STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

CYNTHIA M. THOMAS, Complainant, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	ITEM NO. 588 CASE NO. A1-045804 **ORDER**

For Complainant: Richard I. Dreitzer, Esq.
Law Offices of Richard I. Dreitzer, Chtd.

For Respondent: Deverie J. Christensen, Esq.
Marquis & Aurbach

On June 18, 2004, Complainant CYNTHIA M. THOMAS ("Thomas") filed with the LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD ("the Board") a Complaint against the LAS VEGAS METROPOLITAN POLICE DEPARTMENT ("LVMPD").

On July 21, 2004, Respondent LVMPD filed a Motion to Dismiss the Complaint, attaching as exhibits thereto copies of an Arbitrator's Opinion and Award dated April 28, 2004, and the current Collective Bargaining Agreement ("CBA") between the parties. Thomas filed an Opposition to LVMPD's Motion to Dismiss on August 4, 2004, also citing to the Arbitrator's Opinion, and LVMPD filed its Reply on August 13, 2004.

The Board held deliberations on LVMPD's Motion to Dismiss on November 4, 2004 and December 15, 2004, noticed in accordance with Nevada's Open Meeting Law. Based upon these deliberations, we hereby grant LVMPD's motion, and we dismiss Thomas's Complaint with prejudice.

DISCUSSION

The following facts are not in dispute. LVMPD employed Thomas as a 911 Specialist beginning in May 2002. In July 2003, while off duty, Thomas reported a suspected drunk driver and followed the driver to Fellini's Restaurant in Las Vegas. LVMPD officers responded to Thomas's report and approached the driver inside Fellini's. The driver was identified as Janet Moncrief, a candidate for the Las Vegas City Council. After conducting field sobriety testing, officers determined that Thomas's report was unsubstantiated. Subsequently, Moncrief complained to LVMPD that she had been improperly singled out and embarrassed by the police contact at Fellini's. As a result of its investigation into Moncrief's complaint, LVMPD determined that Thomas's husband was personally affiliated with Moncrief's political opponent and that Thomas had, among other things, conducted from her work console an unauthorized criminal history inquiry for Moncrief in March 2003, and had engaged in acts of dishonesty related to the report of Moncrief's alcohol consumption and during the ensuing investigation into Moncrief's complaint.

On December 19, 2003, LVMPD terminated Thomas from her position as a 911 Specialist. Pursuant to the CBA between the parties, Thomas grieved the termination through final and binding arbitration, alleging she was terminated without just cause and in the context of certain procedural irregularities.

The arbitrator conducted a hearing on April 12 and 13, 2004, and entered an award in favor of LVMPD on April 28, 2004. The arbitrator specifically determined that Thomas had made the March 2003 unauthorized criminal history inquiry for personal reasons and that she had been untruthful in two instances, one instance occurring after she was formally notified that she was the subject of an official investigation. The arbitrator found that the normal discipline for an unauthorized access to criminal history was suspension without pay for less than 41 hours. The arbitrator further found that untruthfulness is considered a serious offense, and that the usual discipline for untruthfulness during an investigation is termination of employment. The arbitrator determined that LVMPD had just cause to terminate Thomas's employment and that termination was appropriate discipline in this case. The arbitrator additionally found that

Thomas's allegations regarding procedural irregularities lacked merit and/or any irregularities did not improperly affect the proceedings leading to the termination of Thomas or the propriety of the discipline imposed.

Thomas claims in her Complaint to this Board that LVMPD violated NRS Chapter 288.270(1)(a) and (f) by discriminating and/or retaliating against her for personal and political reasons based on its political or personal affiliations with, or pressure from, Moncrief.[1] Thomas also alleges that many procedural irregularities occurred in relation to her termination and that her termination was unwarranted. In its Motion to Dismiss Thomas's Complaint, LVMPD contends that this Board must defer to the Arbitrator's Award, and therefore, no probable cause exists to believe that LVMPD has violated NRS Chapter 288.[2] See NAC 288.375(1) (stating that the Board may dismiss a matter "[i]f the Board determines that no probable cause exists for the complaint . . . ."). We have considered all documents submitted by the parties, including the CBA and the Arbitrator's Award provided by LVMPD, and we agree with LVMPD that dismissal with prejudice is warranted here.

