STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

JARED JACKSON,

Complainant,

v.

CLARK COUNTY,

Respondent.

Case No. 2018-007

NOTICE OF ENTRY OF ORDER

TO: Jared Jackson and his attorneys, Daniel Marks, Esq. and Adam Levine, Esq., of the Law Office Daniel Marks;

TO: Clark County and its attorney, Scott Davis, Esq., Deputy District Attorney, Civil Division;

PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on February 26, 2019.

A copy of said order is attached hereto.

DATED this 28 day of February, 2019.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

BY _____
MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 28 day of February, 2019, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Law Office of Daniel Marks
Daniel Marks, Esq.
Adam Levine, Esq.
610 South Ninth Street
Las Vegas, NV 89101

Scott Davis, Esq.
Deputy District Attorney
Civil Division
500 South Grand Central Parkway
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MARISU ROMUALDEZ ABELLAR
Executive Assistant

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

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ORDER

PANEL D

ITEM NO. 837

On December 11, 2018, 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 an administrative hearing on this matter on September 12 and 13, 2018. The Board accepted post-hearing briefs in this matter as well.

Complainant asserts that the issues to be decided by this Board are whether Respondent Clark County (the "County") violated NRS 288.270(1)(a), (e), and (f). Complainant alleges that his termination by the County constitutes a unilateral change to a subject of mandatory collective bargaining in violation of NRS 288.270(1)(a) and (e) because it terminated his employment despite his completion of the 1,040 hour probation period, without any meeting with his supervisors indicating that his performance was less than satisfactory. In addition, Complainant alleges that the County violated NRS 288.270(1)(f) because it discriminated against him for personal or political reasons or affiliations when it terminated his employment.

The County argues that a unilateral change did not occur here as probationary employment is not a mandatory subject of bargaining under NRS 288.150(2), and, in any event, the County did not actually breach the terms of the CBA. Further, the discrimination claim fails as Complainant failed to meet his burden in this regard, and the County let Complainant go due to the "red flags" that came up –

particularly as to how Complainant interacted with his team members and with the customers that are served by the County.

Employees in the County serve a probationary period. The length of the probationary period can vary between a minimum of 520 hours and a maximum of 2,080 hours. The individual department heads are vested with the authority to decide the length of a probationary period, so long as it falls within the range. The probation periods generally depend on the individual's department, and the department's head can establish what the probation period specifically is as long as consistent with the terms of the CBA.

Complainant worked in the Department of Information Technology. The County concedes that nothing prevents a department from taking an employee off probation before working 2,080 hours but this requires an affirmative decision and act by a department to submit an evaluation form on behalf of the employee which did not occur with Complainant.

Per the terms of the CBA, the probationary period will normally be 1,040 hours worked but may not be less than 520 hours worked nor longer than 2,080 hours worked as determined by the department head (the parties used one year/2,080 hours as well as six months/1,040 hours interchangeably throughout the hearing and briefs submitted to the Board). The department head may extend probationary periods only in intervals of 520 hours, and an employee's probationary period may not be extended more than twice. The County is required to notify the employee's union when the employee's probationary period is completed or if it has been extended.

While 1,040 hours is the norm (and is when the IT Department generally starts to consider ending probation), some hires are not taken off probation until they reach the 2,080 hour mark, while others complete probation earlier. At the hearing, the Board heard credible evidence in this regard. Ron McGill, who was hired at the same time as Complainant, and Ted Harris (hired roughly 2 years before Complainant and taken off probation roughly five days before his 2,080 hours) were not taken off probation at the six months, 1,040, hour mark. Indeed, Harris was terminated roughly 5 days before the 1-year mark. As the probationary period in IT is generally initially set as lasting the full year, there was no need to extend the probationary periods in those cases (indeed, it appears if a department sets the probationary period as lasting the full 2,080 hours, the probation period cannot be extended per the

CBA, and thus in those factually specific instances, the wording of the CBA regarding extension is unnecessary for that specific situation).

The County further asserts that while it does not need a reason to let a probationary employee go, there were merit-based non-discriminatory reasons for doing so in Complainant's case. The County contends that from almost the very beginning of Complainant's employment, there had been some red flags that came to the attention of Complainant's supervisors.

