

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

TIMOTHY FRABBIELE,

Complainant,

vs.

CITY OF NORTH LAS VEGAS; NORTH
LAS VEGAS POLICE DEPARTMENT AND
NORTH LAS VEGAS POLICE OFFICERS
ASSOCIATION,

Respondents.

ITEM NO. 680I

CASE NO. A1-045929

ORDER

For Complainant: Adam Levine, Esq.
Law Office of Daniel Marks

For Respondents: Malani L. Kotchka, Esq.
Lionel Sawyer & Collins

This matter came on before the State of Nevada, Local Government Employee-
Management Relations Board ("Board"), on September 10, 2014 for consideration and decision
pursuant to the provisions of the Local Government Employee-Management Relations Act ("the
Act"); NAC Chapter 288 and was properly noticed pursuant to Nevada's Administrative
Procedures Act.

I.

FACTS

Complainant Timothy Frabbiele was hired by Respondent the City of North Las Vegas as
a police officer, effective July 24, 2006. The position of police officer is in a bargaining unit that
was represented for collective bargaining purposes by the North Las Vegas Police Officers
Association ("Association"). Officer Frabbiele's employment was subject to a collective
bargaining agreement between the City and the Association. Among other things, that agreement

1 establishes a grievance process for employees that are subjected to discipline and allows an
2 employee the right to challenge the City's disciplinary action through a grievance and ultimately
3 through an arbitration proceeding. The language in the agreement concerning disciplinary
4 matters and the grievance process does not distinguish between probationary and confirmed
5 officers.
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7 On May 31, 2007 Officer Frabbiele observed a vehicle that had been parked illegally
8 with both of its front tires against a curb. The vehicle was in a cul-de-sac that was outside of
9 Officer Frabbiele's assigned patrol area. The vehicle also belonged to the estranged husband of
10 one of Officer Frabbiele's female acquaintances. The testimony offered at the hearing in this
11 matter indicated that at that point in time Frabbiele's female acquaintance and the owner of the
12 vehicle were going through a bad divorce.
13

14 During his lunch break on May 31, 2007 Officer Frabbiele mentioned the illegally parked
15 vehicle to another North Las Vegas Police Officer named Brent Carter. Frabbiele and Carter
16 agreed that Frabbiele would return to the vehicle and issue a parking ticket. Rather than use
17 Frabbiele's name as the citing officer, Frabbiele would issue the citation under Officer Carter's
18 name. Officer Carter signed a blank citation form and Frabbiele filled out the rest of the
19 information on the form and returned to place the citation on the vehicle's windshield.
20

21 A few days later on June 6, 2007, the owner of the vehicle made a formal complaint with
22 the City concerning the citation.
23

24 On June 28, 2007 Officer Frabbiele was notified that he was the subject of an internal
25 affairs investigation based upon this parking ticket and concerns that the ticket was issued
26 because of a personal bias Frabbiele had towards the owner of the vehicle. This notice was sent
27 to Frabbiele from then-Sergeant Justin Roberts who was conducting the investigation.
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1 As of July 5, 2007, Officer Frabbiele was removed from active duty and placed on the status of
2 administrative leave with pay. He continued in this status until September 11, 2007.

3 Sgt. Roberts interviewed Officer Frabbiele as part of this internal affairs investigation.
4 During the course of this interview, Sgt. Roberts began asking Officer Frabbiele what Frabbiele
5 knew about Officer Carter's marriage and who Officer Carter may have been dating at that time.

6 At the conclusion of his internal affairs investigation, Sgt. Roberts issued a memorandum
7 on August 28, 2007 to Officer Frabbiele. This memorandum identified five "possible" violations
8 of Department policy: unprofessional conduct, violating the code of ethics, truthfulness,
9 impermissible use of the JLINK/Scope systems and improper radio checkout on vehicle stops.
10 Although these violations were listed only as possible violations, the memorandum concluded
11 that there was "just cause for discipline." The same memorandum directed Officer Frabbiele to
12 appear for a mitigation hearing with the Chief of Police on September 5, 2007. At that
13 mitigation hearing, Officer Frabbiele was allowed to present his side of the events.
14 Frabbiele did so and read a prepared statement at that hearing. A copy of Frabbiele's prepared
15 statement was introduced into evidence before the Board. At the hearing before this Board,
16 Joseph Chronister (who was an Assistant Chief at the time) confirmed that a mitigation hearing
17 is part of the discipline process and is listed as such in the Department's Manual of Procedure.
18 This same manual calls for a decision to be rendered within 15 days of the mitigation hearing.

19 A few hours after the mitigation hearing, the City issued another directive to Officer
20 Frabbiele. This memorandum informed Frabbiele that the Chief of Police had "made a decision
21 regarding the discipline [Frabbiele was] to receive" in regards to the internal affairs
22 investigation. The City directed Officer Frabbiele to report to a meeting with the Chief of Police
23 on September 10, 2007 in order to receive his discipline.

