FILED
JUN 28 2019
STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

CHARLES EBARB,

Complainant,

vs.

CLARK COUNTY,

Respondent.

CASE NO. 2018-006

NOTICE OF ENTRY OF ORDER

TO: Charles Ebarb 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 the **ORDER (Item No. 843)** was entered in the above-entitled matter on June 28, 2019.

A copy of said order is attached hereto.

DATED this 28th day of June 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 28th day of June 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
Las Vegas, NV 89155

MARISU ROMUALDEZ ABELLAR
Executive Assistant

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LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

CHARLES EBARB, Complainant, v. CLARK COUNTY and CLARK COUNTY WATER RECLAMATION DISTRICT, Respondents.	Case No. 2018-006 **ORDER** **EN BANC** **ITEM NO. 843**

On April 28, 2019, and May 29, 2019, 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. At issue, was Respondents' motion to defer to the underlying arbitration decision. The Board held hearings on this issue on January 29 and April 22, 2019. In May 2018, the Board ordered this matter to be bifurcated with the hearing on the deferral doctrine occurring first. Neither party filed an objection to said bifurcation. The Board indicated that if the deferral doctrine elements were not satisfied, the Board would proceed with a hearing on the merits as to the unfair labor practices as alleged. As detailed below, the Board finds Complainant has demonstrated that the deferral principles were not met and does not defer to the Arbitrator's decision in this matter.

Preliminarily, this matter was initially set to be heard beginning on January 29, 2019. However, during the hearing, it became apparent that an issue in this case centered around which party in a limited deferral doctrine case would bear the burden of proof as well as whether this Board should change course on the elements for deferral. Complainant argued that the Board should follow the NLRB's decision in *Babcock & Wilcox Construction Co.*, 316 NLRB No. 132 (2014). Respondents argued that if the Board was inclined to address this issue, it should solicit *amicus* briefs. The Board noted, and

parties concurred, that this issue of modification should not be taken lightly in that a number of cases filed with the Board involve the limited deferral doctrine. Pursuant to NAC 288.245, the Board requested *amicus* briefs. The Board received *amicus* briefs from a number of parties and has considered them fully in reaching its decision below. Pursuant to NAC 288.2715, this case was determined to involve an issue of statewide significance, was designated as such, and was assigned to the full Board for all further proceedings.

THE DEFERRAL DOCTRINE

In one of its most recent deferral cases, the Board rendered its decision in *Int'l Ass'n of Fire Fighters, Local 4068 v. Town of Pahrump*, Case No. 2017-009 (2018). In that case, complainants alleged that the Town committed the prohibited practice of failing to bargain in good faith in violation of NRS 288.270(1)(a) and (e). 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 (2015). In *Town of Pahrump*, the Board detailed the current deferral standard:

> The arbitrator had jurisdiction to determine if just cause existed but not to determine whether the Town engaged in an unfair labor practice. The Board has exclusive jurisdiction over unfair labor practice issues. *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 895, 59 P.3d 1212, 1217 (2002). It is proper to look toward the NLRB for guidance on issues involving the EMRB. *Id.* The EMRB defers to a prior arbitration if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not clearly repugnant to the purposes and policies of the EMRA; (4) the contractual issue was factually parallel to the unfair labor practice issue; and (5) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Id.* The party desiring the EMRB to reject an arbitration award has the burden of demonstrating that these principles are not met. *Id*; *see also Washoe Sch. Principals Ass'n v. Washoe Cty. Sch. Dist.*, Case No. A1-046098 (2017); *Reichold Chemicals*, 275 NLRB 1414, 1415 (1985); *Good Samaritan Hosp. & California Nurses Ass'n*, 31-CA-117462, 2015 WL 7223437 (Nov. 16, 2015).

In *City of Reno*, the Nevada Supreme Court "adopt[ed] the NLRB deferral policy and concluded[d] that the EMRB must apply these principles in determining whether to defer to an arbitration." *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 896, 59 P.3d 1212, 1217

(2002).[1] In *City of Reno*, the association alleged that the City refused to bargain collectively in good faith with the exclusive representative in violation of NRS 288.270(1)(e) by adopting new criteria for disciplining police personnel for off-duty conduct without conducting mandatory negotiations resulting in a unilateral change of a past practice disciplinary procedure. *Id.* at 892, n. 1, 895, 899-900.

In *Babcock*, the NLRB "consider[ed] whether to adhere to, modify, or abandon the Board's existing standard for deferring to arbitral decisions in cases involving alleged violations of Section 8(a)(3) and (1) of the National Labor Relations Act." *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB 1127, at 1 (2014).[2] The NLRB indicted that the "Board's standard for deferral is solely a matter for the

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[1] Directly before stating this holding, the Nevada Supreme Court indicated that "'it is proper to look toward the NLRB *for guidance* on issues involved the EMRB.'" *Id* (*emphasis* added). The Nevada Supreme Court then indicated the deferral elements stating that the Board must apply these principles in determining whether to defer. The Board is inclined to reject the notion that is not permitted to change its deferral principles consistent with the NLRB when such is not provided for in statute, the EMRA. As indicated above in *Babcock*, this is solely a matter for the Board's discretion. The Board does not "adhere to the doctrine so stridently that the 'law is forever encased in a straight-jacket.'" *Armenta–Carpio v. State,* 129 Nev. Adv. Op. 54, 306 P.3d 395, 398 (2013) (quoting *Adam v. State,* 127 Nev. Adv. Op. 601, 604, 261 P.3d 1063, 1065 (2011)). *See also Weiner v. Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 832 (2005) ("We have held that precedent interpreting the federal statutes is persuasive in interpreting the EMRA."); *see also Truckee Meadows Fire Prot. Dist. v. Int'l Ass'n of Fire Fighters, Local 2487*, 109 Nev. 367, 375, 849 P.2d 343, 348 (1993) (noting that "NLRB precedent is persuasive in interpreting statutes concerning the public sector that are fashioned on the NLRA."); *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d 1108, 1116 (2013) (*emphasis* added) ("We find this *revised* framework persuasive and adopt the federal burden of persuasion for the plaintiff to establish a prima facie case of discrimination in order to shift the burden to the employer."); *see also Clark Cty. Deputy Marshals Ass'n v. Clark Cty.* (**emphasis** added), 425 P.3d 381, Docket No. 68660, filed September 7, 2018, unpublished deposition (Nev. 2018) ("[w]e are loathe to **commit** the board, which has been charged with the duty to administer the act regulating public employee collective bargaining in this state, to any particular policy course not clearly dictated by the terms of the statute itself), *citing EMRB v. Gen. Sales Drivers, Delivery Drivers and Helpers*, 98 Nev. 94, 98, 641 P. 2d 478, 480 (1982). The Board however does not reach this issue (of whether it may change its standard consistent with the NLRB) as it is not necessary to our determination here.

[2] Of note, Complainant alleges, similar to that in *Town of Pahrump* and *City of Reno*, in his Complaint, that the actions of Respondents violated NRS 288.270(1)(a) and (e). As indicated above, 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). As further detailed in the Board's Order on Respondents' Motion to Dismiss in this matter (May 9, 2018), Complainant alleged Respondents' actions resulted in unilateral changes to mandatory subjects of bargaining (specifically discharge and disciplinary procedures pursuant to NRS 288.150(2)(i) and grievance and arbitration procedures pursuant to NRS 288.150(2)(o)). The refusal to bargain collectively is provided for generally in Section 8(a)(5) of the NLRA. In *Babcock*, "the Board

Board's discretion." *Id.* at 1, 5; *Murray Am. Energy, Inc.*, No. JD-26-16, 2016 WL 1359359 (Apr. 5, 2016) ("It is well established that the Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act.").