The evidence was undisputed that Complainant altered the settings of the County's program called Service Now – the program which assigns troubled tickets to technicians. Complainant made unauthorized changes to the setting to allegedly prevent tickets from being assigned to him. Regardless of Complainant's intent, Complainant admitted to the act. There were also complaints about Complainant's customer service skills that were brought to the attention of his supervisors. Lizette Clark testified to an incident in which Complainant became frustrated and stormed out of the office of a County Commissioner. Mark Matthews, Complainant's supervisor, indicated that Complainant's behavior once almost caused a customer to cry. The Board also heard testimony from Clark as to what it was like to work with Complainant. Clark detailed how it was like working with two different people – "good Jared" and "bad Jared". On days when "bad Jared" showed up there was a great deal of tension among the employees in the Department.

In November 2017, the County had decided to terminate Complainant's employment. As Complainant had not yet reached the 2,080-hour mark, the County believed Complainant was still on probation and thus could be let go for any reason. A meeting was scheduled for December 7, 2017 to terminate his employment. However, somewhat fortuitously, on the eve of that meeting *Complainant informed* his supervisors that he had applied for another position within the County as an IT Security Administrator (Matthews heard this both from Complainant as well as Mike Smith and indicated that Complainant informed him of this to make sure it would okay with Matthews as well as informing Matthews that Complainant secured an interview). Matthews further testified that he thought Complainant might be a better fit within with the Security team. It appears the County attempted a good deed and did not want to sabotage Complainant's chance to compete for the job, considering they felt he may be a better fit there and have a chance to succeed (Matthews testified that a big concern was

that Complainant was not fitting in with their team and knew that Complainant was friends with one of the individuals on the Security team. Complainant testified that his friend was starting to build a team of security analysts in his department, and informed Complainant that he might be a good fit there). As such, the County cancelled the meeting and halted the termination process. However, Complainant was not selected for the position of IT Security Administrator. Once the results of that application were known, his supervisors resumed the termination process, and Complainant was terminated on January 2, 2018.

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 its 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); *Kerns v. LVMPD*, Case No. 2017-010 (2018).

A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of 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. *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, Case No. A1-045965 (2010); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-010 (2017); *Brown v. Las Vegas Metropolitan Police Dep't*, Item No. 818, Case No. 2015-013 (2016). 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).

The CBA provides (which the offer letter mirrors):

> Upon initial appointment to the County Position, an employee shall serve a probationary period. The probationary period will normally be 1040 hours worked but may not be less than 520 hours worked nor longer than 2080 hours worked as determined by the departments head. The Department Head may extend the probationary period in intervals of 520 hours. An employee's probation may not be extended more than twice. The County will advise the Union when the employee's probationary period are completed and/or if probationary period has been extended.

As such, the question becomes what the IT Department set Complainant's probationary period for. The Board heard credible evidence that the probationary period in this department can last up to the full 2,080 hours. Indeed, the Board finds credible the testimony of Michal Lane (IT Department Head) that within this department, probation is not a set period of time as it can range from three months up to a year. Moreover, the Board finds credible Lane's testimony that he did not tell Complainant that his probation period would be six months.

The Board finds credible that when Complainant was hired, he was informed that he was on a probationary period that could last up to 2,080 hours worked (though he could be taken off probation earlier). In other words, Complainant was informed upon being hired that his probationary period could last the full 2,080 hours but the Department could take him off probation earlier if he was performing well. The Board finds Mark Matthews' testimony credible in this regard. The Board also heard credible evidence that Complainant was informed of this from co-workers as well once he began employment. The offer letter that was given to Complainant specifically stated that the range of the probationary period is "normally 1,040 hours worked, but may not be less than 520 hours worked or longer than 2,080 hours worked as determined by the department heard", mirroring the parties' CBA. Kathy Gleeson and Bernadine Welsh stated that when this language is used in an offer letter, the County treats this as assigning the full 2,080-hour probation period to the employee. The Board finds this

testimony credible. Moreover, the Board finds credible the testimonies of Caruthers, Marzan, and Sorenson indicating that the department head determines the probationary period consistent with the CBA, which the CBA also plainly and unambiguously provides for. The Clark County Merit Personnel regulations, while not determinative, also provides for this as well.

Furthermore, while Complainant claimed that his Department Head told him he had a six-month probation period, Michael Lane testified this not to be the case. In connection with the foregoing (as well as Complainant's own testimony and actions as further detailed below), the Board finds Lane's testimony credible in this regard.

