STATE OF NEVADA

LOCAL GOVERNMENT EMPOLOYEE-MANAGEMENT RELATIONS BOARD

TROYCE KRUMME, individually; LAS VEGAS POLICE MANAGERS AND SUPERVISORS ASSOCIATION, Complainants, v. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Case No. 2016-010 **ORDER** **ITEM NO. 822**

On March 13, 2017, this matter came before the State of Nevada, Local Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Local Government-Management Relations Act (the "Act"), NAC Chapter 288 and NRS Chapter 233B. The Board held a 2-day administrative hearing on this matter on December 13-14, 2016 in Las Vegas, Nevada. The Board accepted post-hearing briefs in this matter as well.

Complainants claim that the Las Vegas Metropolitan Police Department ("LVMPD") unilaterally changed the terms and conditions of employment when it refused to attach Sgt. Krumme's rebuttal statement to his written reprimand in his personnel file; when it added a disciplinary component to the TRB process; and when it abandoned its pattern and practice of written reprimands being administered by an employee's immediate supervisor. Sgt. Krumme also claims that he is a victim of discrimination by LVMPD due to personal and political reasons based in part on negative media attention LVMPD received for a shooting death that occurred inside a resort corridor casino.

Sgt. Krumme is assigned as a detective sergeant in the Robbery Section with LVMPD. In November 2014, a series of armed robberies occurred in multiple Las Vegas casinos. LVMPD identified a suspect it believed responsible for the crimes. On or about December 4, 2014, detectives began surveillance of said suspect. LVMPD's Career Criminal Section detectives were assigned to the surveillance of the suspect. On or about December 6, 2014, the surveillance team was monitoring the

suspect. Acting Sgt. Scott Thomas learned that Robbery detectives had ended their shift at that point. Due to the actions of the suspect, acting Sgt. Thomas advised a Robbery detective assigned to the case, Philip DePalma, to contact Robbery detectives and find out what they wanted and to monitor the radio traffic. DePalma contacted Sgt. Krumme and updated him on the situation and gave him the information provided by Career Criminal detectives.

Sgt. Krumme, who was off duty at the time, turned on his radio and began to monitor the surveillance. The surveillance team approached the MGM hotel, and Sgt. Krumme announced himself over the radio. When the suspect was leaving the MGM, the surveillance team believed they had sufficient evidence to make an arrest on probable cause and Sgt. Thomas made requests over the radio requesting Robbery's (Sgt. Krumme's) direction on whether to take the suspect into custody. Sgt. Krumme did not immediately give direction and, due to the delay, the suspect was able to leave the MGM area.

Sgt. Krumme eventually advised the squad that if they could take the suspect into custody safely, they should do so. Once inside the Rio Casino, Detectives Sean Beck and Thomas Faller attempted to take the suspect into custody. While the detectives were attempting to take the suspect into custody, actions occurred which lead to the eventual death of the suspect.

LVMPD's Critical Incident Review Team ("CIRT") conducted an investigation into this matter. CIRT is a component of the Critical Review Process ("CIRP"). CIRT concluded that Krumme did not direct the investigation to LVMPD's standards, noting that his inability to provide an immediate response to the surveillance team when requested delayed the apprehension of the suspect. As part of the review process, a Tactical Review Board ("TRB") was convened on or about January 28, 2016 to review the event and CIRT's findings. The TRB issued its findings, noting that "there was a complete breakdown in command and control due to the lack of decision making by [Complainant]." The TRB noted that when a decision was requested by the team, the entire team was available to apprehend the suspect in a parking lot instead inside the Rio Hotel.

Pursuant to the findings of CIRT and the TRB's validation of the same, an Adjudication of Complaint ("AOC") was issued to Sgt. Krumme. Based on these findings, a written reprimand was issued. The AOC was issued by Assistant Sheriff Todd Fasulo, who was the chairman of the TRB.