The NLRB, in *Babcock*, argued that "[t]he current standard creates excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory issue, or when it is impossible to tell whether he or she has done so." *Babcock*, at 2. The NLRB "agree[d] that the burden of proving that deferral is appropriate is properly placed on the party urging deferral" *in these cases* and "also agree[d] that deferral is appropriate only when the arbitrator has been explicitly authorized to decide the statutory issue, either in the collective-bargaining agreement or by agreement of the parties in the particular case." *Id.* at 3. However, "the General Counsel's proposal that deferral is warranted only if the arbitrator 'correctly enunciated the applicable statutory principles and applied them in deciding the issue' would set an unrealistically high standard for deferral." *Id.* As such, the NLRB's "modified standard, by contrast, will require that the proponent of deferral demonstrate that the parties presented the statutory issue to the arbitrator, the arbitrator considered the statutory issue or was prevented from doing so by the party opposing deferral, and Board law reasonably permits the award." *Id.*

The NLRB noted that a basis for the change was that "[i]n many, if not most arbitral proceedings, the parties do not file written briefs; there is no transcript of proceedings; and decisions often are summarily stated." *Babcock*, at 6. The NLRB noted that "[i]n such situations, it is virtually

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adopt[ed] a more demanding standard in 8(a)(3) and (1) cases, specifically those alleging that employers have retaliated against employees for exercising their rights under Section 7 of the Act" and "modif[ied] our standard for post-arbitral deferral in 8(a)(3) and (1) cases…" *Babcock*, 361 NLRB at 1-2; at 5 ("the discretionary aspect of the Board's deferral policy is particularly significant in 8(a)(3) and (1) cases such as this, where employees' contractual rights, implicated in the grievance, are separate from their rights under the Act."); at 8 ("The Union grieved the discharge, contending that it violated the contractual prohibitions against retaliating against employees for engaging in union activity and against termination except for cause."); at 8 ("the Union specifically argued that Beneli was fired for certain of her steward activities" and the arbitrator's decision "it fail[ed] even to mention the statutory issue or the contractual prohibition against retaliation for union activity"); at 9 ("It is the policy of the Act to ensure--that is, for the Board to ensure--that employees may engage in union and other protected concerted activities to improve their lot in the workplace without fear of retribution"). *See also Good Samaritan Hosp. & California Nurses Ass'n*, No. 31-CA-117462, 2015 WL 7223437 (2015) (alleging violations of Section 8(a)(5) and (1) of the NLRA by the unilateral transferring of work without affording an opportunity to bargain and as such stating that *Babcock* did not apply).

impossible to prove that the statutory issue was *not* considered." *Id* (*emphasis* in original). The NLRB thus held:

> Accordingly, we have decided to modify our deferral standard as follows. If the arbitration procedures appear to have been fair and regular, and if the parties agreed to be bound, the Board will defer to an arbitral decision if the party urging deferral shows that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award.

Id. at 7.

In the instant case, however, it is undisputed that not only did the parties file written briefs but the proceedings were also adequately recorded. The Board also notes that since it does not defer in this case, the concerns in *Babcock* of improper and unfair deferral are ultimately irrelevant here.[3]

In *Town of Pahrump*, the Board "ordered the parties to supplement the record with the transcript from the arbitration proceedings so the Board could fully consider the elements for deferral as set forth below." As such, this Board has clearly indicated a necessity for the proceedings be adequately recorded so the Board can determine that the statutory issue or issues were fully considered and will not change its current doctrine without substantiated factual considerations. *See also Babcock*, 361 NLRB at 1150 (Johnson *dissenting*) ("Regretfully, after 30 years of collective-bargaining relations conducted under that standard, the majority returns in substantial part to a significantly more restrictive and inimical deferral policy towards both arbitration awards and prearbitral proceedings, including settlements. They do so based largely on the speculative supposition that the policy they overrule has not adequately protected employees' statutory rights in an unknown number of grievance and arbitration proceedings that have never been brought to our attention.").

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[3] The Board also notes that the NLRB found the new standard would only have prospective applications for future cases and not in pending cases. *Babcock*, at 19. The NLRB noted that "applying our new standard in pending cases would be unfair to parties that have relied on the current deferral standard in negotiating contracts and in determining whether, and in what manner, to process cases involving unfair labor practice issues through the grievance-arbitration process." *Id*; *Beneli v. Nat'l Labor Relations Bd.*, 873 F.3d 1094, 1102 (9th Cir. 2017) ("The new deferral standard represents an abrupt departure from the more deferential Spielberg/Olin standard that had been followed in labor disputes for almost 60 years. The reliance interests of the parties combined with the primary purpose of the NLRA strongly favor prospective application of the new standard."). As such, even if the Board were inclined to change its standard, which it is not given the factual distinctions, the change would not be applicable in the instant matter given the foregoing. *See also supra* note 2.

APPLICATION OF THE BOARD'S CURRENT DEFERRAL DOCTRINE

As indicated, Complainant alleges Respondents' actions resulted in unilateral changes to mandatory subject of bargaining (specifically discharge and disciplinary procedures pursuant to NRS 288.150(2)(i) and grievance and arbitration procedures pursuant to NRS 288.150(2)(o)).

Complainant alleges that Respondents negotiated a disciplinary procedure with Complainant's union, Local 1107, which required Respondents to produce all the materials relied upon to support discipline, and a provision requiring an arbitrator to refuse to consider evidence which is withheld pursuant to the negotiated procedure. He alleges that Respondents refused to produce the materials it relied upon to terminate Complainant's employment unless Complainant and Local 1107 agreed to additional un-bargained for conditions, such as a protective order, before Respondents would produce such materials. The Complaint alleges that when Local 1107 refused to agree to additional un-bargained for conditions in order to secure the materials which the CBA required to be produced, Respondents withheld these materials such that they could not be effectively used by Complainant at arbitration.

As detailed above, 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. 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). 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 (2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, EMRB Case No. A1-045965 (2010).

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).

As part of the bargained for disciplinary and grievance processes, Article 11(4) of the CBA states:

> For the purposes of resolving grievances at the earliest possible point in time, both parties will make full disclosure of the facts and evidence which bear on the grievance, including but not limited to furnishing copies of evidence, documents, reports, written statements and witnesses relied upon to support their basis of action. Both parties agree to share such facts and evidence at least three (3) working days prior to Step 1 or Step 2 meetings and at least five (5) working days prior to a Step 3 Hearing. An arbitrator will not consider any evidence from a party who willfully failed to produce such evidence in support of his/her positions.

The gravamen of the dispute is that that Complainant was fired based upon an investigation conducted by the OOD. However, in the arbitration the position was taken that the underlying recorded witness statements from OOD interviews would not be produced unless Local 1107 signed a confidentiality or protective order. Local 1107 contended that it would not do so as the imposition of such a condition amounted to an un-bargained for unilateral change to two subjects of mandatory bargaining (discharge and disciplinary procedures as well as grievance and arbitration procedure *relating to interpretation or application of collective bargaining agreements*).