Complainant's own testimony also showed this to be the intent of the parties (though the Board notes that the CBA and offer letter are plain and unambiguous). Complainant's conduct further contradicted his testimony. Matthews indicated that when one comes off probation there are probation adjustment awards, including roughly 3% added to an employee's salary. Complainant testified that when he was hired he took a "drastic pay cut … about 20,000 from what [his] previous position was at Ahern." Complainant said that Matthews indicated (prior to hire and before any of the "red flags" arouse) that they "can" get Complainant off probation by six months and "as little as six months", would get a merit pay increase of 3%, and then after a year would get another 6-7% increase in pay. Complainant further testified that Matthews did not tell him he would automatically come off at the 6-month point. Moreover, Complainant testified that Couillard told him, at the direction of Mike Lane, that his probation was being extended "[i]n so many words". Complainant testified that he doesn't look at his salary statements because he has direct deposit but did not seem to verify whether he did in fact receive the 3% increase, despite the importance of making up his former salary (Complainant testified that "it was important that my salary go back close to what it was to meet my needs for my family.").

As indicated above, the County followed the contract in this regard, and Complainant (nor his union) were ever advised that his probationary period had been completed (which Complainant conceded). The CBA and offer letter are plain and unambiguous.[1] Indeed, we generally assign

[1] The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed. This is well established. *Boykin v. City of N. Las Vegas Police Dept.*, Item No. 674E, Case No. A1-045921 (2010), *citing NLRB v. Strong Roofing & Ins. Co.*, 393 U.S. 357 (1969), *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967), *Jim Walter Resources*, 289

common or normal meanings to words in a contract. *Am. First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015); *Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983). Furthermore, "[a] court should not interpret a contract so as to make meaningless its provisions," and "[e]very word must be given effect if at all possible."' *Mendenhall v. Tassinari*, 403 P.3d 364, 373 (2017).

Moreover, if the Board were to delve into intent of the parties, the evidence established that the probationary period could last the full year as indicated above. *See also, e.g., Grunwald v. Las Vegas Metropolitan Police Dep't*, Case No. 2017-006 (2017) (there was not a change in policy shown, instead the Department followed policy and its guidelines – Officer Grunwald testified that he was aware of and had prior notice of the Department's promotional requirements prior to his application for the position of sergeant. The Board was not presented with sufficient evidence of an actual change in policy given the particular facts of this case.); *Kerns v. LVMPD*, Case No. 2017-010 (2018) (the Department followed the parties' CBA and thus did not commit a unilateral change in this regard); *Douglas Cnty. Support Staff Org. v. Douglas Cnty. Sch. Dist.*, Case No. A1-046105, Item No. 797 ("A party that adheres to the terms of a collective bargaining agreement does not commit a unilateral change for the self-evident reasons that nothing is actually changed from what has been negotiated.").

The Board also notes that the contract does not provide for performance reviews for probationary employees and sufficient evidence was not introduced to evidence a past practice in this regard requiring a review take place, based on the facts of this case.[2] For example, Matthews testified

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NLRB 1441, 1449 (1988); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018). Moreover, the Board has repeatedly emphasized that the preferred method for resolving disputes is through the bargained-for processes. *See, e.g., Ed. Support Employees Ass'n v. Clark Cty. School Dist.*, Case No. A1-045509, Item No. 288 (1992); *Nevada Serv. Employees Union v. Clark Cty.*, Case No. A1-045759, Item No. 540 (2003); *Carpenter vs. Vassiliadis*, Case No. A1-045773, Item No. 562E (2005); *Las Vegas Police Protective Ass'n Metro, Inc. v. Las Vegas Metropolitan Police Dep't*, Case No. A1-045783, Item No. 578 (2004); *Saavedra v. City of Las Vegas*, Case No. A1-045911, Item No. 664 (2007); *Las Vegas City Employees' Ass'n v. City of Las Vegas*, Case No. A1-045940, Item No. 691 (2008); *Jessie Gray Jr. v. Clark County School Dist.*, Case No. A1-046015, Item No. 758 (2011); *Las Vegas Metropolitan Police Dep't v. Las Vegas Police Protective Ass'n, Inc.*, Case No. 2018-017 (2018).

[2] An employer may create, by practice over a substantial period of time, a term of condition of employment which it is obligated to continue, subject to negotiation. *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220 (also noting that the Robertson criteria were an established past practice and hence became

that they do not have to conduct a review at three-month mark, which the Board finds credible. Complainant also testified: "Through word of mouth, I had heard that several employees never ever get their reviews done at the month they're supposed to."