1 At the hearing before the Board, Chief Chronister testified that there are a limited number
2 of possible outcomes to an internal affairs investigation. Either the charges will be sustained or
3 not sustained, the officer may be exonerated or the charges may be found to be unfounded. A
4 final possibility is a finding of a policy and procedure failure.
5

6 But when Officer Frabbiele reported to the Chief as directed on September 10, 2007 he
7 did not receive a decision that made any of these findings for any of the five allegations listed in
8 Sgt. Roberts' August 28, 2007 memorandum. Instead, Officer Frabbiele received only a short
9 notice stating that his employment was non-confirmed as a result of the internal affairs
10 investigation. No information was provided to Officer Frabbiele as to which, if any, allegations
11 had actually been sustained against him or not, despite Chief Chronister's testimony at the
12 hearing that an officer should be informed of the findings after the conclusion of the mitigation
13 hearing.
14

15 At the hearing before the Board, Chief Chronister testified that a non-confirmation is not
16 viewed by the City as a disciplinary action. The reason for this view is because a non-
17 confirmation affects an employee that is on probation; in other words the City viewed it simply
18 as a decision to end the employment relationship. Yet at the same time, Chief Chronister
19 confirmed at the hearing that the City had determined that Officer Frabbiele had been untruthful
20 and for this reason the City could not have retained Officer Frabbiele.
21

22 Following his termination, Office Frabbiele attempted to invoke the grievance process for
23 disciplinary actions. Officer Frabbiele requested that the Association file a grievance on his
24 behalf on the basis that there was not just cause to terminate his employment and that he was the
25 victim of discrimination. The Association did not file the grievance. Among the reasons given by
26 the Association was that Frabbiele lacked property rights in employment due to his status as a
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1 probationary employee. The Association also presumed that all charges against Frabbiele had
2 been sustained, despite the fact that no formal finding had been made by the City.¹

3 Officer Frabbiele persisted in questioning his termination and in January of 2008
4 requested that the City provide him with his internal affairs file. By way of correspondence dated
5 January 21, 2008 the City denied that request, claiming that it could not release the file because
6 the City had not taken any punitive action against Frabbiele.
7

8 Frabbiele filed his complaint with this Board on March 11, 2008.

9 II.

10 TIMELINESS OF COMPLAINT

11 Previously, this Board had found the complaint to be untimely. See Item No. 680F. But
12 that decision was made before the Nevada Supreme Court had issued its opinion in City of North
13 Las Vegas v. State, EMRB, 261 P.3d 1071 (Nev. 2011). On March 26, 2014, the Supreme
14 Court remanded this case to the district court, with instructions for the district court to remand
15 the case back to this Board. Those instructions from the Supreme Court directed us to reconsider
16 the timeliness issue in light of the City of North Las Vegas opinion. The district court, in turn,
17 entered its order of remand back to this Board on August 11, 2014. Pursuant to NAC 288.306,
18 the Board heard from both parties on the timeliness issue at oral arguments, which were held at
19 the Board's regularly scheduled meeting on August 20, 2014.
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23 The City of North Las Vegas opinion addressed the six-month limitations period in NRS
24 288.110(4) at length and clarified that this subsection should be applied in a manner that is
25 consistent with the six-month period of limitations that is contained in the National Labor
26 Relations Act. City of North Las Vegas at 1076-1077. This standard holds that the six month
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28 ¹ Frabbiele's original complaint with this Board included allegations against the Association as well. Frabbiele and the Association stipulated to withdraw that portion of the complaint on September 14, 2009.

1 limitations period "...start[s] running when the alleged victim receives *unequivocal notice* of a
2 final adverse decision." City of North Las Vegas, 261 P.3d at 1077 (emphasis in original).

3 As stated in the Supreme Court's order of remand, we are now called to "...make factual
4 findings as to when Officer Frabbiele received unequivocal notice of the acts giving rise to his
5 complaint..." In doing so, we now find Officer Frabbiele's complaint to be timely as is
6 discussed below.

7
8 In City of North Las Vegas, the Supreme Court relied upon a decision from the Third
9 Circuit Court of Appeals in N.L.R.B. v. Public Service Elec. and Gas Co., 157 F.3d 222 (3d
10 Cir.1998). City of North Las Vegas at 1077. In that case, the Third Circuit indicated that the six-
11 month limitations period "begins to run when an aggrieved party has clear and unequivocal
12 notice of a violation of the NLRA." Public Service Elec. and Gas, 157 F.3d at 227. Because the
13 six-month limitations period does not force the victim of a prohibited labor practice to file
14 anticipatory complaints, a complainant must first have knowledge of the of the facts necessary to
15 support a present and ripe prohibited labor practices complaint. Id. (quoting Esmark, Inc. v.
16 N.L.R.B., 887 F.2d 739, 746 (7th Cir.1989)).

17
18 The six-month limitations period functions as an affirmative defense, and thus the City
19 bears the burden to establish that the complaint was untimely. Id.

20
21 Further, and pursuant to the clarification provided in City of North Las Vegas to look to
22 precedent under the NLRA, the date of the alleged prohibited labor practice is not counted in
23 computing the six-month limitations period. Macdonald's Indus. Products, 281 N.L.R.B. 577
24 (1986).