Complainant argues that if Respondents wanted to add to or alter the CBA for OOD materials, it was obligated do so at the bargaining table and not by unilateral action. As a result, Complainant did not have the benefit of the underlying materials relied upon by OOD to make its findings at arbitration.

Moreover, as the primary accuser of Complainant (Randy Max) was not called as a witness, and instead was substituted by an OOD investigator who testified as to what Max and others had stated in their interviews, Complainant was deprived of a meaningful opportunity to cross-examine the investigator as to what the witnesses had actually stated. As indicated in the Stipulation in Lieu of Testimony for James Cowan, at no time did Respondents bargain for a disciplinary procedure whereby the disclosure obligations contained within Article 11 Section 4 would be subject to any type of restrictive or protective agreement.

Furthermore, at the arbitration hearing, the District took the position that Complainant had been previously sustained by the OOD and disciplined on similar charges in 2010-2011, and that such discipline/sustained Diversity violations had not been appealed. Therefore, the District took the position that as prior discipline that was not appealed it was proper to terminate Complainant for the allegations sustained against him in 2016-2017. Yet, the evidence showed that there were no prior sustained findings by OOD. At a minimum, none were provided by the District prior to the arbitration as required by Article 11(4). After the District made this allegation on the first day of the arbitration hearing, Complainant produced Terese Scupi on day 2 (the Director of OOD in 2010 and 2011). Scupi testified that there were no prior sustained allegations by OOD against Complainant and therefore nothing existed to appeal, as further detailed below.

However, the Arbitrator took the position that Local 1107 could have obtained the materials by simply agreeing to the County's demand for a protective order, that it was permissible to substitute the testimony of the OOD investigator for that of the actual accusers, and that it was Complainant's obligation to appeal the prior discipline for the alleged 2010-2011 OOD findings, and therefore he was properly terminated.

The CBA is plain and unambiguous.[4] Indeed, we generally assign 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

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[4] 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); *N.L.R.B. v. Ne. Oklahoma City Mfg. Co.*, 631 F.2d 669, 675 (10th Cir. 1980); *Jim Walter Resources*, 289 NLRB 1441, 1449 (1988); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. Las Vegas Metropolitan Dep't*, Case No.

(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). The CBA plainly provides: "For the purposes of resolving grievances *at the earliest possible point in time*, both parties will make *full disclosure* of the *facts and evidence which bear on the grievance*, including but not limited to furnishing copies of evidence, documents, reports, written statements and witnesses *relied upon to support their basis of action*." Article 11(4) (*emphasis* added).

Fair and Regular[5]

An arbitral proceeding will be deemed neither fair nor regular where "critical evidence was not presented to the arbitrator, the arbitrator made adverse findings based on the omission of that evidence, and most important, the arbitrator made a critical factual finding completely at odds with the testimony presented at arbitration." *Wheeling-Pittsburgh Steel*, 277 NLRB 1388 (1985). In the same vein, such proceedings will not be deemed fair or regular where due process is violated including where "evidence was deliberately withheld". *Whitestone Const. Corp. and Anthony Charles*, NLRB Div. of Judges 2013 WL 3964786 (July 1, 2013), *citing Precision Fittings*, 141 NLRB 1034 (1963).

Complainant has shown that the arbitration proceeding was not fair and regular. Evidence was deliberately withheld and the arbitrator made adverse findings based on the omission of critical evidence at odds with the testimony presented including (1) the alleged prior sustained violations by OOD from 2010-11, and (2) the interview recordings from the 2016-17 OOD investigation. The proceeding cannot be deemed fair and regular where the District claims that there existed prior sustained findings by OOD which had never been produced at any point despite the requirements of the CBA and were shown to be false (after the District made this allegation on the first day of the arbitration hearing, Complainant produced Scupi on day 2 who testified that there were no prior

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2017-025, Item No. 829 (2018); *Int'l Ass'n of Fire Fighters, Local 4068 v. Town of Pahrump*, Case No. 2017-009 (2018).

[5] Of note, in *Town of Pahrump*, the parties did not dispute the first two elements of deferral ((1) the arbitration proceedings were fair and regular and (2) the parties agreed to be bound) and as such they were not at issue in that case.

sustained allegations by OOD against Complainant as detailed below). Further, without being given access to the primary accuser Randy Max's recorded statement as required by the CBA, the evidence could not be effectively rebutted.

In 2016, there was a different case involving a member of the same bargaining unit who was likewise investigated by the OOD for diversity related infractions. This resulted in discipline and a grievance was filed on behalf of the employee (John Edenburn), which was scheduled to go to arbitration. Prior thereto, Respondents provided the union copies of the audio recordings of all the witnesses who were interviewed pursuant to Article 11(4) of the CBA. However, the County withheld a document, a summary report of the investigation. Respondents informed the union that if they wanted this document, they must sign a protective order. The union took the position that the negotiated provisions required Respondents to turn over all materials, and Respondents could not unilaterally impose additional procedural requirements because grievance and arbitration procedures are mandatory subjects of bargaining.

As the Stipulation in Lieu of Testimony for John Edenburn and Sharon Kisling provide, Clark County/OOD produced during the grievance process the audio interviews of all persons interviewed by OOD in connection with its investigation of Edenburn. However, it withheld the "Confidential OOD Summary Statement" and Memorandum to Tom Minwegen from Sandy Jeantete dated April 26, 2016. Prior to a scheduled arbitration for Edenburn, Local 1107 requested the entire OOD file. The County took the position it would only produce the withheld materials upon an execution of a "Release of Records". Local 1107 took the position that it could not be required to do so as indicated. Prior to the scheduled arbitration for Edenburn, Clark County/OOD did produce the above without requiring the execution of the release.

In 2017, Complainant came under investigation by the OOD and was eventually terminated based upon the allegations. Local 1107 grieved Complainant's termination and advanced the grievance to arbitration under the CBA. However, prior to the arbitration, Respondents did not turn over audio recordings of the witnesses interviewed. Instead, they only provided the summary document and informed the Union if they wanted the recordings, the Union must sign a protective order. The Union again took the same position that this was not permissible conduct. Article 11(4) of the CBA, as

detailed above, further provides that the Arbitrator will not consider any evidence that was willfully[6] failed to be produced. Respondents continued to refuse to turn over the audio recordings that they purportedly relied upon, and the Union went to arbitration without the benefit of those statements and audio recordings and requested that the Arbitrator exclude any such evidence. The Arbitrator refused to exclude it and wrote in the award that the Union could have obtained these, all they needed to do was sign a protective order. The CBA specifically provided that the Arbitrator "will not" consider the evidence.

SEIU Vice President Sharon Kisling, who was representing Complainant through the grievance process, made a request. The response indicated that copies of all documentation used in making the decision were provided when the discipline was administered on Wednesday, March 22, 2017. The CBA does not provide for only documents used in making the decision. It plainly and unambiguously provides for that "which bear on the grievance" and "relied upon to support their basis of action". A narrower interpretation was not provided for in the contract.