Based on the above, the Board does not reach the factual issue of whether probation is significantly related to a mandatory subject of bargaining (here, Complainant argues as related to discharge and disciplinary procedures) as the decision is not necessary to the Board's determination – regardless, the County followed the contract as detailed above. *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 623, n. 30, 188 P.3d 1092, 1099 (2008); *Gaxiola v. State*, 121 Nev. 638, 651, 119 P.3d 1225, 1234 (2005); *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 600, 260 P.3d 408, 412 (2011).

However, the Board notes that based on the facts of this case, the Board was inclined to not find the probationary terms as significantly related to a mandatory subject of bargaining. The Nevada Supreme Court has affirmed that subjects not specifically enumerated in NRS 288.150 as a nonnegotiable subject is nevertheless a mandatory subject of bargaining if it bears a "'significant relationship' to the subjects of mandatory bargaining set forth in NRS 288.150(2), and [is] therefore a mandatory subject of bargaining." *Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 371, 849 P.2d 343, 346 (1993) (a decision to lay off employees had a direct and cognizable effect on wages); s*ee also Grunwald v. Las Vegas Metropolitan Police Dep't*, Case No.

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part of the contract as related to a change in disciplinary procedures, a mandatory subject of negotiation), *citing Ormsby County Education Ass'n v. Carson City Sch. Dist.*, Item No. 311, Case No. A1–045527, at 8 (1993). *See also, e.g., Ormsby County Education Ass'n*, at 8-9 (testimony and evidence insufficient to support creation of a term or condition or employment by virtue of past practice); *Elko County Classroom Teachers Ass'n v. Elko County Sch. Dist.*, Item No. 603B, Case No. A1-045815 (2004) (evidence failed to establish that the District had a proven past practice of consistently approving retirement buyout requires over a substantial period of time that created a term of condition of employment which is subject to negotiation); *Krumme v. Las Vegas Metropolitan Police Dep't*, Item No. 822, Case No. 2016-010 (2017) (past practice demonstrated attaching a rebuttal statement became a term or condition of employment as credible evidence showed that LVMPD never refused to attach an employee's timely submitted rebuttal statement prior to the new Labor Relations Director's appointment as well as no finding past practice established in regards to a first line supervisor as credible testimony showed that it did not always have to be said supervisor issuing the reprimand).

2017-006 (2017) (holding that based on the specific facts of this case, removal from the promotional list was not a form of discipline, but rather a collateral effect with the Department following policy and guidelines, and as such was not significantly related to a subject of mandatory bargaining).

Both parties point to the Board's 1981 decision in the case of *Nevada Classified Sch. Employees Ass'n v. Clark Cty. Sch. Dist.*, Item No. 111, Case No. A1-045345 (1981).

In *Nevada Classified Sch. Employees Ass'n*, which the Board notes was a petition for declaratory order and not a contested case, the Board began its analysis by simply stating that "[p]robationay employment … [is] not included" in the list of mandatory subjects of bargaining under the revised NRS 288.150. The Board then concluded: "More importantly, the Board believes that the petition is improperly before it." The Board ruled that this is a factual matter and as such a petition for declaratory order was improper "as it does not seek ruling as to the applicability or interpretation of any statutory provision or of any rule or order of the Board." As such, the matter was left open.

Complainant points to *Pershing Cty. Classroom Teachers Ass'n v. Pershing Cty. Sch. Dist.*, Case No. A1-045416 (1988). Complainant asserts that the Board overruled *Nevada Classified Sch. Employees Ass'n* in this order. However, as Complainant concedes, this matter dealt with teacher evaluations, not probationary periods. Complainant further points to *Washoe Ed. Ass'n v. Washow Cty. Sch. Dist.*, Item No. 575A, Case No. A1-045792 (2004). In this 2004 matter, the parties also sought a determination that the subject of teacher evaluations and the procedures for such evaluations are within the scope of mandatory subjects of bargaining – the Board held that performance evaluations are significantly related to discharge and disciplinary procedures. The 1984 matter of *Cty. of Washoe v. Washoe Cty. Employees' Ass'n*, Item No. 159, Case No. A1-045365 (1984) (emphasis in original) held that subsequent to the amendment of the EMRA adding specific enumerated subjects, the Board has approached the significantly related analysis "as being whether or not from the facts presented, the subject matter is directly and significantly related to any one of the subjects specifically enumerated in NRS 288.150(2)." The Board then held that "because teacher evaluations are statutorily tied to, and thus related directly and significantly to, discipline and discharge for teachers, the topic is a mandatory subject of negotiation pursuant to NRS 288.150(2)(i)." *See also Truckee Meadows Fire Protection Dist.*, 109 Nev. 367, 372-73, n1 (noting that the "'subjects' specified by the Legislature are couched in

terms which lead to the inescapable conclusion that such `subjects' are the specified areas of bargaining and the extent of topics encompassed within such areas is subject to interpretation and limitation or definition by this Board.").