Having considered documents outside the pleadings, we apply to LVMPD's Motion to Dismiss the standard for motions for summary judgment. See NRCP 12(b), NRCP 56. Appling this standard, dismissal pursuant to NAC 288.375(1) is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See NRCP

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[1]Thomas also alleges that her due process rights have been violated; however, this Board lacks jurisdiction to address alleged constitutional violations.

[2]LVMPD also contends that this Board should not consider Thomas's Opposition to its Motion to Dismiss because the Opposition was filed one day late. See NAC 288.240(4) (setting forth a ten-day deadline for parties to file written opposition to any motion). However, based on the very short delay in filing and the fact that no prejudice to LVMPD is alleged, we elect to consider Thomas's opposition. See NAC 288.040 (providing for liberal construction of NAC Chapter 288); NAC 288.235 (providing that the Board has discretion to disregard defects which do not affect substantial rights of a party). LVMPD additionally contends, for the first time in its Reply to Thomas's Opposition, that pursuant to the parties' CBA, Thomas waived the issue of personal or political discrimination by failing to raise it in her grievance before the arbitrator. Because we have decided to dismiss Thomas's Complaint on other grounds, we decline to address LVMPD's contention.

56; Barmettler v. Reno Air, Inc., 114 Nev. 441, 444-45, 956 P.2d 1382, 1385 (1998), limited on other grounds by Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000); White Pine Ass'n of Classroom Teachers v. White Pine County Sch. Dist., Item No. 462, EMRB Case No. A1-045668, p. 2 (2000). To meet its burden under this test, LVMPD, as the movant, must show that there is an absence of evidence supporting one or more of the elements of Thomas's case. See NGA # 2 Limited Liability Co. v. Rains, 113 Nev. 1151, 1156, 946 P.2d 163, 166-67 (199) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986)). The burden then shifts to Thomas, who must set forth specific facts demonstrating the existence of a genui e issue for hearing. See NGA # 2, 113 Nev. at 1157, 946 P.2d at 167. To avoid dismissal, Thomas must present evidence of adequate "caliber or quantity to allow a rational factfinder, applying the applicable quantum of proof, to find [in her favor]." See Nev. Civ. Prac. Man. § 1712 (4th ed 1998). Although Thomas is entitled to have the evidence and all reasonable inferences accepted as true, she "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (quoting Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975)).

First, we address Thomas's claim under NRS 288.270(1)(a), which provides that it is a prohibited practice for a local government employer or its designated representative willfully to "[i]nterfere, restrain or coerce any employee in the exercise of any right guaranteed under this chapter." Our review of the record here shows that Thomas has failed to set forth in her Complaint or in her Opposition to the Motion to Dismiss any specific facts or evidence to show how LVMPD violated NRS 288.270(1)(a). Thus, we conclude that there is no probable cause to support this claim. See NAC 288.375(1).

We now turn to Thomas's claim NRS 288.270(1)(f), which provides, in relevant part, that it is a prohibited practice for a local government employer or its designated representative willfully to "[d]iscriminate . . . because of political or personal reasons or affiliations."

As a preliminary matter, we analyze this case under the scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and its progeny. See Stationary Engineers, Local 39, Int'l Union of Operating Engineers v. County of Lyon, Item No. 231,

EMRB Case No. A1-045441, at 4 (1989) (applying McDonnell Douglas analysis to claim of discrimination); see also Griffith v. City of DesMoines, 387 F.3d 733 (8th Cir. 2004) (applying McDonnell Douglas at the summary judgment stage).

Under the McDonnell Douglas line of cases, if a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant employer to produce an explanation to rebut the prima facie case, *i.e.* to produce evidence that the adverse employment action was taken for a legitimate nondiscriminatory reason. See id. at 802-03, 93 S.Ct. at 1824; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07, 113 S.Ct. 2742, 2747 (1993); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093 (1981). The employer meets this burden if it sets forth evidence of reasons that, if believed by the trier of fact, would support a finding that the unlawful discrimination was not the cause of the employment action. St. Mary's, 509 U.S. at 506-07, 113 S.Ct. at 2747. After an employer has met its burden of production, "the factual inquiry proceeds to a new level of specificity," and requires of the plaintiff specific proofs of discriminatory motivation showing that the reason given by the employer is a pretext. Id. at 516, 113 S.Ct. at 2752 (quoting Burdine, 450 U.S. at 255, 101 S.Ct. at 1095). At all times, the plaintiff retains the burden of persuading the trier of fact that the employer intentionally discriminated. Id.; Water Employees Ass'n v. Las Vegas Valley Water Dist., Item No. 326, EMRB Case No. A1-045538, at 4 (1994). Additionally, a reason cannot be a pretext for discrimination unless it is shown "*both* that the reason was false, *and* that discrimination was the real reason." St. Mary's, 509 U.S. at 515, 113 S.Ct. at 2752.