As it related to the 2017 charges for which Complainant was terminated – Respondents withheld the actual witness audio recordings. Exhibit CC was provided by the parties where Kisling read a statement regarding the failure to provide those recordings and how she cannot properly prepare. The proceedings were not fair and regular as the information was willfully withheld. The parties also provided Exhibits DD through FF (stipulations in lieu of testimony for James Cowan, Steve Sorensen, and Kisling). In Edenburn's case, the Union was provided the audio recordings but withheld only the summary statement. In Ebarb's case, Respondents essentially did the opposite. Further, as indicated, Randy Max was not called. Instead, they called the OOD investigator, Terrance McCarthy, who testified as to what Randy Max told him regarding Ebarb; however, Local 1107 could not properly verify the accuracy of or challenge that testimony due to Respondents' unilateral change (*i.e.* the refusal to provide the underlying recordings).[7]

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[6] "Willful" is defined as "done deliberately" or "intentional". Merriam-Webster On-Line Dictionary.

[7] The Board notes the distinction here is not in the Arbitrator's decision to rely on hearsay evidence in it of itself – instead, evidence was deliberately withheld which violated due process. *See, e.g.*, *Precision Fittings*, 141 NLRB 1034 (1963); *Horn & Hardart Co.*, 173 NLRB 1077, 1079 (1968) ("it is clear from the testimony at the hearing and from a reading of the arbitration award that not all of the pertinent

The Arbitrator stated that with regards to the confidentiality issue, the evidence indicated the County informed the Union that it would provide access to the audio interviews if the Union would protect its confidentiality concerns by agreeing to a protective order to ensure confidentiality. Further, as an alternative, the evidence indicated the County informed the Union it could obtain a discovery order from the arbitrator to gain access to the audio recordings (there is no requirement for this action provided in contract as well). However, the Union stated that the County's conditions for providing the Union access to the audio recordings was not accepted by the Union. If the County wanted confidentiality or wanted to restrict the scope of what the contract as written in Article 11, the County was obligated to obtain that restriction at the bargaining table, not by unilateral change. The Union would have a right at the bargaining table to request other changes or concessions, something in return for such a modification.

In addition, contrary to the Edenburn case, in Complainants' case, Respondents provided the summary statement (Exhibit D). On page 3 it states: "OOD records indicate that on or about January 11, January 12, and January 13, 2011 three separate employees from Water Reclamation came forward with allegations that a supervisor and a manager (Charles Ebarb and Michael Ermi) engaged in inappropriate [sic] conduct that fell within the jurisdiction of OOD. It was learned by OOD that the individuals accused of the misconduct had already been the subject of an investigation and disciplined in part for the conduct that fell within OOD's jurisdiction." The Arbitrator took the position that since that prior 2011 OOD discipline was not appealed, it was a binding prior discipline and could be used for the purposes of progressive discipline.

However, as indicated, there was no OOD investigation and no OOD findings. The retired director of OOD who was in place in 2011, Scupi, testified that there had been no such investigation as further detailed below. Instead, Complainant had been investigated not by the OOD but by a manager of Water Reclamation who ultimately dismissed those charges. As such, there was nothing for

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evidence was made available to the arbitrator."); *Requirement of fair and regular proceedings*, 9 Emp. Coord. Labor Relations § 10:7 ("When some procedural defects are evident in a given arbitration proceeding, the degree to which they hindered the grievant's chance to present his full case to the arbitrator determines whether or not the award was the result of fair and regular process."). In addition, it is undisputed that Complainant and Local 1107 repeatedly objected on numerous basis as well as not providing the alleged prior sustained violations by OOD from 2010-11.

Complainant, from an OOD basis, to appeal in 2011. Yet, the Arbitrator treated it as if it were a prior discipline supporting a demotion, contrary to the evidence, and no documents were produced prior to the arbitration which would allow Complainant to defend against this claim (of discipline in 2011 for OOD matters that were not appealed). As indicated above, the NLRB also holds that that failure to turn over that which bears on the grievance is more than merely contractual, it is an obligation to provide the Union information necessary to represent its members.

The OOD materials relating to the prior alleged violations of the diversity policy from 2010-2011 were willfully withheld. Exhibit D, which was provided to the Union and the Arbitrator, is an OOD summary statement which states the above on page 3. At the Arbitration, the District indicated that Complainant was disciplined, and he did not grieve it. Therefore, the District argued it was properly considered not grieved prior discipline, which may be considered as part of the progressive discipline process (as provided for under the CBA). Scupi indicated that was mischaracterized. There was an investigation conducted by the District which lacked jurisdiction. The human resource representative (Exhibit F) stated, "I'm not going to hear any grievance related to an OOD matter. That's for the OOD." The matter was referred to OOD and it was not actually sustained. Exhibit T was stipulated into evidence by the parties. Scupi further indicated that she was asked to re-certify the improper investigation by Assistant County Manager Jeff Wells, which she refused to do. Hoskins indicated that he did not have authority to make a determination because it was properly an OOD matter. Hoskins upheld the demotion on the non-OOD provisions, which were overturned by the arbitrator. Ultimately, the OOD did not sustain the accusations against Complainant for race-based comments. Complainant testified that he was never disciplined for making the statements alleged against him in 2010 or 2011, remaining a supervisor from the time of the implementation of award reversing his demotion through his termination. As indicated, Kisling requested all audio recordings, yet they were not received.

Indeed, Brenda Marzan, president of Local 1107 and previously vice president of the non-supervisory unit of the Clark County bargaining unit, credibly testified that the past practice of the parties, in the years prior to 2016 and 2017, was for Clark County not to require protective orders or

confidentiality agreements for investigatory materials that led to a decision to discipline an employee. Instead, these materials were turned over voluntarily.[8]

In Exhibit R, on page 48, the Arbitrator held that, "Further, the OOD summary also indicates that the Grievant was the subject of a previous investigation by the District in 2010-2011 involving similar allegations of misconduct. Thus, McCarthy [who was the OOD investigator in the new case in 2017], also indicated that after his investigation there was no doubt in his mind that the Grievant had committed the harassing and discriminatory comments as alleged by Max Benes." "The Union objected to the use of the prior 2010-2011 discipline issued to the Grievant, that was separated from another charge of alleged misconduct, which the District used in the consideration of the level of discipline that would be appropriate in this case which the District ultimately concluded warranted his termination."

In other words, the Arbitrator indicated that the District was relying upon this earlier 2010-2011 determination for the level of discipline to be imposed, as this was progressive discipline. Generally, progressive discipline is to correct behavior and when a prior violation is not corrected, more severe discipline such as termination may be warranted. "However, the Union asserts that the 2010-2011 allegations against the Grievant were not sustained as purportedly indicated by the District witnesses at the arbitration hearing, and the prior discipline separated from another charge, should not have been considered in this case in determining whether the termination of the Grievant was warranted." The Arbitrator then discussed how Jesse Hoskins refused (Exhibit F) to consider anything during the grievance process relating to the OOD. "However, the evidence indicates that the allegations of discrimination were never pursued under the NERC/OOD procedure, and the matter appeared to remain an outstanding discipline in the Grievant's record. It is well recognized in grievance matters that in protesting discipline issued to a Union member, it is the responsibility of the Union to pursue charges of misconduct against any employee under the procedure outlined in a grievance procedure in a CBA. Additionally, it is indicated in the CBA in this case, that it is the responsibility of the Union to pursue allegations of misconduct against the Grievant through the NERC/OOD procedure. With the Union not

[8] The Board notes the distinction between a request to maintain confidentiality compared with actual contractual obligations in executing a protective order or confidentiality agreement.

pursuing the 2010-2011 charges, it appears that the 2010-2011 charges issued against the Grievant remained a part of his disciplinary record."