The County asserts that probation periods are not significantly related to discharge and disciplinary procedures, and NRS 288.150(3) provides that the right to hire is "not within the scope of mandatory bargaining and [] reserved to the local government employer without negotiation." The County contends that probationary periods "are part and parcel" to this mandatory right.

The Board's decision in *D'Ambrosio v. Las Vegas Metropolitan Police Dep't*, Item No. 808, Case No. A1-046119 (2011) is instructive in this regard. In this case, the Board noted that the matter does not implicate the disciplinary procures because the evidence did not show that the complainant was ever actually disciplined. The Board noted that one instance of purported disciplinary action alleged is that the complainant had not been non-confirmed by the Department. The Board held that while a non-confirmation is an adverse employment, "a non-confirmation is not a disciplinary matter *ipso facto*." The Board held: "If were to conclude that non-confirmation alone were sufficient to show disciplinary action, we would effectively intrude on the bargaining process and eradicate the ability of employers and bargaining agents to bargain for separate probationary periods and for non-confirmation processes." The Board went on: "The Act requires bargaining over certain terms of employment, but it does not dictate the substance of those terms of employment. Thus, more is required than a simply non-confirmation in order to show disciplinary action."

While Complainant urges that this case is similar to the Board's prior decisions in *Boykin* and *Frabbiele*, *D'Ambrosio* explained the distinction. The Board in *D'Ambrosio* detailed that in *Boykin* the Board found a unilateral change by use of the non-confirmation process in order to punish an employee (using the definition of discipline as approved by our Nevada Supreme Court). The Board stated: "We specifically noted in Boykin that the evidence in that case established that the employer had taken disciplinary action against a police officer, and that the terms of the operative collective bargaining agreement governing the terms of the disciplinary process did not permit the employer's action." The Board went on: "We have treated non-confirmation as a disciplinary action only when the particular facts and evidence in a given case have demonstrated an employer's intent to punish an employee, and

where the non-confirmation process was used as a means to circumvent the bargained-for disciplinary process." *Id, citing e.g. Frabbiele v. City of N. Las Vegas*, Item No. 680I, Case No. A1-045929 (2014); *Barto et. al. v. City of Las Vegas*, Item No. 799, Case No. A1-046091 (2014) (noting that "the agreement separates probationary employees from non-probationary employees, and extends the protections of the bargained-for discipline process only to non-probationary employees, leaving the City free to determine the appropriate procedure to use when discharging probationary employees.").

As in the present case, the Board in *D'Ambrosio* found that "[t]his case is distinguishable from Boykin because it presents a different factual scenario." In *D'Ambrosio*, the Board was "not presented with any evidence establishing that the Department's non-confirmation was in fact a punitive action." The Board specifically noted, as is the current case, that it "look[ed] to Ms. Murga's testimony that her recommendation was based upon concerns that Ms. D'Ambrosio was not a good fit with the Department."

In the same vein, the County was also concerned that Complainant was not a good fit within the department, and even temporarily halted the termination process to help Complainant get the position he was currently seeking hoping he would be a good fit somewhere else and have a chance to succeed. As in *D'Ambrosio*, "[t]his appears in our judgment to be a simple separation of employment without any indicia of disciplinary or punitive action by the Department that was critical to our decision in Boykin". "It was the Department's prerogative to non-confirm Ms. D'Ambrosio based upon concerns because the Department had bargained for the ability to do so." *See, e.g., Grunwald v. Las Vegas Metropolitan Police Dep't*, Case No. 2017-006 (2017) (finding that, based on the specific facts of that case, removal from the promotional list was not a form of discipline, but rather a collateral effect with the Department following policy and guidelines. As such, removal from the promotional list, based on the facts of this case, is not significantly related to a subject of mandatory bargaining.); *Pershing Cty. Law Enforcement Ass'n v. Pershing Cty*, Item No. 725A, Case No. A1-045974 (2010); *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002); *compare with Clark Cty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 530 P.2d 114 (1974) ("This means wages, hours and conditions of employment are significantly enmeshed with the requirement to be prepared."); *Carson City Firefighters v. Carson City*, EMRB Case No. A1-045569, Item No. 345 (1994) (the Board found that the "the payment