Here, appropriate deference to the Arbitration Award resolving Thomas's grievance requires a finding that LVMPD has met its burden of proof under the McDonnell Douglas analysis. Pursuant to the Nevada Supreme Court's decision in City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 896, 59 P.3d 1212, 1217 (2002), we must give controlling weight to an arbitrator's award absent a sufficient showing by the person seeking to avoid it that (1) the arbitration proceedings were not fair and regular; (2) the parties did not agree to be bound by the arbitrator's decision; (3) the arbitrator's decision was clearly repugnant to the purposes and policies of NRS Chapter 288; (4) the contractual issues before the arbitrator were not

factually parallel to the unfair labor practice issues; and (5) the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice issues. Cf. City of Reno v. International Ass'n of Firefighters, Item No. 360-A, EMRB Case No. A1-045572 (1995) (applying doctrine of *res judicata* to grant motion to dismiss based on arbitrator's award where arbitrator found in favor of Respondent on all salient points at issue in the complaint filed with the Board). Accordingly, we reject Thomas's reliance on this Board's exclusive jurisdiction over claims arising under NRS Chapter 288 as a means of avoiding the Arbitrator's Award. See generally Rosequist v. International Ass'n of Firefighters, 118 Nev. 444, 449, 49 P.3d 651, 654 (2002) (recognizing this Board's exclusive jurisdiction over violations of NRS Chapter 288); see also NRS 288.110(2); NRS 288.280. Furthermore, we conclude that Thomas has failed to meet her burden under any prong set forth in Reno Police Protective Ass'n, 118 Nev. at 896, 59 P.3d at 1217, and noted *supra*.

We accept the arbitrator's determinations that Thomas carried out the unauthorized criminal history inquiry; that she was untruthful in relation to Moncrief's alcohol consumption and during the subsequent official investigation; that LVMPD had just cause to terminate Thomas; that Thomas's allegations of procedural irregularities lacked merit and/or any irregularities did not affect the disciplinary proceedings against her or the propriety of the discipline imposed; and, that Thomas's termination was appropriate and the usual discipline under the circumstances. Based on these established facts, LVMPD has met its burden, under McDonnell Douglas, of producing evidence of a legitimate reason for its challenged conduct.

Consequently, to demonstrate the existence of a genuine issue for hearing, Thomas was required to set forth, either in her Complaint or in her Opposition to the Motion to Dismiss specific proof (for example, evidence of disparate treatment) that LVMPD's actions were actually taken for unlawful discriminatory reasons. She failed to do so, and her bare allegations that LVMPD was improperly motivated by personal or political reasons is insufficient. Moreover, any potential claim of disparate treatment is negated by the arbitrator's determinations that the discipline Thomas received was the *usual* discipline for conduct similar to Thomas's, and that the disciplinary action here was appropriate. In sum, we conclude that no reasonable

trier of fact could find in Thomas's favor, and there is no probable cause to believe that a violation of NRS 288.270(1)(f) has occurred. See NAC 288.375(1).

FINDINGS OF FACT

1. Complainant Thomas was employed by LVMPD as a 911 Specialist from May 2002 to Decemberel9, 2003, and as such, was a local government employee as defined by NRS 288.050.

2. Respondent LVMPD is a local government employer as defined by NRS 288.060.

3. This Board has jurisdiction over the parties and the subject matters of the Complaint on file herein arising under NRS Chapter 288.

4. LVMPD terminated Thomas from her position on December 19, 2003, and Thomas grieved her termination through the procedures provided in the CBA between the parties.

5. An arbitrator resolved Thomas's grievance after conducting a two-day hearing on April 12 and 13, 2004, and by an Arbitrator's Opinion and Award entered on April 28, 2004.