25
26 With these principles in mind, we consider the timeliness of each of Officer Frabbiele's
27 allegations.
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1 Unequivocal Notice of a Unilateral Change

2 Officer Frabbiele claims that the City unilaterally changed the discipline and discharge
3 procedures when the City used the non-confirmation process to terminate his employment in lieu
4 of the discipline procedure that had been bargained-for. At oral arguments before the Board to
5 address this issue, the City argued that any actual change to the disciplinary process could have
6 occurred no later than September 7, 2007, as Frabbiele's mitigation hearing had taken place two
7 days prior and the decision to terminate his employment was made shortly thereafter. But the
8 City did not adduce any evidence showing that Frabbiele could have possibly had notice of that
9 fact prior to the September 10, 2007 notice.
10

11 Officer Frabbiele proposes a different date for the date of his unequivocal notice.
12 Frabbiele argued at oral arguments that unequivocal notice of a unilateral change could not have
13 occurred prior to January 21, 2008, which is the date that the City sent a letter to Frabbiele
14 advising him of the City's view that by using the non-confirmation process the City did not
15 discipline him. The Board agrees with Frabbiele and finds that unequivocal notice of a unilateral
16 change could not have occurred prior to January 21, 2008.
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18 The evidence in this case indicates that Frabbiele did not have unequivocal notice that the
19 City was viewing his termination as a non-disciplinary matter until at least the City's January 21,
20 2008 letter. This letter was a response to Frabbiele's request for his internal affairs file. The
21 City's response to that request was to inform Frabbiele that he was not entitled to his internal
22 affairs file because the City did not view itself as having taken punitive action against him.
23

24 Frabbiele's actions indicate that prior to this January 21, 2008 letter, he understood the
25 City's actions against him to have been disciplinary. After being terminated, Frabbiele attempted
26 to invoke the grievance process for disciplinary actions by filing a grievance over his
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1 termination. This grievance would have challenged the City's just cause to terminate him. The
2 attempt to file a grievance is indicative that at that time Frabbiele understood the City's actions
3 to have been disciplinary. Further, Frabbiele persisted in viewing his termination as disciplinary
4 when he invoked NRS 289.080 to request his internal affairs file. This right attaches when an
5 employer has taken punitive action against an officer. In light of these actions the City cannot
6 show that Officer Frabbiele had notice that the City was using a non-disciplinary process to
7 terminate his employment at any identifiable date prior to January 21, 2008. It is this
8 correspondence that clearly informed Frabbiele that the City had bypassed the bargained-for
9 disciplinary process. Therefore this letter established unequivocal notice.
10

11
12 The City's position relies solely upon the fact that the September 10, 2007 notice to
13 Frabbiele mentioned the non-confirmation process. This fact was the basis of our prior decision
14 that found the complaint untimely. Item No. 680F (Finding of Fact # 2, Conclusion of Law # 3);
15 Item No. 680G. Our prior decision was not decided under the unequivocal notice standard, and
16 instead considered when Frabbiele knew or "should have known" of the change. Item 680 F, p. 3
17 (referring to State of Nevada Local Government Employee-Management Relations Board and
18 John Strahan v. Washoe County Sheriff's Supervisory Deputies Association, Case No. 48708
19 (Nev. 2008)). However, this isolated reference to non-confirmation is insufficient to establish the
20 unequivocal notice now required by City of North Las Vegas.
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22
23 Unequivocal notice of a violation does not exist where an employer sends conflicting
24 signals about its actions. In Re Cab Associates & Bldg. Material Teamsters, Local 282, 340
25 N.L.R.B. 1391, 1392 (2003); see also Pershing County Law Enforcement Association v.
26 Pershing County, Item No. 725C, EMRB Case No. A1-045974 (May 17, 2013). In this case, the
27 City's actions, at best, sent conflicting signals to Frabbiele about what had actually occurred. The
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1 whole affair was initiated by a citizen's complaint and up until the September 10, 2007 notice
2 that terminated Frabbiele's employment the City followed the process that is indicative of
3 disciplinary action. It advised Frabbiele of a disciplinary action under the Police Officers Bill of
4 Rights, it conducted an internal affairs investigation, and it held a mitigation hearing, which is a
5 necessary step in the bargained-for disciplinary process. The memorandum prepared by Sgt.
6 Roberts clearly indicated that the City was contemplating disciplinary action by stating that
7 Frabbiele's actions "constitutes just cause for discipline." When the City advised Frabbiele of
8 come to the meeting on September 10, 2007, it was a notice to come and receive his disciplinary
9 regarding the same internal affairs investigation. It was at this meeting on September 10, 2007
10 that the notice was delivered to Frabbiele. Even the September 10, 2007 notice states that the
11 non-confirmation was the result of the internal affairs investigation.

14 Given these facts, no reasonable person would believe that he was not being disciplined
15 by the City, and the City did not clearly indicate otherwise until its letter of January 21, 2008. As
16 NRS 288.110(4) requires that a complainant have notice that is unequivocal, we find the date of
17 unequivocal notice of the facts supporting the unilateral change claim to be January 21, 2008. As
18 the complaint was filed March 11, 2008, this charge is timely.