of such [ambulance] fees clearly constitutes a form of direct monetary compensation"); *Ormbsy Cty. Ed. Ass'n v. Carson City Sch. Dist.*, EMRB Case No. A1-045549, Item 333 (1994) (the Board held that "[w]hether an employee's family is provided insurance coverage, and at what cost, are critical concerns with direct impact upon the employee."); *Washoe County Sch. Dist. V. Washoe Ed. Ass'n*, EMRB Case No. A1-045878, Item No. 626C (2009) (direct deposit and pay card system was significantly related to salary or wages or other forms of direct compensation under NRS 288.150(2)(a), that additional cost of the direct deposit and pay card system was on the employees).

Regardless, here as in *D'Ambrosio*, "we saw no evidence that the Department changed this process when it non-confirmed Ms. D'Ambrosio." "By adhering to the negotiated terms of the agreement the Department did not commit a unilateral change to either the discharge or disciplinary process." In the same vein, as indicated above, the Board does not find that the County committed a unilateral change in this matter. The County followed the terms of the CBA.[3]

DISCRIMINATION

Complainant 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

[3] The Board also notes that even if the County had breached or altered the CBA, Complainant failed to present sufficient evidence to show that the alleged change to the probationary terms was not merely an isolated breach of contract but amounted to a change in policy. *See, e.g.*, testimony regarding McGill and Harris.

aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is merely pretextual. *Id.*

As stated, 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 (and the totality of facts as detailed above and further detailed below), the Board does not believe the acts were taken for discriminatory purposes. As such, we find that Complainant did not meet his initial burden to support the inference that any protected conduct was a motivating factor in County's decision. Regardless, the Board finds that the County was able to demonstrate that the same action would have taken place even in the absence of the alleged protected conduct, and Complainant failed to offer credible evidence that the County's legitimate explanation was merely pretextual (as also detailed above and further detailed below).

In *Kilgore v. City of Henderson*, Item No. 550H, Case No. A1-045763 (2005), the Board stated that "personal reasons" "can be best described as 'non-merit-or-fitness' facts, i.e., factors that are unrelated to any job requirement and not otherwise made by law a permissible basis for discrimination." The Board went on to conclude: "Thus, the proper construction of the phrase 'personal reasons or affiliations' include 'non-merit-or-fitness' factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, or activities that do not affect the individual's merit or fitness of any particular job." This is an intense factual inquiry.

Matthews was chiefly responsible for the decision to let Complainant go. He testified that there were multiple red flags including the unauthorized changes made to the Service Now program (which caused Matthews initial concerns due to Complainant's apparent attempts to avoid work or to receive easy tickets), the customer services issues (also including arguing in front of customers), and, the tension that Complainant created internally within the Department (including in the tech lab as well as teamwork concerns). Matthews also stated that McGill "said he just didn't want to be around

[Complainant] anymore. He was getting too many questions. He felt harassed."[4] In any event, Matthews indicated that it wasn't just McGill or Clark but they were getting too many "consistent stories across the board" in this regard from multiple technicians. Clark (who Complainant shadowed upon hire for training purposes and then was permanently assigned with) testified that on those days when "bad Jared" showed up, it was tense and disruptive in the Department. Clark further detailed the customer complaints she received. Based upon the facts of this case, this conduct affected his fitness for the job. *See, e.g., D'Ambrosio* (noting that the Board "look[ed] to Ms. Murga's testimony that her recommendation was based upon concerns that Ms. D'Ambrosio was not a good fit with the Department."). In light of the factual circumstances, and the totality of facts detailed above, the Board finds that the County's reasons for its action were also reasonable.

In addition to the above, the Board also notes that in Complainant's Complaint and Pre-Hearing Statement, he appeared to base his claim on the County allegedly filling his position with Samantha Anderer, "even though it never formally advertised the position after Jared was terminated." Complainant asserted that the County terminated him under the false claim of failure to complete probation in order to hire Anderer "outside of the normal posting and recruitment process." However, at the hearing, the Board was not presented with sufficient credible evidence that this indeed occurred. In contrast, the County presented credible evidence that it did not depart from the normal process when it filled Complainant's position.

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. Employees in the County serve a probationary period.

2. The length of the probationary period can vary between a minimum of 520 hours and a maximum of 2,080 hours.

[4] The Board does not find the testimony presented that McGill and Complainant were generally friends enough to overcome this, given the totality of facts. The Board also notes that it was not presented with testimony from McGill himself contradicting this testimony (which may have been evidence of false pretext).