6. The arbitrator determined that, as asserted by LVMPD, Thomas made an unauthorized inquiry of criminal history for Janet Moncrief; Thomas had been untruthful in her report of Moncrief's alcohol consumption; Thomas had been untruthful during LVMPD's official investigation of Moncrief's complaint, after being formally notified of the investigation, the normal discipline for unauthorized access to criminal history information is suspension without pay for less than 41 hours; untruthfulness is considered a serious offense and the usual discipline for untruthfulness during an official investigation after being formally notified of the investigation is termination of employment; LVMPD had just cause to terminate Thomas's employment; termination was the appropriate discipline in this case; and, Thomas's allegations of procedural irregularities lacked merit and/or any irregularities did not affect the disciplinary proceedings against her or whether the discipline given was warranted.

7. Thomas has failed to demonstrate that the proceedings before the arbitrator were not fair and regular; that the parties did not agree to be bound by the arbitrator's decision, that the arbitrator's decision was clearly repugnant to the purposes and polices of NRS Chapter 288;

that the contractual issues before the arbitrator were not factually parallel to the unfair labor practice issues before this Board; or that the arbitrator was not presented generally with the same facts relevant to resolving the unfair labor practice issues.

8. The arbitrator's above-stated conclusions are properly adopted as facts in the instant prohibited labor practices case.

9. The parties have been given a full and fair opportunity to litigate LVMPD's Motion to Dismiss the Complaint, which was filed on July 21, 2004, and Thomas has failed to bring forth more than bare allegations of discrimination by LVMPD.

10. Considering Thomas's complaint, the facts established in the arbitrator's award, and the lack of specific evidence of discrimination, no reasonable trier of fact could find in Thomas's favor, and no probable cause exists to believe that a violation of NRS 288.270(1)(a) or (f) has occurred.

11. If any of these findings of fact would be more properly considered a conclusion of law, it should be so considered.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matters of the Complaint on file herein arising under NRS Chapter 288.

2. This Board is bound to defer to an arbitrator's award if the person seeking to avoid it fails to meet her burden under the test set forth in City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 896, 59 P.3d 1212, 1217 (2002), as set forth more fully in the discussion section of this Order.

3. Thomas failed to meet her burden under Reno Police Protective Ass'n, *supra*, and therefore, the arbitrator's April 28, 2004 decision is accepted on all points relevant to resolution of the prohibited labor practice issues before this Board.

4. Because this Board considered matters outside the pleadings in resolving LVMPD's Motion to Dismiss, application of the summary judgment standard as set forth in the discussion section of this Order is proper here.

5. LVMPD met its burden of showing a lack of evidence to support one or more elements of Thomas's case, and Thomas has failed to demonstrate the existence of any genuine issue for hearing.

6. Thomas failed to set forth in her Complaint or in her Opposition to the Motion to Dismiss any specific facts or evidence to show how LMVPD violated NRS 288.270(1)(a), and, therefore, no probable cause exists to support a claim under NRS 288.270(1)(a).

7. Considering the aforementioned Arbitrator's Opinion and Award, LVMPD met its burden of production under the analysis set forth in McDonnell Douglas Corp. v Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and its progeny, to show the adverse employment actions against Thomas were taken for legitimate nondiscriminatory reasons.

8. In order to show the existence of a genuine issue for hearing, Thomas was required, under McDonnell Douglas, and its progeny, to set forth specific proofs of discriminatory motivation, and she has failed to do so.

9. Thomas has failed to demonstrate the existence of probable cause to believe that a violation of NRS 288.270(1)(f) has occurred, and dismissal pursuant to NAC 288.375(1) is warranted.

10. If any of these conclusions of law would be more properly considered a finding of fact, it should be so considered.

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ORDER

IT IS HEREBY ORDERED that LVMPD's Motion to Dismiss the Complaint is GRANTED. Complainant Thomas's Complaint is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that each party shall bear its own attorneys' fees and costs in this matter.

DATED this 23rd day of February, 2005.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY: _____
JANET TROST, ESQ., Chairman

BY: _____
TAMARA E. BARENGO, Vice-Chairman

DISSENTING OPINIONe

I agree with the majority's analysis and conclusion concerning Thomas' claim under NRS 288.270 (1) (a) and therefore agree with its dismissal of that claim. However, I dissent in the dismissal of the NRS 288.270 (1) (f) claim. Ms. Thomas, in my opinion, is entitled, under the circumstances of this case, to pursue her claim before this board on that issue.

We only need look to the recent case of City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 59 P.3rd 1212 (2002), to resolve whether to grant Respondent's Motion to Dismiss. In that decision, the Nevada Supreme Court stated: "This Court has recognized that the EMRB has exclusive jurisdiction over unfair labor practice issues....The EMRB has the duty to administer NRS Chapter 288....We conclude, therefore, that the EMRB is not estopped from determining issues previously decided by an arbitrator when the EMRB has exclusive jurisdiction over the issue. Thus, the EMRB did not err by hearing the RPPA's unfair labor practice complaint."