21 Unequivocal Notice of Discrimination Based Upon Personal Affiliations

23 Officer Frabbiele claims to have been the victim of discrimination based upon his
24 personal affiliation with Officer Brent Carter. We find that the notice of September 10, 2007
25 informing Frabbiele that his employment would be terminated provided Frabbiele with the
26 unequivocal notice of this claim.

1 The focus of this claim is the City's motivation for terminating his employment rather
2 than the procedure used for doing so and asserts that Frabbiele was singled out for termination
3 due to his affiliation with Officer Carter. The facts supporting this charge arise in advance of the
4 actual termination of employment. We look to the conduct of the internal affairs investigation in
5 which Sgt. Justin Roberts questioned Frabbiele about Officer Carter's personal relationships.
6 Frabbiele's own statement in support of his attempted grievance indicated that he was concerned
7 at that time over the questioning and that he was aware at that time of the connection between
8 Carter's ex-wife and an Officer Hickman, and that he was further aware at that time that Officer
9 Carter was a non-active member of the LDS church. During his mitigation hearing, Frabbiele
10 referred to his relationship with Officer Carter, and Frabbiele already knew that Officer Carter's
11 name appeared on the face of the parking ticket that initiated the internal affairs investigation.
12

14 The City informed Frabbiele on September 10, 2007 that his employment would be
15 terminated, which is the date of the prohibited labor practice as this is the date of the City's final
16 adverse action. However, this allegation is still timely as we do not include the date of the
17 prohibited labor practice when calculating the six-month limitations period and the complaint
18 was filed on March 11, 2008.
19

21 Unequivocal Notice of Sex Discrimination

23 Officer Frabbiele also asserts that he was the victim of sex discrimination based upon the
24 City's comparative treatment of a female officer named Kathryn Buehler. The evidence in this
25 case does not directly confirm when Frabbiele had notice of the City's treatment of Officer
26 Buehler. In order to comply with the directive of the Supreme Court and make factual findings
27 pertaining to unequivocal notice, we find that Officer Frabbiele had unequivocal notice of this
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1 alleged prohibited labor practice claim by September 25, 2007. We look to the grievance that
2 Officer Frabbiele attempted to file over his termination that bears this date. That grievance
3 invokes the discrimination provisions of the collective bargaining agreement. The Association's
4 response to that attempted grievance referred to previous statements between Officer Frabbiele
5 and Officer Buehler. The testimony at the hearing in this case regarding Officer Buehler
6 indicated that her case had arisen prior to the parking ticket that prompted the action against
7 Officer Frabbiele in this case. Therefore we find September 25, 2007 to be the date of
8 unequivocal notice. In any event, this allegation is timely as a final adverse action is required and
9 the six-month limitations period on this claim could not have commenced prior to the September
10 10, 2007 notice.
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14 Equitable Tolling

15 Equitable tolling is an exception to the timeliness requirement that allows the Board to
16 hear and determine a complaint that is otherwise untimely. As we conclude that Officer
17 Frabbiele's complaint is in fact timely in all regards under the unequivocal notice standard stated
18 in City of North Las Vegas it is not necessary to consider whether equitable tolling applies to the
19 complaint. We also note that at oral arguments, Frabbiele's counsel indicated that he was not
20 relying upon an equitable tolling argument.
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23 Having determined that the complaint is indeed timely under City of North Las Vegas,
24 we turn now to the merits of the complaint.

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1 III.

2 MERITS OF THE COMPLAINT

3 Unilateral Change Claim

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5 It is well-settled that it is a prohibited labor practice for a local government employer to
6 unilaterally change the terms of employment affecting a mandatory subject of bargaining. City of
7 Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 59 P.3d 1212 (2002); NRS 288.270(1)(a)
8 and (e). Under the Act, discipline and discharge procedures are a mandatory subject of
9 bargaining. NRS 288.150(2)(i).

10
11 Frabbiele asserts that the City committed such a prohibited labor practice by unilaterally
12 changing the discipline and discharge procedures in this case. We agree and find that Frabbiele
13 has proved as much by a preponderance of the evidence.

14 The evidence established that the City did commit a unilateral change to the discharge
15 and disciplinary process. We look first to the collective bargaining agreement to establish the
16 process that had been bargained for by the City. In addition, the past practice can establish the
17 terms of employment where the collective bargaining agreement is silent. City of Reno, 118 Nev.
18 at 899, 59 P.3d at 1219. Long-standing internal rules may also demonstrate the existing terms of
19 employment. See Jenkins v. Las Vegas Metropolitan Police Dept., Item No. 775A, EMRB Case
20 No. A1-046020 (Jan. 24, 2013).