However, because all of the information which bears on the grievance and relied upon to support the basis of action as required by the CBA were not produced, the Arbitrator made a critical factual finding at odds with the testimony presented at arbitration (*i.e.* it was not sustained). There was nothing for Local 1107 to pursue when charges are not sustained (*i.e.*, as it was not sustained, there would be no reason to take it arbitration). Local 1107 could not do its job where the information relating to what happened in 2010-2011 was withheld (including the charges that were eventually not sustained by the entity with proper jurisdiction) and then mischaracterized at the arbitration proceeding (*see* Exhibits E, F, as well as Scupi's testimony as detailed above). Thus, the proceedings were not fair and regular for this reason as well.

Agreement to be Bound

Article 11 of the CBA (*emphasis* added) provides in pertinent part:

> The arbitrator's decision shall be final and binding on all parties to this Agreement *as long as the arbitrator does not exceed his/her authority* as set for below and as long as the arbitrator performs his/her functions in accordance with the case law regarding labor arbitrator, the provisions of the U.S. Uniform Arbitration Act, and where applicable, NRS.

While it was generally agreed that grievances were intended to be final and binding, this was premised upon the arbitrator complying with the provisions of the CBA, including Article 11(4)'s mandatory disclosure provisions. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361 (1960) ("Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement … his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse to enforcement of the award.").

The contract makes clear that the parties to do not agree to be bound if an Arbitrator exceeds the authority provided for in the CBA. The Arbitrator exceeded that authority when he refused to exclude evidence which was willfully withheld and conditioned upon the imposition of extra-contractual

requirements, as detailed above and further below.[9]

Repugnancy to the Purpose and Policies of the EMRA

The Board also finds that the decision is clearly repugnant to purposes and policies of the EMRA. In *City of Reno*, *supra*, 9 off-duty Reno police officers were involved in an altercation at Caesar's Tahoe, located in Douglas County, Nevada, resulting in the arrest of 2 officers for disorderly conduct and battery. The City disciplined the officers for such off-duty misconduct based upon new criteria for evaluating off-duty transgressions which differed from those previously established by past practice. The association grieved the discipline and advanced the grievance to arbitration in which the arbitrator upheld the discipline. The association also filed a complaint before this Board for unilateral changes to a subject of mandatory bargaining, specifically discharge and disciplinary procedures. Notwithstanding the decision of the arbitrator to uphold the discipline, this Board found that the City of Reno had engaged in a prohibited practice by changing the criteria used to discipline without negotiating with the association. As indicated above, once appealed, the Nevada Supreme Court adopted the Board's current deferral doctrine. The Nevada Supreme Court also affirmed the Board's decision because an arbitrator's decision upholding discipline in the face of the unilateral change is repugnant to the EMRA. The Nevada Supreme Court specifically held:

> …the arbitrator's decisions were repugnant to the Employee–Management Relations Act (EMRA). Under the NLRB deferral standard, **the NLRB need not defer if the 'arbitrator's decision is not susceptible to an interpretation consistent with the [NLRA].'** Here, the EMRB has exclusive jurisdiction over alleged prohibited practices concerning mandatory bargaining issues. **The arbitrator found that the City may unilaterally adopt rules and enforce them with disciplinary action, as long as the rules are reasonable and not in conflict with the law. Yet, under the EMRA, disciplinary procedure is a mandatory subject of negotiation.** We conclude, therefore, that the EMRB was not required to defer to the arbitrations in this particular matter.

City of Reno, 118 Nev. at 897, 59 P.3d at 1217–18 (**emphasis** added).[10]

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[9] *See also infra* note 11 regarding the CBA's reference to the Uniform Arbitration Act and authorization of protective orders. It is undisputed that the Arbitrator did not issue a protective order pursuant to NRS 38.233(5), nor did Respondents ever apply for one. Further, as indicated, willful is defined as deliberate or intentional which is apparent in this matter as Respondents clearly conditioned the production on Complainant agreeing to an extra-contractual requirement.

[10] The Court also held: "The EMRB determined that the Robertson criteria were a past practice and hence became part of the contract.... The Robertson criteria were the established criteria for

In the same vein, the arbitrator's decision here is not susceptible to an interpretation consistent with the EMRA due to the permission of a unilateral change. Likewise, the withholding of information from a union can be considered repugnant to the EMRA. *See New Jersey Bell Telephone Co. and Local 1022, Communications*, 300 NLRB 42 (1990) ("it is well settled that an employer had a duty to provide, upon request to the Union, information which is relevant to the Union in carrying out its duties and responsibilities ... [including] the administration of a contract or the processing and evaluation of a grievance.").[11]

The Union objected to the unilateral change in the Edenburn case first, Respondents complied in that case, yet choose to deviate in the matter at hand. *See. e.g., Serv. Employees Int'l Union, Local 1107 v. Clark County*, Case No. A1-045965, Item No. 713A (2010) (looking to the parties' prior conduct in determining whether a unilateral change had been committed), *citing Golden Stevedoring Co.* 335 NLRB 410, 435 (2001) (comparing the terms and conditions of employment before and after the change). The Arbitrator may not have been concerned with the unilateral change (as is generally not required of the Arbitrator) permitting the conditions imposed by the Respondents or the additional requirements outside of contract. As *City of Reno* makes clear, this Board has exclusive jurisdiction over alleged prohibited practices concerning mandatory bargaining issues and need not defer when unilateral changes were permitted.

Respondents altered the CBA and it is undisputed that their actions were taken without bargaining over the change. In addition to the above, Marzan testified, which the Board finds credible, that after the Ebarb case she felt forced to sign those, not that she wanted to, not that she believed it was appropriate, but because the Union couldn't do its job if it didn't have the information. Marzan stated that she felt coerced into doing so. As such, the Board finds 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

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determining punishable conduct of off-duty officers. We conclude, therefore, the EMRB had substantial evidence on which to base the determination that when the City added an additional criterion to the Robertson criteria without negotiation, it failed to comply with NRS 288.150." *City of Reno*, 118 Nev. at 900, 59 P.3d at 1220.

[11] The NLRB further noted that the "standard for determining whether information is relevant to the Union's legitimate collective bargaining need is a liberal discovery type test." *Id.*

impact on the bargaining unit members' terms and conditions of employment). The CBA plainly provides that the parties will make *full disclosure* of the facts and evidence which *bear* on the grievance as well as relied upon to support their basis of action. As indicated above, it is well established that the Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed. While the Board finds there is no ambiguity here, even if there was, the disclosure of the information at issue here would be required under the current language. If Respondents wanted a narrower interpretation, they needed to provide for such clearly in contract. In the same vein, Respondents alternatively required Complainant to apply for a protective order, which is not provided for in the parties' bargained-for-procedures either (nor did Respondents ever pursue one).