Sgt. Krumme lodged a grievance challenging the written reprimand pursuant to the parties' CBA. Under the CBA, a grievance of a written reprimand is to be heard by a member two ranks above the grievant. As such, Captain Jason Letkiewicz heard the grievance. At the conclusion of Sgt. Krumme's grievance hearing, Capt. Letkiewicz issued a written grievance response, concluding that he found "no legitimate cause or justification to override the [TRB's] decision" and denied the grievance. Since Sgt. Krumme's grievance hearing, the parties negotiated a new CBA and, under the new terms of the CBA, grievances for written reprimands issued by the TRB are reviewed by the Sheriff.

On or about March 15, 2016, Sgt. Krumme requested a rebuttal statement be attached to the AOC and placed in his personnel file pursuant to NRS 289.040 and Article 24.3 of the CBA. On or about March 21, 2016, LVMPD declined to attach said rebuttal, stating that because the rebuttal was for an AOC, NRS 289.040 did not apply.

DISCUSSION

Unilateral Change

NRS 288.270(1)(e) deems it a prohibited labor practice for a local government employer to bargain in bad faith with a recognized employee organization and a unilateral change to the bargained for terms of employment is regarded as a per se violation of this statute. A unilateral change also violates NRS 288.270(1)(a). *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (May 15, 2015). Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002).

An employer may create, by practice over a substantial period of time, a term or condition of employment which it is obligated to continue, subject to negotiation. *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220.

A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms or conditions of employment have been changed by the employer such that after the occurrence which is the subject of the complaint, terms of the employment differ

from what was bargained for or otherwise established. *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (May 15, 2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, EMRB Case No. A1-045965 (Oct. 5, 2010). Typically, a complainant can meet this burden by showing the following four elements: (1) the employer breached or altered the CBA or established past practice; (2) the employer's action was taken without bargaining with the union over the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not merely an isolated breach of contract, but amounts to a change in policy (*i.e.* the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment). *O'Leary*, at 7; *California State Employees' Ass'n v. Pub. Employment Relations Bd.*, 51 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d 488, 496 (1996).

Rebuttal Statement

As indicated, Complainants claim that LVMPD unilaterally changed the terms and conditions of employment when it refused to attach Sgt. Krumme's rebuttal statement to his written reprimand in his personnel file. The Board agrees.[1]

The plain wording of the CBA as well as past practice make clear that LVMPD committed a prohibited labor practice in this regard. The parties' CBA provides, in pertinent part:

> C. Rebuttal Statement ... The employee may file a written response that is specific to the adverse comment or document entered into his/her personnel file within 30 days after he or she is asked to initial or sign the comment or document. If a written response is prepared by the employee, the Department **must** attach the employee's written response to the adverse comment or document....

[1] LVMPD argues that this matter is moot because the rebuttal statement was eventually attached to AOC and, in any event, the rebuttal statement and AOC have been purged from Sgt. Krumme's personnel file, citing a number of prior Board decisions. The Board disagrees and notes that those prior decisions do not stand for the broad proposition LVMPD advances. *See Water Employees Ass'n v. Las Vegas Water Dist.*, Case No. A1-045454, Item No. 245 (1990) (holding the matter moot because the arbitration issued a final and binding award ordering reimbursement for the increased premiums); *Reno Police Prot. Ass'n v. Reno Police Dep't*, Case No. A1-045645, Item No. 457 (2000) (solely holding that due to the arbitrator's decision invaliding the memorandum, the remedy requested has become moot); *Int'l Brotherhood of Teamsters, Local 533 v. City of Fallon*, Case No. A1-045631, Item No. 424 (holding that since both parties subsequently agreed to ratify the agreement subject to resolving the issue of whether disciplinary matters are subject to the arbitration procedures, that action effectively remedies any claim of bad faith bargaining). Here, the matter is not moot as Sgt. Krumme alleges he did not receive a new position (and has still not received said position) because of the action. *See also* discussion *infra* re remedy.

