 raised his voice in return. Swanson denied that he challenged Lewis to a fight. In addition,
15 White testified that it was Moser's decision to deny Lewis a transfer to the Bike Team, and
16 Swanson was not involved. Chief Mayberry reversed Moser's decision at the urging of Vadasy,
17 backed by White.

18 We credit the testimony that Swanson is a direct person and is passionate about the
19 success of the K-9 Unit. The evidence also supports a finding that Swanson may be somewhat
20 short tempered or unapproachable. However, these personality characteristics do not indicate
21 that Swanson holds grudges or calculates to take adverse action for improper motives. Nor does
22 Lewis's testimony that he was initially denied a transfer to the Bike Team, given that White
23 credibly testified that Swanson was not involved in that denial.

24 **Claims that are timely raised under NRS 288.110(4)**

25 **Reassignment to Patrol Division³**
26
27

28 ³Because this transfer did not actually occur until March 31, 2003, we treat Bott's claim
as timely under NRS 288.110(4).

1 Bott alleges that Swanson transferred him out of the K-9 Unit because of prohibited
2 animus and not for any legitimate reason. This allegation lacks sufficient evidentiary support.
3 Swanson testified credibly as to the complaints that he had received from other supervisors
4 regarding Bott's resistance in responding to calls for K-9 Unit assistance. Swanson's testimony is
5 corroborated by the credible testimony of Sergeants Long, McCorkle, and Peters, and by the
6 written documentation which reiterates these sergeants' and Sergeant Brooks's earlier complaints
7 to Swanson. Swanson also credibly testified that after Bott opted to not attend his scheduled
8 training on March 17, 2003, Swanson went to White, asking for advice on what to do. White
9 determined that Bott should be transferred. Because HPD's computers had been purged,
10 Swanson lost earlier correspondence setting forth various sergeants' complaints about Bott's lack
11 of responsiveness. White instructed Swanson to ask the complaining supervisors to prepare
12 memoranda, restating the basis of their previous complaints to Swanson. White corroborated
13 Swanson's testimony regarding the meeting between the two of them. White specifically
14 testified that, during this meeting, Swanson neither brought up the issue of a transfer nor asked
15 for Bott to be transferred. Instead, Swanson expressed frustration with not knowing what to do.
16 Nonetheless, White ordered that Bott be transferred on the bases that he had already fulfilled his
17 two-year commitment to the K-9 Unit and was not behaving as an officer in a specialized unit
18 should behave.

19 Bott presented some evidence, including his own testimony and the testimony of King
20 and Tyndall, to show that his transfer was not supported by performance reasons or HPD e
21 violations, that HPD did not make sufficient effort to correct any problems; and that HPD lacked
22 a sufficient documentary record of problems or efforts to correct them. Notwithstanding this
23 evidence, we are convinced that the reliable evidence clearly shows that the City and s
24 representatives were genuinely concerned regarding the effect that Bott's performance and
25 attitude was having on the success and reputation of the K-9 Unit. The documentary evidence
26 detailing the problems with Bott's performance and attitude was sufficiently corroborated by
27 testimony of Sergeants Swanson, Long, McCorkle, and Peters. Further, it appears that C y
28 representatives acted within their prerogative by transferring Bott for such reasons. The City

1 could validly choose to remove Bott and thereby sacrifice short-term efficacy and investment in
2 favor of long-term improvement and success. Thus, the harm to the K-9 Unit does not, as Bott
3 alleges, belie the existence of a legitimate motive for his removal. In sum, we find and conclude
4 that the evidence demonstrates that the City and its representatives transferred Bott for the
5 legitimate reason of improving the K-9 Unit by removing Bott because he demonstrated
6 resistance in responding to calls and in accepting direction from Swanson and that Bott failed to
7 present sufficient persuasive evidence to support his claim of improper motives and
8 discrimination in violation of NRS 288.270(1)(f).