21
22 Under the established process, the City does possess the ability to discipline its police
23 officers for misconduct, including termination of employment if necessary, but only through the
24 specified process. That process incorporated the police officers bill of rights, NRS 289.020-.120,
25 into the collective bargaining agreement and thus required notices given to an officer for punitive
26 actions and granted the officer certain rights of representation during disciplinary proceedings. In
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1 addition, prior to imposing any discipline the City holds a mitigation hearing to allow an officer
2 the opportunity to be heard. Even more significantly for purposes of this case, Article 23 of the
3 collective bargaining agreement allows an officer that has been disciplined to challenge that
4 discipline through a grievance process that culminates in a final and binding arbitration. This
5 point is especially important because a non-confirmation is not considered disciplinary and
6 therefore an officer that has been non-confirmed does not have the same grievance rights that
7 attach to disciplinary actions.
8

9 In this case, the City impermissibly collapsed elements of the disciplinary process and
10 elements of the non-disciplinary non-confirmation process into one process. This spawned an
11 altogether new process that was used to terminate Officer Frabbiele. The City went through the
12 motions of a disciplinary action, but used a non-disciplinary process to impose discipline on him
13 and terminate his employment. The effect of this was to impose upon Frabbiele all of the
14 negative aspersions that accompany disciplinary action, including labeling Frabbiele as
15 untruthful as was discovered at the hearing before the Board, while simultaneously denying him
16 the ability to contest those aspersions through the bargained-for grievance process.
17

18 It appears that even the Association was confused by the City's action, as in denying the
19 grievance it did not comprehend what had occurred. It alternatively characterized Frabbiele's
20 discharge as a disciplinary for-cause discharge, and also as a simple non-confirmation based
21 upon Frabbiele's probationary status.
22

23 We make no finding as to whether or not the City had just cause to discipline Frabbiele.
24 That is a question for the grievance process. We do find that the City changed the disciplinary
25 process by using the non-confirmation process to impose that discipline.
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1 The City did not bargain for the ability to use non-confirmation to impose discipline. This
2 was confirmed at the hearing by the President of the Association Terrence McAllister. The City's
3 good faith bargaining obligations meant that in order to impose discipline on Officer Frabbiele it
4 was bound to follow the bargained-for process. In this case, the City attempted to pick and
5 choose what was most beneficial from the disciplinary process and what was most beneficial
6 from the non-confirmation process to create an entirely new process. This is the same type of
7 action that was confirmed as a prohibited labor practice in City of Reno.

8
9 We have previously addressed the City's use of this non-confirmation to impose
10 discipline. In Boykin v. City of North Las Vegas, Item No. 674E, EMRB Case No. A1-045921
11 (Nov. 12, 2010), we found that the City was guilty of a prohibited labor practice for the exact
12 same action of using the same non-confirmation process to impose discipline on a police officer.
13 Just as we did in Boykin, we find the City's actions to be a prohibited labor practice in violation
14 of NRS 288.270(1)(a) and NRS 288.270(1)(e).
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18 Discrimination Based Upon Personal Affiliations

19 NRS 288.270(1)(f) prohibits a local government employer from discriminating against an
20 employee based upon "political or personal reasons or affiliations." Under this clause of
21 subsection (f), charges of discrimination based upon protected conduct are analyzed under the
22 modified Wright Line test adopted in Bisch v. Las Vegas Metropolitan Police Dept., 302 P.3d
23 1108 (Nev. 2013).
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25 Under this test, a complainant first bears the burden to present credible evidence to
26 support an inference that protected conduct was a motivating factor in the employer's decision.
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1 Bisch at 1116-1117. Only if this burden is met does the employer then bear the burden to prove
2 that it would have taken the same action even absent the protected conduct. Id.

3 Officer Frabbiele has not met his burden to present credible evidence to support the
4 inference that his association with Officer Carter was a motivating factor in the City's decision to
5 terminate his employment.
6

7 The evidence presented by Officer Frabbiele only established that he was friends with
8 Officer Carter, that he had used Officer Carter's name on the parking citation, and that Officer
9 Carter's personal and religious concerns may have alienated Officer Carter from one or two other
10 members of the North Las Vegas Police Department. While one of these officers was Sgt.
11 Roberts, the connection is far too tenuous to support the great leap of logic that Frabbiele asks the
12 court to make in order to connect his termination to Officer Carter's personal and religious matters.
13 Nothing suggests that Chief Paresi, who made the final decision to non-confirm Frabbiele, was
14 affected by any of Frabbiele's personal affiliations. In our view the evidence does not rise above
15 mere speculation and simply does not support an inference that the City was motivated to
16 terminate Officer Frabbiele's employment due to his affiliation with Officer Carter.
17

18 Even if Frabbiele were able to connect his termination to his friendship with Officer
19 Carter, the City would still have met its burden to prove that it still would have taken the same
20 actions against Officer Frabbiele. The City's final decision was concerned with what Frabbiele
21 had done rather than the other members of the police force with whom Frabbiele had associated.
22 Prior to the mitigation hearing, the City had identified specific policies that it charged Frabbiele
23 with violating. Thus, we find that the City would have taken the same actions against Officer
24 Frabbiele even absent his friendship with Officer Carter. Further, nothing suggests that this was a
25 pre-text in order to discriminate against Frabbiele due to his personal affiliations.
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1 Discrimination Based Upon Sex

2 Allegations of discrimination based upon protected classifications under N S
3 288.270(1)(f), including sex, are analyzed under the burden shifting test stated in City of North
4 Las Vegas. In order to state a *prima facie* case of discrimination, Officer Frabbiele must sh w
5 that 1) he belongs to a protected class; 2) that he was qualified for his job; 3) that he was subj t
6 to an adverse employment action and 4) that similarly situated employees not in his protec.ed
7 class received more favorable treatment. City of North Las Vegas, 261 P.3d at 1078.
8