Very clearly, Thomas has alleged violation of NRS 288.270 (1) (f) "willfully to discriminate....because of political or personal reasons or affiliations." In a continuing litany of paragraphs in her complaint, Thomas alleges "political" motives for "special actions" taken either against her or in the conduct of the investigation by the Respondent (see Complaint, pp 4-16, paragraphs 1 through 58), e.g. her alleged inquiry into Moncrief's criminal history and its handling thereafter; her reporting of Moncrief's alleged intoxication and its handling by respondent; the unusual handling of the Moncrief matter at Fellini's parking lot by Sgt. Galvan; that the investigation into Thomas' conduct was instigated by the Sheriff after receiving a call from Moncrief; the serial interviews of Thomas by IAB; the "public assault" to the local news media by the Respondent and its agents in disclosing information about Thomas'; the cavalier handling of Thomas' complaint against Sgt. Galvan.

I do not know whether these allegations have any basis in fact or not, but I do believe I know the following: this Board has a duty to administer NRS Chapter 288: the Nevada Legislature granted employees of local governments the right to be free of discrimination based on political reasons or affiliations: the remedy for an employee that believes they have been

discriminated against by a local government is to file a timely complaint with this Board; and that the appropriate method for determining if the rights of the Complainant have been violated under NRS 288 is for this Board to process the complaint according to NRS and NAC 288.

Clearly, Complainant has plead facts which make out a prima facia case and should now be given the opportunity to provide "specific proofs of discriminatory motivation showing that the reason given by the employer is pretext" (Majority opinion, p. 5, line 13-14).

We can further look to the City of Reno (supra) case for guidance as to this Board's treatment of the arbitrator's decision in this case. The Majority lays out the five-prong test used by the National Labor Relations Board, and blessed by our Supreme Court, in deciding whether to defer to a prior arbitration. However, the Majority errs when it concludes, "...that Thomas has failed to meet her burden under any prong set forth in Reno Police Protective Ass'n..." It needs to be noted that the Board was only presented with briefs of counsel and few exhibits including the arbitrator's award and excerpts from the collective bargaining agreement. These pieces of evidence must be weighed against Complainant's verified complaint.

Conclusive evidence that the parties (including Complainant) agreed to be bound by the arbitration is missing. The portions of the collective bargaining agreement we have allude to "final and binding arbitration" in Article 9, Section 9.2, Step 3. However, the last paragraph under that Step references the possibility that the parties may not agree to "binding" arbitration. The submission agreement was not presented to us. In the absence of such proof, I cannot conclude requirement (2) of Reno Police Protective was met.

I believe, after a thorough reading of the arbitrator's opinion and award, that it is "clearly repugnant" to NRS 288 is several regards: the Act contemplates unfair labor practices are to be decided by a three member "qualified" Board, not by a single individual; there is no substantiation that the requirements of NAC 288.273 et seq. have been extended to the parties (we do not even know whether witnesses were sworn or a transcript was prepared).

The issue presented to Arbitrator Runkle was whether the Respondent had "cause" under several articles of the collective bargaining agreement to terminate Thomas. Further, the arbitrator's opinion and award focuses entirely upon Thomas' conduct and not, in any regard,

upon the conduct of Respondent or its agents. NRS 288.270 (1) (f) prohibits willful discriminatory conduct on the part of employers and their representatives. Since there is not evidence before us suggesting any conduct on the part of Respondent, the Sheriff, Sgt. Galvan the IAB investigators, etc. was even presented to the arbitrator, I cannot conclude the "contractual issue was factually parallel to the unfair labor practice issue" and therefore, the number (4) requirement is not fulfilled. A finding that a disciplinary action be an employer meets the "just cause" requirements of a collective bargaining agreement does not conclusively equate to the absence of discrimination because of political or personal reasons or affiliations.

It follows that if facts were not presented to satisfy (4), then (5) could not be fulfilled either.

As a consequence, I must conclude this Board should not defer to this arbitration opinion and award as a basis for granting Respondent's Motion to Dismiss the NRS 288.270 (1) (f) unfair labor practice charge.

DATED this 23rd day of February, 2005.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY: _____
JOHN E. DICKS, ESQ., Board Member