3. The individual department heads are vested with the authority to decide the length of a probationary period, so long as it falls within the range.

4. The probation periods generally depend on the individual's department.

5. The department head can establish what the probation period specifically is as long as consistent with the terms of the CBA.

6. Nothing prevents a department from taking an employee off probation before working 2,080 hours but this requires an affirmative decision and act by a department to submit an evaluation form on behalf of the employee.

7. This did not occur with Complainant.

8. The probationary period will normally be 1,040 hours worked but may not be less than 520 hours worked nor longer than 2,080 hours worked as determined by the department head.

9. The department head may extend probationary periods only in intervals of 520 hours, and an employee's probationary period may not be extended more than twice.

10. The County is required to notify the employee's union when the employee's probationary period is completed or if it has been extended.

11. While 1,040 hours is the norm (and is when the IT Department generally starts to consider ending probation), some hires are not taken off probation until they reach the 2,080 hour mark, while others complete probation earlier.

12. The probationary period in Complainant's department can last up to the full 2,080 hours.

13. The Board finds credible the testimony of Michal Lane (IT Department Head) that within this department, probation is not a set period of time, it can range from three months up to a year.

14. Ron McGill and Ted Harris were not taken off probation at the six months, 1,040, hour mark.

15. The Board finds credible Lane's testimony that he did not tell Complainant that his probation period would be six months.

16. The Board finds credible that when Complainant was hired, he was informed that he was on a probationary period that could last up to 2,080 hours worked (though he could be taken off probation earlier).

17. The Board finds Mark Matthews' testimony credible in this regard.

18. Complainant was informed of this from co-workers as well once he began employment.

19. As the probationary period in IT is generally initially set as lasting the full year, there was no need to extend the probationary periods in those cases.

20. When the language that was used in the Offer Letter is used, the County treats this as assigning the full 2,080-hour probation period to the employee.

21. The Board finds credible the testimonies of Caruthers, Marzan, and Sorenson indicating that the department's head determines the probationary period consistent with the CBA, which the CBA also plainly and unambiguously provides for.

22. The Clark County Merit Personnel regulations, while not determinative, also provides for this as well.

23. While Complainant claimed that his Department Head told him he had a six-month probation period, Michael Lane testified this not to be the case, which the Board finds credible.

24. Complainant's own testimony also showed this to be the intent of the parties.

25. Complainant's conduct further contradicted his testimony.

26. Matthews indicated that when one comes off probation there are probation adjustment awards.

27. Complainant said that Matthews indicated (prior to hire and before any of the "red flags" arouse) that they "can" get Complainant off probation by six months and "as little as six months", would get a merit pay increase of 3%, and then after a year would get another 6-7% increase in pay.

28. Complainant further testified that Matthews did not tell him he would automatically come off at the 6-month point.

29. Complainant testified that Couillard told him, at the direction of Mike Lane, that his probation was being extended "[i]n so many words".

30. Complainant testified that he doesn't look at his salary statements because he had direct deposit but did not seem to verify whether he did in fact receive the 3% increase, despite the importance of making up his former salary (Complainant testified that "it was important that my salary go back close to what it was to meet my needs for my family.").

31. Complainant (nor his union) were ever advised that his probationary period had been completed (which Complainant conceded).

32. The contract does not provide for performance reviews for probationary employees.

33. Matthews testified that they do not have to conduct a review at the three-month mark, which the Board finds credible.

34. Complainant also testified: "Through word of mouth, I had heard that several employees never ever get their reviews done at the month they're supposed to."

35. Complainant admitted to the act.

36. There were also complaints about Complainant's customer service skills that were brought to the attention of his supervisors.

37. Lizette Clark testified to an incident in which Complainant became frustrated and stormed out of the office of a County Commissioner.

38. Complainant's behavior once almost caused a customer to cry.

39. Clark detailed how it was like working with two different people – "good Jared" and "bad Jared".

40. On days when "bad Jared" showed up there was a great deal of tension among the employees in the Department.

41. In November 2017, the County had decided to terminate Complainant's employment.

42. The County believed Complainant was still on probation and thus could be let go for any reason.

43. A meeting was scheduled for December 7, 2017 to terminate his employment.

44. On the eve of that meeting, Complainant informed his supervisors that he had applied for another position within the County as an IT Security Administrator.