CBA, Article 24.3(C) (**emphasis** added).

The parties argue that NRS 289.040 either prohibits or allows for the attachment of the rebuttal statement in this matter. LVMPD argues that the right to attach a rebuttal statement is statutorily limited by NRS 289. Specifically, LVMPD argues that NRS 289 stands for the proposition that "the right to submit a rebuttal statement to an unfavorable document does not extend to those born out of an investigation subject to NRS 289.057, such as CIRP/TRB." Closing Brief, at 18. While not clearly dictated as such in NRS 289, LVMPD nonetheless argues that, "[i]n this case, the AOC issued out of the TRB and, therefore, the right outlined in subsection 1 of the statue is inapplicable and the Department was not obligated to attach the rebuttal statement to the AOC." Closing Brief, at 18.

Preliminarily, the Board notes that the CBA is clear and unmistakable in its requirements, and the parties could have chosen to incorporate LVMPD's argument in their CBA, which they did not. In any event, to the extent the parties seek the Board to interpret NRS 289 in this specific case (or find a violation thereof), that is expressly beyond this Board's jurisdiction. NRS 288.110(2); NAC 288.200(1)(c); *Bonner v. City of North Las Vegas*, Case No. 2015-027 (2017), *citing City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474–75, 653 P.2d 156, 158 (1982); *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union*, 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); NRS 233B. 135(3)(B); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case No. A1-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. A1-04611, Item No. 796 (2014); *see e.g., Flores v. Clark Cty.*, Case No. A1-045990, Item No. 737 (2010); *Rosequist v. International Ass'n of Firefighters Local 1908*, 118 Nev. 444, 49 P.3d 651 (2002); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 896-900, 59 P.3d 1212, 1217-20 (2002); *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 467 P.2d 96 (1970).

Moreover, the past practice of the parties demonstrated that attaching a rebuttal statement became a term or condition of employment which LVMPD was obligated to continue, subject to negotiation. The Board heard evidence, which it finds credible, from former Chairman John Faulis, who testified that he had no knowledge of LVMPD ever refusing to attach an employee's timely-submitted rebuttal statement to an adverse document prior to Director Frost taking over as Labor Relations Director. The Board also finds testimony credible from current PMSA Chairman Michelle

Jotz, who previously worked with the Police Protective Association for seven years, that she had never seen a timely-submitted rebuttal denied by LVMPD. Furthermore, Director Frost's predecessor, former Labor Relations Kelley Sweeney, with almost 15 years of experience in LVMPD's Labor Relations, stated that she had never denied a timely rebuttal statement and saw no reason for doing so.

The Board also finds that sufficient evidence was presented that the change was not merely an isolated breach of contract, but amounts to a change in policy (*i.e.* the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment). Director Frost admitted that it was her position that employees do not have a right to attach rebuttal statements in this regard. Director Frost testified that LVMPD can attach or deny a rebuttal statement as it sees fit, and the decision will be made on a case by case basis moving forward.

Finding that a prohibited labor practice has been committed, the Board turns to the appropriate remedy to be ordered based on the facts of this case. Complainants request that Sgt. Krumme be given an immediate transfer to Homicide or, in the alternative, that he be transferred to Homicide at the next available vacancy. However, it is beyond the Board's authority to order as such.

The Board "may order ... to restore to the party aggrieved any benefit of which the party has been deprived by that action." NRS 288.110(2). Sgt. Krumme claims that when he tested for the Homicide Section first line supervisor position, Sgt. Krumme was asked about the reprimand. Sgt. Krumme states that when he was notified that he failed the oral board, the main justification was that he had received discipline and failed to take ownership. Complainants claim that the oral board did not have the ability to review his rebuttal to the discipline because it was not attached to his personnel file. While it appears that Sgt. Krumme could have explained his rebuttal orally to the Board, but even if he was precluded from doing so, Sgt. Krumme assumes he would have obtained the position. The Board finds that Complainants failed to present sufficient evidence that Sgt. Krumme would have obtained the position if the rebuttal statement had been placed in his personnel file. As such, it is beyond this Board's authority to order an immediate transfer to Homicide, as Complainants request. *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 681, 119 P.3d 1259, 1263 (2005). Moreover, NRS 288.110(2) is clearly permissive in nature.