9 Frabbiele has shown that he is a member of a protected class, as the Act prohibits
10 discrimination based upon either sex. Id. at 1078-1080. Frabbiele has further shown that he was
11 qualified for his job; he had obtained the necessary certifications and aside from the parking
12 ticket the City did not show deficient performance on the part of Officer Frabbiele. Even the
13 parking ticket was valid to the extent that the subject vehicle was apparently parked illegally.
14 Thus, we find that Frabbiele was qualified for his job. There is no question that Frabbiele was
15 the subject of an adverse employment action when his employment was non-confirmed effective
16 September 11, 2007.
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18 However, Frabbiele has not demonstrated a *prima facie* case because he has not shown
19 that similarly situated female employees have received more favorable treatment than he. When
20 deciding whether two employees are similarly situated the employees need not be identical, but
21 they must be similarly situated in all material respects. City of North Las Vegas at 1079 (quoting
22 Nicholson v. Hyannis Air Service, Inc., 580 F.3d 1116, 1125 (9th Cir.2009)). This does not
23 require a showing of identical circumstances, but the evidence must still demonstrate a
24 reasonably close resemblance of the facts and circumstances of the complainant's and the
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1 comparator's cases. Id. In determining whether employees are in fact similarly situated we
2 consider all relevant factors. Id.

3 Frabbiele points to the actions and subsequent discipline of Officer Kathryn Buehler, who
4 received only a two-week suspension without pay rather than a non-confirmation. We do not find
5 that Officer Frabbiele was similarly situated to Officer Buehler. Principally, the evidence does
6 not show that Officer Frabbiele and Officer Buehler engaged in comparable conduct. The details
7 in Officer Buehler's case concerned off duty conduct in which she was a passenger in a single
8 vehicle accident. In Frabbiele's case, the City determined that he was untruthful, but no such
9 evidence was presented regarding Officer Buehler. Both Officer Buehler and Chief Chronister
10 confirmed that truthfulness was not an issue in her discipline. The City was clearly concerned in
11 this case that Frabbiele's conduct involved a personal bias and abuse of his police authority. In
12 contrast, the incident involving Officer Buehler raised no such concerns. In Officer Buehler's
13 case, she had completed her probationary period and was a confirmed officer at the time she
14 faced discipline. Frabbiele, on the other hand, had not yet completed a probationary period and
15 was still a probationary officer when he faced discipline. There also appears to be a notable time
16 gap between the two incidents. Officer Buehler testified that the conduct giving rise to her
17 discipline occurred in December of 2005. In Frabbiele's case the incident occurred on May 31,
18 2007.

19 Further, Frabbiele did not show that female officers were actually treated more favorably.
20 At the hearing Chief Chronister testified as to a number of female officers, both probationary and
21 confirmed, who had been terminated for truthfulness violations. The Board finds that these
22 officers are more appropriate comparators to Officer Frabbiele because of their comparable
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1 conduct and concerns over truthfulness. As these officers were also terminated, we do not see
2 any more favorable treatment.

3 Accordingly, we find that Officer Frabbiele has not met his burden to show a *prima facie*
4 case of discrimination because he has not demonstrated that similarly situated female employees
5 received more favorable treatment.
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7 IV.

8 REMEDY

9 Having found that Officer Frabbiele was the victim of a prohibited labor practice based
10 upon the City's unilateral change, we turn to the appropriate remedy for the City's violation. We
11 conclude that Officer Frabbiele must be reinstated to his status that existed prior to the City's use
12 of non-confirmation to impose discipline. Thus, we order Officer Frabbiele to be reinstated to the
13 same status that he held on September 10, 2007 prior to reporting to the Chief's office to receive
14 his discipline - that of on administrative leave with pay pending the City's decision on
15 disciplinary action. This reinstatement must be subject to any seniority status that Officer
16 Frabbiele may have held and in consideration of any reductions in force that the City may have
17 made subsequent to Frabbiele's non-confirmation. As Frabbiele's status prior to the prohibited
18 labor practice entitled him to receive pay we also find that an award of back pay is appropriate in
19 this case. The City shall provide back pay to Officer Frabbiele from the period of September 12,
20 2007 to the effective date of his reinstatement pursuant to this order. Any amount of back pay
21 shall be offset by the salary or earnings that Officer Frabbiele has obtained during that same
22 period.
23

24 We also find that the City's prohibited labor practice deprived Officer Frabbiele of the
25 benefit of a clean disciplinary record, and we order the City to immediately expunge any and all
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1 adverse findings, including any finding of untruthfulness, that it may have made against Officer
2 Frabbiele in connection with the internal affairs investigation discussed above. Our order does
3 not preclude the City from taking disciplinary action or making any appropriate finding against
4 Frabbiele upon his reinstatement, provided that in doing so the City follows the required
5 disciplinary process and allows Officer Frabbiele the ability to grieve any discipline in
6 accordance with the terms of the collective bargaining agreement.
7

8 We find that an award of reasonable costs pursuant to NRS 288.110(6) is appropriate. We
9 direct Frabbiele to submit a memorandum of his claimed costs in this matter to the Board within
10 30 days of the date of this order. The City then shall be allowed 15 days to submit any opposition
11 to Frabbiele's claimed costs.
12

13 Based upon the foregoing, the Board makes the following findings of fact and
14 conclusions of law.
15

16 V.

17 FINDINGS OF FACT

18 1. Complainant Timothy Frabbiele was employed by the City of North Las Vegas as a
19 police officer effective July 24, 2006.