Complainant and his representatives consistently contended that Respondents could not unilaterally determine conditions on the disclosure of information which bears upon the grievance.[12] *See also* C & D Security, Inc., 39 NLRB AMR 34 (2009) ("When determining whether an award is 'clearly repugnant,' the Board examines all the circumstances, including the parties' contract language, bargaining history, and past practices.'"), *citing Kohler Mix Specialties*, 332 NLRB 630, 631 (2000) (no deferral where arbitrator concluded contract did not prohibit unilateral subcontracting); *Haddon*

[12] Interestingly, Marzan testified that what the OOD does in these cases is conduct the underlying investigation. Once it reaches its conclusion, discipline is issued by the County. This is subject to the same grievance and arbitration provisions under the contract and as Marzan credibly indicated, is not excluded from the grievance mechanism. Marzan further explained that when an employee is disciplined as a result of an OOD investigation, it is not treated differently than an employee who is disciplined as a result of a non-ODD investigation (other than discovery requests going to the OOD in an OOD investigation). Here, discipline was issued and there was a dispute over the issuance of discipline, falling within the definition of a grievance. It is undisputed that Local 1107 grieved Complainant's termination and advanced said grievance to arbitration under the CBA. Furthermore, in 2011, Complainant was involuntarily demoted for what was alleged to include, amongst other things, OOD-related materials. "The Union, on behalf of an employee, may submit a grievance in writing to the Clark County Human Resources Director (Step 2) within five (5) working days of receipt of this action." In other words, Clark County seems to acknowledge that discipline issued in connection with OOD-related matters bears on a grievance. *See, e.g., Yu v. Las Vegas Metropolitan*, Case No. 2017-025, Item No. 829 (2018); *Int'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 104 Nev. 615, 620, 764 P.2d 478, 481 (1988) (holding that an employer's action of suspending an employee because of his larceny charge was a disciplinary action subject for grievance and arbitration); *Jenkins v. Las Vegas Metropolitan Dep't*, Case No. A1-046020, Item No. 775A (2013), *aff'd* NSC Case No. 65102 (claims and their basis arise out of the interpretation and performance of provisions under NRS Chapter 288, including LVMPD's obligation to negotiate in good faith for disciplinary and grievance procedure changes).

Craftsmen, 300 NLRB 789, 790 fn.5 (1990) (no deferral where arbitrator found contract did not specifically bar unilateral reclassification of employees); *Armour & Co.*, 280 NLRB 824, fn.2 (1986) (no deferral where arbitrator merely found employer was not contractually prohibited from taking unilateral action at issue); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, fn.3, 1016 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (no deferral where arbitrator relied upon contractual silence to uphold unilateral implementation of attendance control policy); *see also supra*, *e.g.*, Marzan testimony regarding previously voluntary production of materials as well as Edenburn matter.[13]

In *Krumme v. Las Vegas Metropolitan Police Dep't*, Case No. 2016-010 (2017), the Board agreed with 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.

In the same vein as the current matter, the plain wording of the CBA made clear that LVMPD committed a prohibited labor practice.[14] LVMPD argued that NRS 289 stood 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." Further, "[i]n this case, the AOC issued out of the TRB and, therefore, the right outlined in subsection 1 of the statute is inapplicable and the Department was not obligated to attach the rebuttal statement to the AOC." The Board noted that the CBA is clear and unmistakable in its requirements (as here), and the parties could have chosen to incorporate LVMPD's argument in their CBA, which they did not. *See also Boykin v. City of N. Las*

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[13] Respondents pointed to the CBA's reference to the Uniform Arbitration Act, and that NRS 38.233(5) authorized protective orders. NRS 38.233(5) provides: "An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State." Complainants countered that Respondents did not actually seek a protective order from the Arbitrator (which was uncontested) and, instead, without involving the Arbitrator unilaterally withheld information it contractually agreed to provide unless SEIU entered into a protective order.

[14] The parties' CBA in that case provided, in pertinent part: "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 if prepared by the employee, the Department must attach the employee's written response to the adverse comment or document...."

Vegas Police Dep't, Case No. A1-045921, Item No. 674E (2010) (finding a unilateral change for failing to provide the rights recognized in the collective bargaining agreement); *Jenkins v. Las Vegas Metropolitan Dep't*, Case No. A1-046020, Item No. 775A (2013), *aff'd* NSC Case No. 65102 (finding a unilateral change as the parties "negotiated Article 23 of the CBA which addressed administrative transfers, but did not grant to the Department the ability to administratively transfer an employee in order to impose discipline."); *Clark County Ed. Ass'n v. Clark County Sch. Dist.*, Case No. A1-046025, Item No. 764B (2012) ("deferral to the arbitrator's decision at this stage would result in the Board's approval of a local government employer's refusal to bargain over a mandatory subject of bargaining. Such a result is clearly repugnant to the policies and purposes of the Act.").

The Board finds that Complainant showed that the actual terms and conditions of employment were by the employer such that the terms of the employment differed from what was bargaining for or otherwise established. Respondents breached or altered the CBA or established past practice; Respondents' action was taken without bargaining with the union over the change; the change in policy concerns a matter within the scope of representation (discharge and disciplinary procedures as well as grievance and arbitration procedure *relating to interpretation or application of collective bargaining agreements*); and (4) the change is not merely an isolated breach of contract, but amounted to a change in policy.[15]

* * *

[15] As all 5 principles are required to be meet in order for the Board to defer, the Board does not reach whether the contractual issue was factually parallel to the unfair labor practice issue, or whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, as they are not necessary to our determination here. If Respondents feel this is in error, Respondents should file a petition for rehearing as provided in NAC 288.364. *See also City of Reno*, 118 Nev. at 897, 59 P.3d at 1217–18 (concluding the Board was not required to defer to the arbitrations as a unilateral change was committed); *Munn v. Clark County Firefighters IAFF Local 1908 Int'l Ass'n of* Firefighters, Case No. A1-046045, Item No. 781 (2012) (finding the limited deferral doctrine did not apply as to respondent "Local 1908 who was not party to the arbitration proceedings therefore satisfying one of the exceptions to deferral set forth in *City of Reno*… [and not upon facts parallel so] [t]his too constitutes grounds to exempt Munn's claims against Local 1908"); *see, e.g.*, *Garcia v. N.L.R.B.*, 785 F.2d 807, 812 (9th Cir. 1986); *Yu v. Las Vegas Metropolitan Dep't*, Case No. 2017-025, Item No. 829 (2018), *citing Allstate Ins. Co. v. Fackett,* 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *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).

"When countervailing policies outweigh the policy of preferring arbitration, the limited deferral doctrine will not apply." *Clark County Ed. Ass'n v. Clark County Sch. Dist.*, Case No. A1-046025, Item No. 764B (2012). Based on the above, the Board finds the limited deferral doctrine does not apply in this matter.

While the Board finds that a unilateral change has been committed based on the evidence presented, since it initially ordered the matter bifurcated, it will give the parties an additional opportunity for the presentation of evidence and/or argument should the parties deem it necessary.

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). *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 681, 119 P.3d 1259, 1263 (2005) (holding that "[u]nder NRS 288.110(2) the Board only had the authority to restore [Complainant] to her previous status" before the violation); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) ("The task of the Board in devising a final remedy is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice."); *Frank v. HTH Corp.*, 650 F.3d 1334, 1366 (9th Cir. 2011) ("Very often, the most effective way to protect the Board's ability to recreate such relationships and restore the status quo will be for the [Board] itself to order a return to the status quo."); *Yu v. Las Vegas Metropolitan Dep't*, Case No. 2017-025, Item No. 829 (2018) (Board ordered the Department to accept Sgt. Yu's grievance and process it in compliance with the parties' contractually agreed upon terms and bargained-for procedures as set forth in Article 12 of the CBA (Grievance Procedures)).