The Board finds that based on the facts in this case the appropriate remedy here is to order that Krumme be immediately allowed to test for the Homicide Section first line supervisor. While normally the Board would order that the rebuttal statement be attached to the AOC, it is undisputed that the AOC and rebuttal statement have now been purged from Krumme's personnel file. As such, when Krumme now tests, there will be no AOC in his personnel file in this regard.

Tactical Review Board

As indicated, Complainants also claim that LVMPD unilaterally changed the terms and conditions of employment when it added a disciplinary component to the TRB process.

A past practice by the parties may evidence that a party waived a statutory or contractual right, but such waiver must be clear and unmistakable. *Washoe County Teachers Ass'n v. Washoe County Sch. Dist.*, Case No. A1-045678, Item No. 470C (2001), at 4, *citing Ormsby County Educ. Ass'n v. Carson City Sch. Dist.*, Case No. A10945527, Item No. 311; *see also El Dorado Cty. Deputy Sheriff's Ass'n v. Cty. of El Dorado*, 244 Cal. App. 4th 950, 956, 198 Cal. Rptr. 3d 502, 507 (2016) (holding that "[f]ailure by the [employee organization] to assert its bargaining rights after receiving notice of the proposed change in terms of employment constitutes waiver of its rights."). "To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." *American Distrib. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983) (citations omitted). "In addition, the employer must show that the union failed to make a timely bargaining request before the change was implemented." *Id.*

The Board finds that Complainants' waiver in this matter is clear and unmistakable, and PMSA had clear notice of LVMPD's intent to institute the change sufficiently in advance of actual implementation. It is also undisputed that PMSA failed to make a timely bargaining request. The Board heard testimony of Faulis in this regard, which it finds credible. The testimony of Faulis (who retired from LVMPD in 2016, with the last six years of his employment serving as the chairman of the Police Managers and Supervisors Association ("PMSA")), demonstrated that the current version of the TRB policy was known to the PMSA well before its implementation and was published. Faulis explained that LVMPD sends proposed policy changes to the PMSA in advance of the effective date of

the policy and specifically received advanced notice of the policy challenged in this case. Faulis explained that when the PMSA received the revisions to the policy, the PMSA "let [LVMPD] know of some things [the PMSA was] concerned with." The concerns the PMSA raised at that time were the same issues raised in this case. These discussions occurred in 2010 or 2011 when the policy was revised. Thus, the PMSA waited 5-6 years to bring an action regarding the alleged unilateral change. Moreover, as Faulis testified, the policy regarding the TRB has been in place at its latest revised version since August of 2014, almost two years prior to when Sgt. Krumme's TRB occurred. Faulis also stated that it was "[s]pecifically regarding the administration of the TRB, the scope that it was handling these events with supervisors." PMSA chose to allow the policy to continue and LVMPD's reliance was upon the same. As such, Complainants waived any claim in this regard. *See also Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 705, 103 S. Ct. 1467, 1476, 75 L. Ed. 2d 387 (1983) (stating that the courts have "long recognized that a union may waive a member's statutorily protected rights....").

In any event, the Board finds that Faulis' testimony at the hearing revealed that the PMSA and LMVPD did negotiate the policy in good faith. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010) (holding that "an employer commits a prohibited labor practice when it changes the terms and conditions of employment which fall under the subjects of mandatory bargaining listed in NRS 288.150 without first bargaining in good faith with the recognized bargaining agent."); *Stone Boat Yard v. N.L.R.B.*, 715 F.2d 441, 444 (9th Cir. 1983); *M & M Contractors*, 262 NLRB 1472 (1982); *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 376, 849 P.2d 343, 350 (1993); *Reno Municipal Employees Ass'n v. City of Reno*, Item No. 93 (1980). Indeed, in addition to the above, Faulis also testified that these issues with the TRB were specifically discussed in negotiations.