20 2. As a police officer, Frabbiele's employment was governed by the collective bargaining
21 agreement between the City and the North Las Vegas Police Officers Association.
22

23 3. The collective bargaining agreement incorporated the Police Officers Bill of Rights for
24 disciplinary procedures.

25 4. The collective bargaining agreement did not distinguish between the rights of
26 probationary officers and confirmed officers for disciplinary matters.
27
28

1 5. The collective bargaining agreement did not include the ability to use non-confirmation
2 to impose discipline on an officer.

3 6. On June 28, 2007 the City notified Officer Frabbiele that he was the subject of an internal
4 affairs investigation that arose out of a parking ticket that had been issued on May 31, 2007.

5 7. On July 5, 2007 the City placed Officer Frabbiele on administrative leave with pay.

6 8. The internal affairs investigation was conducted by then-Sgt. Justin Roberts.

7 9. Sgt. Roberts interviewed Officer Frabbiele during the course of the internal affairs
8 investigation. During this interview Sgt. Roberts questioned officer Frabbiele about the marital
9 status and dating situation of Officer Brent Carter.

10 10. On August 28, 2007, Sgt. Roberts informed Officer Frabbiele that the internal affairs
11 investigation had been concluded, and identified five possible violations of Department Policies
12 and Procedures: Unprofessional Conduct, Violation of the Code of Ethics, Violation of
13 Truthfulness policy, Impermissible Access to JLINK/Scope Systems and improper radio
14 checkout on vehicle stops.

15 11. The August 28, 2007 memorandum from Sgt. Roberts instructed Officer Frabbiele to
16 report for a mitigation hearing to take place on September 5, 2007.

17 12. The mitigation hearing did take place on September 5, 2007. During the mitigation
18 hearing Officer Frabbiele read a prepared statement that referred to Officer Brent Carter.

19 13. On September 5, 2007 the City instructed Officer Frabbiele to report to the Chief of
20 Police on September 10, 2007 to receive discipline.

21 14. On September 10, 2007 the City gave Frabbiele written notification that due to the
22 internal affairs investigation his employment with the City was non-confirmed effective
23 September 11, 2007.
24
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1 15. The City did not make any formal findings that any of the five possible violations noticed
2 in the August 28, 2007 memorandum had been sustained.

3 16. On or about September 25, 2007, Frabbiele attempted to file a grievance through the
4 North Las Vegas Police Officers Association to challenge his termination. This grievance
5 asserted that his termination was not supported by just cause and that Frabbiele had been the
6 victim of discrimination.
7

8 17. The North Las Vegas Police Officers Association denied the grievance.

9 18. On or about January 2, 2008 Frabbiele wrote to the City to request a copy of his internal
10 affairs file. Frabbiele invoked his rights under NRS 289.080.
11

12 19. Prior to January 21, 2008 Frabbiele reasonably believed that the City had taken
13 disciplinary action against him.

14 20. On January 21, 2008 the City responded to Frabbiele's request. In this response, the City
15 for the first time indicated that it had substituted a non-disciplinary process in order to non-
16 confirm Frabbiele's employment.
17

18 21. Frabbiele did not have unequivocal notice of the City's unilateral change to the discipline
19 and discharge process prior to January 21, 2008.

20 22. The September 10, 2007 notice provided Frabbiele with unequivocal notice of his alleged
21 prohibited labor practice based upon his personal affiliation with Officer Carter.
22

23 23. Frabbiele had unequivocal notice of his alleged sex discrimination allegation by
24 September 25, 2007.

25 24. Frabbiele filed his complaint with this Board on March 11, 2008.

26 25. The City unilaterally changed the discipline and discharge procedure when it used the
27 non-confirmation process to discipline Frabbiele and terminate his employment.
28

1 26. The termination of Frabbiele's employment was a punitive action against him.

2 27. By invoking the non-confirmation process, the City intended to deprive Frabbiele of the
3 right to grieve his termination in accordance with the terms of the collective bargaining
4 agreement.
5

6 28. The City did not negotiate with the Association for the right to use the non-confirmation
7 process to impose discipline.

8 29. Officer Frabbiele's affiliation with Officer Carter was not a motivating factor in the
9 City's decision to terminate his employment.
10

11 30. The City would have taken the same actions against Officer Frabbiele even in the absence
12 of his personal affiliation with Officer Carter.

13 31. Officer Frabbiele is member of a protected class based upon his sex.

14 32. Officer Frabbiele was qualified for his job as police officer.

15 33. Officer Frabbiele was subject to an adverse employment action when the City terminated
16 his employment effective September 11, 2007.
17

18 34. Officer Frabbiele is not similarly situated to Officer Kathryn Buehler as stated herein.