9 **Bott's failure to attend scheduled training**

10 Bott also challenges the City's discipline of him by the May 28, 2003 letter of reprimand
11 for his decision not to attend training on March 17, 2003. According to Bott's testimony, he did
12 not feel well on the morning of the scheduled training, and he knew the same training was being
13 offered later that week. Further, he claims that he acted appropriately by opting to work his
14 normal schedule when he felt better later during the day of the missed training. Bott contends
15 that the K-9 Unit's custom and practice left training as a matter within a K-9 officer's individual
16 responsibility and discretion.

17 Swanson convincingly testified that he previously had problems with Bott changing his
18 schedule and telling Swanson after the fact. Swanson had discussed the issue with Bott a couple
19 of times. On September 11, 2002, Swanson addressed changes in schedules at a unit meeting;
20 this fact is corroborated by the City's documentary evidence consisting of Swanson's unit
21 meeting notes. According to persuasive testimony from Swanson, he made clear to Bott and
22 King that unless they first cleared proposed changes with Swanson, they were not to alter their
23 schedules. Bott admits that in September 2002, Swanson told him that no schedule changes were
24 to be made without Swanson's approval. Swanson testified that he had specifically scheduled
25 Bott for training on March 17, 2003, to avoid further adjustments to Bott's schedule that week.
26 Bott did not leave a message that he was sick the morning that he missed training, and he only
27 contacted Swanson later that evening to state that he had worked his regular shift instead of
28 attending the training. Swanson viewed this as a violation of his directive not to change

1 schedules without prior approval. White testified that if Bott was sick, the correct procedure
2 would have been to call in sick, and not just work another shift without approval from a
3 supervisor.

4 We are not persuaded by Bott's testimony that it was within his discretion, pursuant to K-
5 9 Unit custom and practice, to alter his training and work schedule. Instead, we are convinced by
6 the evidence, including the testimony of White and Swanson, Swanson's notes from the
7 September 2002 unit meeting, and the documentary record of the disciplinary proceedings
8 related to Bott's conduct on March 17, 2003, that the actions by Swanson and other City
9 representatives were based on a legitimate ground: Bott's violation of HPD's rules. We find and
10 conclude that Bott failed to demonstrate that the discipline imposed for the missed training
11 constitutes discrimination in violation of NRS 288.270(1)(f).

12 **Swanson's April 2003 evaluation of Bott**

13 Bott asserts that a prohibited discriminatory practice occurred in the preparation of his
14 April 2003 annual evaluation and the City's subsequent denial of Bott's appeal from that
15 evaluation. Bott argues that the evaluation and its supporting documentation are inaccurate and
16 false. Bott also claims that the evaluation improperly incorporated previous written warnings.

17 Swanson credibly testified as to reasons for the negative assessment of Bott contained in
18 the April 2003 evaluation. According to Swanson's testimony, during Bott's first year with the
19 K-9 Unit, Swanson would talk to Bott about any performance problems, and Bott would make
20 adjustments appropriately. During Bott's second year, Swanson started getting complaints from
21 other HPD supervisors about Bott's unwillingness to respond or lack of enthusiasm for
22 responding to calls. During the year 2002, these complaints were sporadic, with most of them
23 starting around September. After Swanson would receive a complaint, at the next opportunity he
24 would meet with Bott and get his side of the story. Swanson would then counsel Bott on
25 adjustments that needed to be made and believed Bott would make them. Swanson repeatedly
26 discussed with Bott the expectation that the K-9 Unit be responsive to calls. Because Bott
27 seemed unwilling to do searches on his own, Swanson also implemented a minimum-number-of-
28 searches requirement. Also, during weekly meetings of the K-9 Unit, the unit members would

1 discuss whatever training issues arose. But Swanson did not counsel Bott in front of King, and
2 any problems relating to particular incidents were discussed privately. Swanson did not perceive
3 a long-term problem at this time and thought of the complaints about Bott as the normal
4 "growing pains" of a new unit. Swanson did not give Bott written warnings for resistance in
5 responding to calls because Swanson believed the problem was fixable, and Bott would say that
6 he would correct his behavior. As discussed above, Sergeants Long, McCorkle, and Peters
7 provided persuasive testimony to support their written reports to Swanson, which were attached
8 to Bott's evaluation. Long also testified that when he encountered problems with Bott, he tried to
9 work the problems out with Bott, personally, before going to Swanson. However, Bott continued
10 to lack motivation, and Long became frustrated with Swanson over Bott's performance.