First Line Supervisor

Complainants further claim that LVMPD unilaterally changed the terms and conditions of employment when it abandoned its patterns and practice of written reprimands being administered by an employee's immediate supervisor. The Board disagrees.

Preliminarily, the parties' CBA does not provide that the first line supervisor is the only person who can issue discipline. Complainants concede this fact, instead arguing that "LVMPD breached a

long-established past practice regarding the manner in which discipline is administered when Assistant Sheriff Fasulo directly issued a written reprimand to Sergeant Krumme." Closing Brief, at 14. As such, the Board turns to whether LVMPD altered an established past practice in this regard. The Board finds that Complainants failed to present sufficient evidence of such.

The Board finds Assistant Sheriff Fasulo's testimony credible that it does not always have to be the first line supervisor issuing the reprimand. Moreover, the Board finds Capt. Letkiewicz's testimony credible that he would have modified the grievance if he thought appropriate despite the fact that the reprimand was issued by the Assistant Sherriff.

As such, the Board finds that Complainants failed to present sufficient evidence that LVMPD created, by practice over a substantial period of time, a term or condition of employment which it was obligated to continue, subject to negotiation. *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220.

Personal/Political Discrimination

Sgt. Krumme also claims he is a victim of discrimination by the Department due to personal and political reasons in violation of NRS 288.270(1)(f). Discrimination of this sort is analyzed under the framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108 (2013).

An aggrieved employee must make a *prima facie* showing sufficient to support the inference that the protected conduct was a motivating factor in the employer's decision. Under the revised framework, "it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed ….". *Bisch*, 302 P.3d at 1116. Once this is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have been taken place even in the absence of the protected conduct. *Id.* The aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is merely pretextual. *Id.*

The Board finds that Krumme did not meet his initial burden to support the inference that his protected conduct was a motivating factor in the Department's decision.

The Board finds testimony credible from Assistant Sherriff Fasulo that he did not have any evidence of the Department being pressured by any casino representative to discipline Sgt. Krumme. Moreover, Assistant Sherriff Fasulo testified that he did not have any evidence that Sgt. Krumme was disciplined as a result of any casino influence. The Board finds that solely because the events took place in the resort corridor and there was negative press about the incident in general, does not support the inference that any protected conduct of Sgt. Krumme was a motivating factor in the Department's decision. Indeed, current PMSA President Michelle Jotz testified that she was not aware of any evidence of pressure from a casino to discipline Sgt. Krumme. Sgt. Krumme himself even testified that he was not aware of any conversations, communications or other evidence of political or personal motivation for the discipline. In the same vein, Sgt. Krumme testified that he had no evidence to prove that the Department used him as a scapegoat or otherwise told anyone involved in the casino industry about his discipline.

As indicated, under the analysis of the framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108 (2013), our Supreme Court instructs that under this revised framework, "it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed by the factfinder". *Bisch*, 302 P.3d at 1116. "Only upon meeting this burden of persuasion does the burden of proof shift to the employer." *Id.* Based on the evidence presented, the Board does not believe the acts were taken for discriminatory purposes. As such, we find that Sgt. Krumme did not meet his initial burden to support the inference that any protected conduct was a motivating factor in LVMPD's decision.

Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter.

FINDINGS OF FACT

1. In November 2014, a series of armed robberies occurred in multiple Las Vegas casinos.

2. While the detectives were attempting to take the suspect into custody, actions occurred which lead to the eventual death of the suspect.