Here, the Board cannot conclude that Complainant would have succeeded at arbitration even with full disclosure. The benefit of which Complainant was deprived was an arbitration without the above committed violations (thus recreating the conditions and relationships that would have been had there been no unfair labor practices and for the Board to order a return to the status quo). As this stage, the Board is inclined to order as follows (as requested in part by Complainant): (1) that Respondents committed the prohibited labor practices as detailed above; (2) prohibiting all future violations of the type committed against Complainant; and (3) Respondents to produce the materials withheld and order the parties to a new arbitration before a new arbitrator. However, the Board instructs the parties to

include argument on the appropriate remedy in their briefing if they believe an alternative remedy should be ordered.

As such, the Board orders the parties to submit written briefs in regards to the above. Respondents shall file their brief within 15 days of the date of this Order. Within 10 days after service of Respondents' brief, Complainant shall file his responding brief. Should the parties need an extension of time, they may request so in writing to the Commissioner who shall have the power to grant said extension in his discretion.

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. The parties filed written briefs in the underlying arbitration.

2. Those proceedings were adequately recorded.

3. In 2017, Complainant came under investigation by the OOD and was eventually terminated based upon the allegations.

4. Local 1107 grieved Complainant's termination and advanced the grievance to arbitration under the CBA.

5. SEIU Vice President Sharon Kisling, who was representing Complainant through the grievance process, made a request.

6. The response indicated that copies of all documentation used in making the decision were provided when the discipline was administered on Wednesday, March 22, 2017.

7. The CBA does not provide for only documents used in making the decision.

8. However, prior to the arbitration, Respondents did not turn over audio recordings of the witnesses interviewed.

9. In the arbitration, the position was taken that the underlying recorded witness statements from OOD interviews would not be produced unless Local 1107 signed a confidentiality or protective order.

10. Local 1107 contended that it would not do so as the imposition of such a condition amounted to an un-bargained for unilateral change to two subjects of mandatory bargaining (discharge

and disciplinary procedures as well as grievance and arbitration procedure relating to interpretation or application of collective bargaining agreements).

11. Respondents continued to refuse to turn over the audio recordings that they purportedly relied upon.

12. Complainant did not have the benefit of the underlying materials relied upon by OOD to make its findings at arbitration.

13. The primary accuser of Complainant (Randy Max) was not called as a witness.

14. Instead Max was substituted by an OOD investigator who testified as to what Max and others had stated in their interviews.

15. McCarthy testified as to what Randy Max told him regarding Ebarb.

16. Complainant was deprived of a meaningful opportunity to cross-examine the investigator as to what the witnesses had actually stated.

17. Local 1107 could not properly verify the accuracy of or challenge that testimony due to Respondents' refusal to provide the underlying recordings.

18. Kisling could not properly prepare.

19. At no time did Respondents bargain for a disciplinary procedure whereby the disclosure obligations contained within Article 11(4) would be subject to any type of restrictive or protective agreement.

20. The Arbitrator took the position that Local 1107 could have obtained the materials by simply agreeing to the County's demand for a protective order.

21. As an alternative, the County informed the Union it could obtain a discovery order from the arbitrator to gain access to the audio recordings (there is no requirement for this action in the parties' bargained-for-procedures).

22. The Arbitrator took the position that it was permissible to substitute the testimony of the OOD investigator for that of the actual accusers.

23. The Arbitrator did not issue a protective order.

24. Respondents did not apply for a protective order.

25. The past practice of the parties, in the years prior to 2016 and 2017, was for Clark County not to require protective orders or confidentiality agreements for investigatory materials that led to a decision to discipline an employee.

26. Instead, these materials were turned over voluntarily.

27. In cases like Ebarb's, the OOD conducts the underlying investigation.

28. Once it reaches its conclusion, discipline is issued by the County.

29. This is subject to the same grievance and arbitration provisions under the contract and as Marzan credibly indicated, is not excluded from the grievance mechanism.

30. In other words, when an employee is disciplined as a result of an OOD investigation, it is not treated differently than an employee who is disciplined as a result of a non-ODD investigation (other than discovery requests going to the OOD in an OOD investigation).

31. Discipline was issued and there was a dispute over the issuance of discipline, falling within the definition of a grievance.

32. Local 1107 grieved Complainant's termination and advanced said grievance to arbitration under the CBA.

33. Furthermore, in 2011, Complainant was involuntarily demoted for what was alleged to include, amongst other things, OOD-related materials.

34. Clark County seems to acknowledge that discipline issued in connection with OOD-related matters bears on a grievance.

35. The District took the position that Complainant had been previously sustained by the OOD and disciplined on similar charges in 2010-2011, and that such discipline/sustained Diversity violations had not been appealed.

36. The District indicated that Complainant was disciplined, and he did not grieve it.

37. The District took the position that as prior discipline that was not appealed it was proper to terminate Complainant for the allegations sustained against him in 2016-2017.

38. The District argued it was properly considered not grieved prior discipline, which may be considered as part of the progressive discipline process.

39. No documents were produced prior to the arbitration which would allow Complainant to defend against this claim (of discipline in 2011 for OOD matters that were not appealed).

40. After the District made this allegation on the first day of the arbitration hearing, Complainant produced Terese Scupi on day 2 (the Director of OOD in 2010 and 2011).

41. Scupi indicated that was mischaracterized.

42. Scupi testified that there were no prior sustained allegations by OOD against Complainant and therefore nothing existed to appeal.

43. There was an investigation conducted by the District which lacked jurisdiction.

44. The human resource representative stated, "I'm not going to hear any grievance related to an OOD matter. That's for the OOD."

45. The matter was referred to OOD and it was not actually sustained.

46. Scupi further indicated that she was asked to re-certify the improper investigation by Assistant County Manager Jeff Wells; she refused to do.

47. Hoskins indicated that he did not have authority to make a determination because it was properly an OOD matter.

48. Hoskins upheld the demotion on the non-OOD provisions, which were overturned by the arbitrator.

49. The OOD did not sustain the accusations against Complainant for race-based comments.

50. The Arbitrator took the position that it was Complainant's obligation to appeal the prior discipline for the alleged 2010-2011 OOD findings, and therefore he was properly terminated.

51. The Arbitrator took the position that since that prior 2011 OOD discipline was not appealed, it was a binding prior discipline and could be used for the purposes of progressive discipline.

52. There was no OOD investigation and no OOD findings.

53. Complainant had been investigated not by the OOD but by a manager of Water Reclamation who ultimately dismissed those charges.

54. There was nothing for Complainant, from an OOD basis, to appeal in 2011.

55. The Arbitrator treated it as if it were a prior discipline supporting a demotion, contrary to the evidence.

56. In 2016, there was a different case involving a member of the same bargaining unit who was likewise investigated by the OOD for diversity related infractions.

57. This resulted in discipline and a grievance was filed on behalf of the employee (John Edenburn), which was scheduled to go to arbitration.