45. Matthews thought Complainant might be a better fit within with the Security team.

46. The County attempted a good deed and did not want to sabotage Complainant's chance to compete for the job.

47. Matthews testified that a big concern was that Complainant was not fitting in with their team and knew that Complainant was friends with one of the individuals on the Security team.

48. Complainant testified that his friend was starting to build a team of security analysts in his department, and informed Complainant that he might be a good fit there.

49. Complainant was not selected for the position of IT Security Administrator.

50. Once the results of that application were known, his supervisors resumed the termination process, and Complainant was terminated on January 2, 2018.

51. The County was concerned that Complainant was not a good fit within the department, and even temporarily halted the termination process to help Complainant get the position he was currently seeking hoping he would be a good fit somewhere else and have a chance to succeed.

52. The Board held in *D'Ambrosio*, as is the current case, that it "look[ed] to Ms. Murga's testimony that her recommendation was based upon concerns that Ms. D'Ambrosio was not a good fit with the Department."

53. Regardless, also as in *D'Ambrosio*, "we saw no evidence that the Department changed this process when it non-confirmed Ms. D'Ambrosio."

54. There were multiple red flags.

55. Complainant made unauthorized changes made to the Service Now program (which caused Matthews initial concerns due to Complainant's apparent attempts to avoid work or to receive easy tickets).

56. Complaint had customer services issues (also including arguing in front of customers).

57. Complainant created tension internally within the Department (including in the tech lab as well as teamwork concerns).

58. Matthews also stated that McGill "said he just didn't want to be around [Complainant] anymore. He was getting too many questions. He felt harassed."

59. The Board does not find the testimony presented that McGill and Complainant were generally friends enough to overcome this given the totality of facts.

60. Matthews indicated that it wasn't just McGill or Clark but they were getting too many "consistent stories across the board" in this regard from multiple technicians.

61. The Board was not presented with sufficient credible evidence that the County departed from the normal process when it filled Complainant's position.

62. In contrast, the County presented credible evidence that it did not depart from the normal process.

63. 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. 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.

4. A unilateral change also violates NRS 288.270(1)(a).

5. 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.

6. A party claiming that a unilateral change has been committed must show by a preponderance of the evidence that the actual terms of 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 Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed.

9. The County followed the contract.

10. The Offer Letter to Complainant is plain and unambiguous in this regard.

11. The CBA is plain and unambiguous in this regard.

12. We generally assign common or normal meanings to words in a contract.

13. Sufficient evidence was not introduced to evidence a past practice in this regard requiring a review take place, based on the facts of this case.

14. Even if the County had breached or altered the CBA, Complainant failed to present sufficient evidence to show that the alleged change to the probationary terms was not merely an isolated breach of contract but amounted to a change in policy.

15. Complainant 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).

16. 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).

17. 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.

18. 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.

19. The aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is merely pretextual.

20. Based on the evidence presented (and the totality of facts as detailed above and further detailed below), the Board does not believe the acts were taken for discriminatory purposes.

21. Complainant did not meet his initial burden to support the inference that any protected conduct was a motivating factor in County's decision.

22. Regardless, the Board finds that the County was able to demonstrate that the same action would have been taken place even in the absence of the alleged protected conduct.

23. Complainant failed to offer credible evidence that the County's legitimate explanation was merely pretextual.

24. The proper construction of the phrase 'personal reasons or affiliations' include 'non-merit-or-fitness' factors, and would include the dislike of or bias against a person which is based on an individual's characteristics, beliefs, or activities that do not affect the individual's merit or fitness of any particular job."

25. This is an intense factual inquiry.

26. Based upon the facts of this case, this conduct affected his fitness for the job.

27. There were merit-based non-discriminatory reasons letting Complainant go.

28. In light of the factual circumstances, and the totality of facts detailed above, the Board finds that the County's reasons for its action were also reasonable.

29. Based on the facts of this case, the Board was inclined to not find the probationary terms as significantly related to a mandatory subject of bargaining.

30. The Board's decision in *D'Ambrosio v. Las Vegas Metropolitan Police Dep't*, Item No. 808, Case No. A1-046119 (2011) is instructive in this regard and incorporated by reference.

31. As in the present case, the Board in *D'Ambrosio* found that "[t]his case is distinguishable from Boykin because it presents a different factual scenario."

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

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ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondent as set forth above. Complainant shall take nothing by way of his Complaint.

DATED this 28 day of February, 2019.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
CAM WALKER, Board Member

By: _____
GARY COTTINO, Board Member