3. LVMPD's CIRT conducted an investigation into this matter.

4. CIRT concluded that Sgt. Krumme did not direct the investigation to LVMPD's standards.

5. As part of the review process, a TRB was convened on or about January 28, 2016 to review the event and CIRT's findings and noted that "there was a complete breakdown in command and control due to the lack of decision making by [Complainant]."

6. An AOC was issued to Sgt. Krumme.

7. The AOC was issued by Assistant Sheriff Todd Fasulo.

8. Sgt. Krumme lodged a grievance challenging the written reprimand pursuant to the parties' CBA.

9. Under the CBA, a grievance of a written reprimand is to be heard by a member two ranks above the grievant.

10. Captain Jason Letkiewicz heard and denied the grievance.

11. On or about March 15, 2016, Sgt. Krumme requested a rebuttal statement be attached to the AOC and placed in his personnel file pursuant to NRS 289.040 and Article 24.3 of the CBA.

12. On or about March 21, 2016, LVMPD declined to attach said rebuttal, stating that because the rebuttal was for an AOC, NRS 289.040 did not apply.

13. The parties' CBA provides that the Department must attach the employee's written response to the adverse comment or document.

14. The past practice of the parties demonstrated that attaching a rebuttal statement became a term or condition of employment which LVMPD was obligated to continue, subject to negotiation.

15. Former Chairman John Faulis had no knowledge of LVMPD ever refusing to attach an employee's timely-submitted rebuttal statement to an adverse document prior to Director Frost taking over as Labor Relations Director.

16. PMSA Chairman Michelle Jotz, who previously worked with the Police Protective Association for seven years, stated that she had never seen a timely-submitted rebuttal denied by LVMPD.

17. Director Frost's predecessor, former Labor Relations Kelley Sweeney, with almost 15 years of experience in LVMPD's Labor Relations, stated that she had never denied a timely rebuttal statement and saw no reason for doing so.

18. Director Frost admitted that it was her position that employees do not have a right to attach rebuttal statements in this regard and that LVMPD can attach or deny a rebuttal statement as it sees fit, and the decision will be made on a case by case basis moving forward.

19. Sgt. Krumme alleges he did not receive a new position (and has still not received said position) because of the action.

20. Krumme assumes he would have obtained the position when he tested for the Homicide Section.

21. The AOC and rebuttal statement have now been purged from Krumme's personnel file.

22. PMSA had clear notice of LVMPD's intent to institute the change sufficiently in advance of actual implementation.

23. PMSA failed to make a timely bargaining request.

24. The testimony of Faulis demonstrated that the current version of the TRB policy was known to the PMSA well before its implementation and was published.

25. Faulis explained that LVMPD sends proposed policy changes to the PMSA in advance of the effective date of the policy and specifically received advanced notice of the policy challenged in this case.

26. The concerns the PMSA raised at that time were the same issues raised in this case.

27. These discussions occurred in 2010 or 2011 when the policy was revised.

28. Faulis testified that the policy regarding the TRB has been in place at its latest revised version since August of 2014, almost two years prior to when Sgt. Krumme's TRB occurred.

29. Faulis also stated that it was "[s]pecifically regarding the administration of the TRB, the scope that it was handling these events with supervisors."

30. PMSA had the opportunity to object but instead allowed the policy to continue and LVMPD's reliance was upon the same.

31. Faulis' testimony revealed that the PMSA and LMVPD did negotiate the policy in good faith.

32. Faulis testified that these issues with the TRB were specifically discussed in negotiations.

33. Assistant Sheriff Fasulo stated that it does not always have to be the first line supervisor issuing the reprimand.

34. Capt. Letkiewicz would have modified the grievance if he thought appropriate despite the fact that the reprimand was issued by the Assistant Sherriff.

35. Assistant Sherriff Fasulo did not have any evidence of LVMPD being pressured by any casino representative to discipline Sgt. Krumme or that Sgt. Krumme was disciplined as a result of any casino influence.