11 Bott disputed the testimony of these supervisors, the accuracy of their reports to
12 Swanson, and whether Swanson had ever counseled him regarding any complaints about his lack
13 of responsiveness or attitude. For instance, Bott presented testimony from HPD Investigator
14 Rand Allison and from King to show that Bott did respond to a telephone request for help by
15 McCorkle, even though McCorkle got angry and hung up the telephone during the discussion
16 wherein McCorkle requested Bott's help. Nonetheless, we are persuaded that strong and
17 convincing evidence shows that Sergeants Long, McCorkle, Peters and Brooks did complain to
18 Swanson, that Swanson did counsel Bott on the subjects of these complaints, and that Bott did
19 repeatedly demonstrate a lack of eagerness to respond to calls. Moreover, Bott has failed to
20 show that Swanson's mention of previous written warnings in the evaluation was motivated by
21 any discriminatory intent.

22 Finally, White testified that when Bott appealed his evaluation, White ordered HPD
23 Lieutenant Eric Denison and Swanson to meet with Bott and go over the evaluation and address
24 any problems with it. The record shows that this meeting was held on August 21, 2003, and that
25 Bott was non-communicative about any issues he had with the evaluation. Subsequent to the
26 meeting, White recommended the evaluation stand. In sum, Bott has failed to present sufficient
27 evidence to show that any of the City's representatives who produced the evaluation or any of its
28

1 attachments or who upheld the evaluation as valid acted for prohibited reasons or violated NRS
2 288.270(1)(f).

3 **Bott's complaint to the City's Human Resources Department**

4 On or about August 20, 2003, Bott submitted a complaint to the City's HR Department,
5 alleging harassment, personal discrimination and hostile work environment. Bott suggests that
6 evidence of discrimination against him is shown by the HR Department's referral of his
7 complaint to the City Attorney's Office. He complains that one of the reasons given to him for
8 the referral, i.e., a conflict relating to HR Department Analyst Maxine Mendelsohn, is untrue.
9 Bott also complains that the City Attorney failed to pursue his complaint.⁴

10 However, the evidence of the HR Department's letter to Bott together with the credible
11 testimony of Mendelsohn sufficiently explains legitimate bases for the decision to refer Bott's
12 complaint to the City Attorney's Office. Mendelsohn was uncomfortable with handling the
13 investigation because of her previous dealings with Swanson and Bott, and a potential conflict
14 existed because Swanson's wife worked in HPD's IAB, a unit which might have been called upon
15 to assist in any HR Department investigation. White also testified that Henderson City Attorney
16 Shauna Hughes advised him that since Bott had brought a complaint of identical substance
17 before the EMRB, she elected not to independently investigate his complaint to HR and to let
18 this Board make any determinations on Bott's claims. We find and conclude that the City's
19 determinations on the handling of Bott's complaint were based on legitimate reasons and that
20 Bott has failed to produce sufficient evidence of a prohibited motive.

21 **FINDINGS OF FACT**

- 22 1. The City is "local government employer" as defined by NRS 288.060.
23 2. Bott is a "local government employee" as defined by 288.050.

24
25 ⁴Bott further contends that the City's failure to investigate his complaint amounts to
26 interfering with, restraining, or coercing an employee in the exercise of the right to be free from
27 personal discrimination under NRS Chapter 288. Cf. NRS 288.270(1)(a) (stating, "It is a
28 (a) Interfere, restrain or coerce any employee in the exercise of any right guaranteed under this
chapter."). Inasmuch as Bott's claims of discrimination lack merit, so does this claim made
pursuant to NRS 288.270(1)(a).

1 3. Bott is a member of the HPOA, which is an "employee organization" as defined by
2 NRS 288.040.

3 4. Bott filed his complaint with this Board on September 30, 2003, and his claims related
4 to acts occurring on or after March 30, 2003 are timely.