58. Prior thereto, Respondents provided the union copies of the audio recordings of all the witnesses who were interviewed.

59. Prior to a scheduled arbitration for Edenburn, Local 1107 requested the entire OOD file.

60. Clark County/OOD produced during the grievance process the audio interviews of all persons interviewed by OOD in connection with its investigation of Edenburn.

61. However, it withheld the "Confidential OOD Summary Statement" and Memorandum to Tom Minwegen from Sandy Jeantete dated April 26, 2016.

62. The County took the position it would only produce the withheld materials upon an execution of a "Release of Records".

63. The union took the position that the negotiated provisions required Respondents to turn over all materials, and Respondents could not unilaterally impose additional procedural requirements because grievance and arbitration procedures are mandatory subjects of bargaining.

64. Prior to the scheduled arbitration for Edenburn, Clark County/OOD did produce the above without requiring the execution of the release.

65. The Union objected to the unilateral change in the Edenburn case first, Respondents complied in that case, yet choose to deviate in the matter at hand.

66. The Union went to arbitration and requested that the Arbitrator exclude evidence willfully withheld.

67. Evidence was willfully withheld at the arbitration

68. Evidence was deliberately withheld which violated due process.

69. The audio recordings were willfully withheld.

70. The OOD materials relating to the prior alleged violations of the diversity policy from 2010-2011 were willfully withheld.

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71. The arbitrator made adverse findings based on the omission of critical evidence at odds with the testimony presented including (1) the alleged prior sustained violations by OOD from 2010-11, and (2) the interview recordings from the 2016-17 OOD investigation.

72. The Arbitrator refused to exclude the audio recordings.

73. Local 1107 could not do its job where the information relating to what happened in 2010-2011 was withheld (including the charges that were eventually not sustained by the entity with proper jurisdiction) and then mischaracterized at the arbitration proceeding.

74. The arbitration proceedings were not fair and regular.

75. The parties did not agree to be bound.

76. The Arbitrator exceeded his authority when he refused to exclude evidence which was willfully withheld.

77. The decision was clearly repugnant to the purposes and policies of the EMRA.

78. The Arbitrator's decision here is not susceptible to an interpretation consistent with the EMRA due to the permission of a unilateral change.

79. Respondents altered the CBA.

80. Respondents' actions were taken without bargaining over the change.

81. Marzan testified, which the Board finds credible, that after the Ebarb case she felt forced to sign those, not that she wanted to, not that she believed it was appropriate, but because the Union could not do its job if it did not have the information.

82. Marzan stated that she felt coerced into doing so.

83. The actual terms of conditions of employment were by the employer such that the terms of the employment differed from what was bargaining for or otherwise established.

84. Respondents breached or altered the CBA or established past practice.

85. Respondents' action was taken without bargaining with the union over the change.

86. The change in policy concerns a matter within the scope of representation

87. 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).

88. The Board cannot conclude that Complainant would have succeeded at arbitration even with full disclosure.

89. The benefit of which Complainant was deprived was an arbitration without the above committed violations (thus recreating the conditions and relationships that would have been had there been no unfair labor practices and for the Board to order a return to the status quo).

90. 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. The EMRB defers to a prior arbitration if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the decision was not clearly repugnant to the purposes and policies of the EMRA; (4) the contractual issue was factually parallel to the unfair labor practice issue(s); and (5) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice(s).

4. The party desiring the Board to reject an arbitration award has the burden of demonstrating that these principles are not met.

5. The CBA is plain and unambiguous.

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

7. "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."'

8. The CBA plainly provides: "For the purposes of resolving grievances *at the earliest possible point in time*, both parties will make *full disclosure* of the *facts and evidence which bear on the grievance*, including but not limited to furnishing copies of evidence, documents, reports, written statements and witnesses *relied upon to support their basis of action*." Article 11(4) (*emphasis* added).

9. A narrower interpretation was not provided for in the contract.

10. Article 11(4) of the CBA plainly provides that the Arbitrator will not consider any evidence that was willfully failed to be produced.

11. The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed.

12. "Willful" is defined as "done deliberately" or "intentional".

13. An arbitral proceeding will be deemed neither fair nor regular where "critical evidence was not presented to the arbitrator, the arbitrator made adverse findings based on the omission of that evidence, and most important, the arbitrator made a critical factual finding completely at odds with the testimony presented at arbitration."

14. An arbitral proceeding will not be deemed fair or regular where due process is violated including where "evidence was deliberately withheld".

15. "When some procedural defects are evident in a given arbitration proceeding, the degree to which they hindered the grievant's chance to present his full case to the arbitrator determines whether or not the award was the result of fair and regular process."

16. The CBA plainly provides that the arbitrator's decision is binding as long as the arbitrator does not exceed his/her authority.

17. While it was generally agreed that grievances were intended to be final and binding, this was premised upon the arbitrator complying with the provisions of the CBA, including Article 11(4)'s mandatory disclosure provisions.

18. "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement … his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse to enforcement of the award.").

19. The contract makes clear that the parties to do not agree to be bound if an Arbitrator exceeds the authority provided for in the CBA.

20. The Board need not defer if the arbitrator's decision is not susceptible to an interpretation consistent with the EMRA.

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21. The Board has exclusive jurisdiction over alleged prohibited practices concerning mandatory bargaining issues.

22. The Board need not defer if the arbitrator permits unilateral changes.

23. The withholding of information from a union can be considered repugnant to the EMRA.

24. "When determining whether an award is 'clearly repugnant,' the Board examines all the circumstances, including the parties' contract language, bargaining history, and past practices.'"

25. "When countervailing policies outweigh the policy of preferring arbitration, the limited deferral doctrine will not apply."

26. Complainant has met his burden.

27. The limited deferral doctrine does not apply in this matter.

28. The Board's standard for deferral is solely a matter for the Board's discretion.

29. The Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act.

30. The Board does not adopt the standard in *Babcock* given the factual distinctions in this case and in cases previously before this Board.

31. 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.

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

33. 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.

34. 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.

35. Typically, a complainant can meet this burden by showing the following 4 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).

36. The Board may look to the parties' prior conduct in determining whether a unilateral change had been committed.

37. Respondents committed unilateral changes in this case.

38. The Board "may order ... to restore to the party aggrieved any benefit of which the party has been deprived by that action."

39. "Under NRS 288.110(2) the Board only had the authority to restore [Complainant] to her previous status" before the violation.

40. "The task of the Board in devising a final remedy is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice."

41. 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 Respondents' Motion to Defer to the Arbitration Award is DENIED.

IT IS FURTHER ORDERED Respondents shall file its brief pursuant to this Order within 15 days of the date of this Order. Within 10 days after service of Respondents' brief, Complainant shall file their responding brief. Should the parties need an extension of time, they may request so in writing to the Commissioner who shall have the power to grant said extension in his discretion.

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IT IS FURTHER ORDERED that the parties may stipulate for the remainder of this case to be randomly assigned to a panel as the issue of statewide significance has been resolved. Should the parties fail to stipulate within 10 days of the date of this Order, the matter will remain assigned to the full Board.

DATED this ___ day of June 2019.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
PHILIP LARSON, Board Member

By: _____
CAM WALKER, Board Member

By: _____
GARY COTTINO, Board Member