36. PMSA President Michelle Jotz testified that she was not aware of any evidence of pressure from a casino to discipline Sgt. Krumme.

37. Sgt. Krumme himself testified that he was not aware of any conversations, communications or other evidence of political or personal motivation for the discipline and that he had no evidence to prove that the Department used him as a scapegoat or otherwise told anyone involved in the casino industry about his discipline.

38. Based on the evidence presented, the Board does not believe the acts were taken for discriminatory purposes.

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

CONCLUSIONS OF LAW

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

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

3. It is a prohibited labor practice under NRS 288.270(1)(a) and (e) for a local government employer to unilaterally change the terms and conditions of employment concerning a mandatory subject of bargaining.

4. Under the unilateral change theory, an employer commits a prohibited labor practice when its changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent.

5. An employer may create, by practice over a substantial period of time, a term or condition of employment which it is obligated to continue, subject to negotiation.

6. A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms or conditions of employment have been changed by the employer such that after the occurrence which the subject of the complaint, terms of the employment differ from what was bargaining for or otherwise established.

7. A complainant can demonstrate a unilateral change by showing: (1) the employer breached or altered the collective bargaining agreement, or established past practice; (2) the employer's actions was taken without bargaining with the recognize bargaining agent over the change; (3) the change in policy concerns a matter within the scope of representation; and (4) the change is not merely an isolated breach of contract, but amounts to a change of policy, *i.e.*, the change has a generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment.

8. The CBA is clear and unmistakable in its requirements.

9. To the extent the parties seek the Board to interpret NRS 289 in this specific case (or find a violation thereof), that is expressly beyond this Board's jurisdiction.

10. The past practice of the parties demonstrated that attaching a rebuttal statement became a term or condition of employment which LVMPD was obligated to continue, subject to negotiation.

11. The change is not merely an isolated breach of contract, but amounts to a change in policy.

12. In regards to the rebuttal statement, the matter is not moot.

13. The Board "may order ... to restore to the party aggrieved any benefit of which the party has been deprived by that action." NRS 288.110(2).

14. Complainants failed to present sufficient evidence that Sgt. Krumme would have obtained the position if the rebuttal statement had been placed in his personnel file.

15. It is beyond this Board's authority to order an immediate transfer to Homicide. *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 681, 119 P.3d 1259, 1263 (2005).

16. A past practice by the parties may evidence that a party waived a statutory or contractual right, but such waiver must be clear and unmistakable.

17. "To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." *American Distrib. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983) (citations omitted).

18. Complainants' waiver in this matter is clear and unmistakable, and PMSA had clear notice of LVMPD's intent to institute the change sufficiently in advance of actual implementation.

19. Complainants waived any claim in this regard.

20. PMSA and LMVPD did negotiate the policy in good faith.

21. In regards to the first line supervisor issue, Complainants failed to present sufficient evidence that LVMPD created, by practice over a substantial period of time, a term of condition of employment which it was obligated to continue, subject to negotiation.

22. Discrimination due to personal and political reasons is analyzed under the framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108 (2013).

23. An aggrieved employee must make a prima facie showing sufficient to support the inference that the protected conduct was a motivating factor in the employer's decision.

24. Under the revised framework, "it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed ….". *Bisch*, 302 P.3d at 1116.

25. Complainants did not meet their initial burden to support the inference that Krumme's protected conduct was a motivating factor in LVMPD's decision.

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

ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Complainants on the first issue in this case; namely that LVMPD had committed a prohibited practice regarding the rebuttal statement. Accordingly, the Board orders that Krumme be immediately allowed to test for the Homicide Section first line supervisor. The Board finds in favor of Respondent on all other issues.

DATED this 11th day of April, 2017.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____
PHILIP LARSON, Chairman

By: _____
SANDRA MASTERS, Board Member

By: _____
BRENT ECKERSLEY, ESQ., Vice-Chairman