5 5. Bott's claims relating to events occurring before March 30, 2003, including his
6 assignment to the front desk after his injury, the treatment of him and written warning issued to
7 him at the February 6, 2003 meeting, and the treatment of him at the meetings of March 20 and
8 24, 2003, are barred as untimely.

9 6. Neither the evidence relating to these untimely claims, nor Bott's other evidence
10 submitted to support his allegations of prohibited animus, including his allegations relating to his
11 2001 appointment to the K-9 Unit, his criticism of the unit's agility course and subsequent injury,
12 and his allegations of Swanson's personality traits and other conduct, demonstrates that Swanson
13 or any other representative of the City harbored any improper animus toward Bott, or acted based
14 on such animus, during the statute of limitations period for a cognizable claim.

15 7. As set forth in the preceding discussion, the City's witnesses, and particularly White
16 and Swanson, testified credibly as to the conduct and intent at issue with respect to Bott's
17 allegations of discrimination.

18 8. As set forth in the preceding discussion, the City established by the great weight of the
19 evidence that Bott's March 31, 2003 ~~reassignment~~ to the Patrol Division was made for the
20 legitimate purpose of improving the K-9 Unit by removing Bott because he demonstrated
21 resistance in responding to calls and in accepting direction from Swanson.

22 9. As set forth in the preceding discussion, the City's discipline of Bott by the May 28,
23 2003 letter of reprimand was done for the legitimate reason of correcting Bott because he
24 violated HPD's K-9 Unit rules by changing his schedule without approval from Swanson.

25 10. As set forth in the preceding discussion, Bott has failed to demonstrate that any
26 representative of the City acted out of improper animus toward Bott in preparing any part of
27 Bott's April 2003 evaluation or in denying relief to him in his appeal of that evaluation.
28

1 11. As set forth in the preceding discussion, Bott has failed to demonstrate that any
2 representative of the City acted out of improper animus toward Bott in the handling of his
3 complaint to the Human Resources Department, including the referral of the complaint to the
4 City Attorney's Office and the City Attorney's decision to forgo investigation of the complaint.

5 12. As set forth in the preceding discussion, the City proved by the great weight of the
6 convincing evidence that its adverse employment actions were within its prerogative and were
7 taken for legitimate, nondiscriminatory reasons, and Bott failed to present any reliable or
8 persuasive evidence, even considering evidence outside the statute of limitations period, that the
9 City's reasons for its actions within the limitations period were pretextual and that those actions
10 were actually based upon political or personal discrimination.

11 13. Bott has failed to demonstrate by sufficient reliable evidence that the City or any of
12 its designated representatives willfully interfered with, restrained, or coerced Bott in the exercise
13 of any right guaranteed under NRS Chapter 288.

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

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

19 CONCLUSIONS OF LAW

20 1. This Board has jurisdiction over the parties and Bott's claims arising under NRS
21 288.270(1), but does not have jurisdiction over claims alleging independent claims under the
22 CBA, HPD Policy, constitutional due process, or other laws governing the rights of a peace
23 officer.

24 2. Pursuant to NRS 288.110(4), any claim arising more than six months before Bott's
25 filing of the Complaint on September 30, 2003, is not cognizable by this Board.

26 3. This Board properly considered evidence of conduct occurring prior March 30, 2003,
27 as background evidence to evaluate subsequent conduct that is within the statute of limitations
28 period.

1 4. No credible or persuasive evidence demonstrates that the City violated NRS
2 288.270(1)(a).

3 5. No credible or persuasive evidence demonstrates that the City violated NRS
4 288.270(1)(f).

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

8 7. To the extent that any of these conclusions of law might be more properly stated as
9 findings of fact, they should be considered as such.

10 **ORDER**

11 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that for the above-stated
12 reasons, the City is entitled to judgment in its favor.

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

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

19 DATED this 21st day of July, 2005.

20 LOCAL GOVERNMENT EMPLOYEE-
21 MANAGEMENT RELATIONS BOARD

22 BY: 
23 JANET TROST, ESQ., Chairman

24 BY: 
25 TAMARAE. BARENGO, Vice-Chairman

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