19 35. As a result of the City's unilateral change to the disciplinary process, Officer Frabbiele
20 was deprived of the benefit of a clean disciplinary record.
21

22 36. As a result of the City's unilateral change, Officer Frabbiele was deprived of the right to
23 challenge his termination for just cause.

24 37. The status quo that existed prior to the City's prohibited labor practice is that which
25 existed between the mitigation hearing on September 5, 2007 and the notice of termination
26 provided on September 10, 2007. Under this status Officer Frabbiele was on administrative leave
27 with pay and awaiting formal imposition of discipline following the mitigation hearing.
28

1 38. If any of the foregoing findings is more appropriately construed as a conclusion of law, it
2 may be so construed.

3 VI.
4

5 CONCLUSIONS OF LAW

6 1. The Board is authorized to hear and determine complaints arising under the Local
7 Government Employee-Management Relations Act.

8 2. The Board has exclusive jurisdiction over the parties and the subject matters of the
9 Complaint on file herein pursuant to the provisions of NRS Chapter 288.

10 3. The six-month limitations period under NRS 288.110(4) commences upon unequivocal
11 notice of prohibited labor practice.

12 4. Consistent with six-month limitations period contained in the National Labor Relations
13 Act, the date of the prohibited labor practice is not included when calculating the limitations
14 period.
15

16 5. Six months from September 11, 2007 is March 11, 2008.

17 6. Office Frabbiele's complaint is timely filed for all allegations as stated herein.

18 7. The City of North Las Vegas is a local government employer subject to the Act.

19 8. The City is obligated to bargain in good faith over discipline and discharge procedures
20 pursuant to NRS 288.150(2)(i).
21

22 9. The City did not bargain for the ability to use non-confirmation in order to impose
23 discipline on its police officers.
24

25 10. The established terms of employment required the City to make a finding concerning the
26 allegations in an internal affairs investigation of either sustained, not sustained, exonerated,
27 unfounded or policy and procedure failure.
28

11. The City never made any finding concerning the allegations in the internal affairs investigation of Officer Frabbiele.

12. The City unilaterally changed the bargained-for discipline and discharge procedures when it used non-confirmation in order to impose discipline on Officer Frabbiele.

13. The City's unilateral change was made in violation of NRS 288.270(1)(a) and NRS 288.270(1)(e).

14. The City did not discriminate against Officer Frabbiele due to his personal affiliations.

15. The City did not discriminate against Officer Frabbiele due to his sex.

16. Officer Frabbiele's complaint is well-taken based upon the finding of unilateral change against the City.

17. An award of costs, including attorneys' fees, pursuant to NRS 288.110(6) is warranted in this case.

18. The policies and purposes of the Local Government Employee-Management Relations Act are properly served by the remedies ordered by the Board in this matter.

19. If any of the foregoing conclusions is more appropriately construed as a finding of fact, it may be so construed.

VII.

ORDER

Pursuant to the findings of fact, conclusions of law and discussion set forth above; it is hereby ordered that the City shall reinstate Officer Frabbiele to the status of on administrative leave with pay, subject to seniority considerations as stated above.

It is further ordered that the City shall provide back pay to Officer Frabbiele from the period of September 12, 2007 to the date of his reinstatement pursuant to this order. Such back

1 pay shall include salary and other benefits that would have been earned by Officer Frabbiele
2 during this time period and must be offset by any of Frabbiele's earnings from the same time
3 period.
4

5 It is further ordered that the City shall immediately expunge any and all adverse
6 determinations or findings, whether formal or not, against Officer Frabbiele in connection with
7 the internal affairs investigation identified as PD 07-I-16 and referenced above.

8 It is further ordered that the City shall pay Frabbiele's reasonable costs incurred in this
9 matter pursuant to NRS 288.110(6). Frabbiele shall submit a memorandum detailing his claimed
10 costs within 30 days of the date of this order. The City may oppose any claimed costs within 15
11 days thereafter.
12

13 DATED this 25th day of September, 2014.
14

15 LOCAL GOVERNMENT EMPLOYEE-
16 MANAGEMENT RELATIONS BOARD

17 BY:



18 PHILIP E. LARSON, Chairman

19 BY:



20 BRENT ECKERSLEY, ESQ., Vice-Chairman

21 BY:



22 SANDRA MASTERS, Board Member
23
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STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

TIMOTHY FRABBIELE,
Complainant,

vs.

CITY OF NORTH LAS VEGAS; NORTH
LAS VEGAS POLICE DEPARTMENT AND
NORTH LAS VEGAS POLICE OFFICERS
ASSOCIATION,

Respondents.

CASE NO. A1-045929

NOTICE OF ENTRY OF ORDER

To: Adam Levine, Esq.
Law Office of Daniel Marks

To: Malani L. Kotchka, Esq.
Lionel Sawyer & Collins

PLEASE TAKE NOTICE that an ORDER was entered in the above-entitled matter on
September 25, 2014.

A copy of said order is attached hereto.

DATED this 25th day of September, 2014.

LOCAL GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY


YVONNE MARTINEZ, Executive Assistant

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Adam Levine, Esq.
Law Office of Daniel Marks
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Las Vegas, NV 89101


YVONNE MARTINEZ, Executive Assistant