STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

AFSCME, LOCAL 4041, Complainant, v. STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, HIGH DESERT STATE PRISON; BRIAN E. WILLIAMS, SR. WARDEN, Respondents.	Case No. 2020-002 **NOTICE OF ENTRY OF ORDER** **ITEM NO. 862-B**

TO: Complainant and its attorney of record, Fernando Colon, Associate General Counsel, AFSCME Office of the General Counsel;

TO: Respondents and their attorneys of record, Roger L. Grandgenett II, Esq. and Neil C. Baker, Esq. and Littler Mendelson, P.C.

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on April 15, 2021.

A copy of said order is attached hereto.

DATED this 15th day of April 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 15th day of April 2021, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Fernando R. Colon
Associate General Counsel
AFSCME Office of the General Counsel
1101 17th Street NW, Suite 900
Washington, D.C. 20036

Neil Baker, Esq.
Roger Grandgenett, Esq.
Littler Mendelson P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169-5937

MARISU ROMUALDEZ ABELLAR
Executive Assistant

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

AFSCME, LOCAL 4041, Complainant, v. STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, HIGH DESERT STATE PRISON; BRIAN E. WILLIAMS, SR. WARDEN, Respondents.	Case No. 2020-002 **ORDER** **PANEL E** **ITEM NO. 862-B**

On April 15, 2021, this matter came before the State of Nevada, Government Employee-Management Relations Board (Board) for consideration and decision pursuant to the provisions of NRS Chapter 288, the Employee-Management Relations Act (EMRA); NAC Chapter 288 and NRS Chapter 233B.

The operative complaint claims two primary violations – a violation of a duty to bargain in good faith and interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

Specifically, it is alleged that Respondents committed a prohibited practice by circumventing its duty to bargain in good faith with Complainant, the now exclusive representative, when it unilaterally changed the employees' shifts during Complainant's organizing campaign at the High Desert State Prison (High Desert) by changing employees' shift lengths from 12 hours to 8 hours. By making said unilateral change, Respondents failed to maintain the status quo.

Complainant also asserts that Respondents interfered, restrained, or coerced employees in the exercise of their rights under the EMRA because the timing of Respondents' changes to employee shift lengths was intended to or had the effect of interfering with employee free choice to select an exclusive representative by encouraging employee defection from supporting Complainant as well as

undermining employee organizing to form their union. In other words, the operative complaint (as well as the pre-hearing statements and Amended Notice of Hearing) makes clear that Complainant asserts that Respondents' changes interfered, restrained, or coerced employees in the exercise of various rights established under the EMRA.

The Department of Corrections (the Department) operates High Desert. High Desert employees previously worked schedules consisting primarily of 8-hour shifts, although a few employees who worked in specialty positions also worked 10-hour shifts. In 2017, some employees lobbied then-Warden Brian Williams (now Deputy Director of Operations) to include 12-hour shifts in the 2018 schedules. Williams decided to implement 12-hour shifts as a pilot program in 2018. On June 18, 2019, Williams announced that 12-hour shifts would not be included in the 2020 shift bid.

Correctional officers bid on shifts at High Desert. Specifically, the shift bidding process starts roughly in August where they post the seniority list for officers to review. The next step is they would make available posts that were available to bid on (including certain exempt posts). Then, normally, the bid process would begin sometime in the middle of November (roughly before Thanksgiving) – staff would come in, bid on their post or shift. The bidding then goes into effect in the first half of January. This is done every year in accordance with Administrative Regulation 301.[1]

In November 2019, Complainant demanded the Department include 12-hour shifts in the 2020 schedules. Warden Williams initially informed employees that High Desert would reconduct the 2020 shift bid. However, after further discussion, Williams decided to honor the results of the initial 2020 shift bid. On December 31, 2019, Williams issued a memorandum to employees explaining that High Desert would continue with the 2020 8-hour shift bid as was conducted in November 2019. The 2020 shift bid went into effect on January 13, 2020.

The EMRA was amended in 2019 to grant certain rights for state employees, becoming effective on June 12, 2019.[2] Complainant filed their petition seeking to be designated as the exclusive

[1] These are part of their policies and procedures – specifically, AR 301, as related to shift bids. It gives them a step-by-step guide of what is required in regards to posting the seniority list as well as the posts that staff would bid on (including certain exempt posts).

[2] https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6159/Overview ("Effective June 12, 2019"); *see also* Sec. 55 ("This act becomes effective upon passage and approval."); Sec. 53 ("As soon as practicable after the effective date of this

representative for Bargaining Unit I on August 23, 2019. On October 30, 2019, Board staff issued its audit report on the petition which was presented to the Board at our December 17, 2019 meeting. On January 14, 2020, the Board met and orally designated Complainant as the exclusive representative (obtaining 52.8% showing of interest), with the formal designation order issued on January 22, 2020.

DISCUSSION

As indicated, Complainant asserts two primary violations.

The Duty to Bargain in Good Faith

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); *Jackson v. Clark County*, Case No. 2018-007, Item No. 837 (2019).[3] Under the unilateral change theory, an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002); *Kerns v. LVMPD*, Case No. 2017-010 (2018).

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act but not later than August 1, 2019"); *see, e.g., State of Nev. Employees Ass'n, Inc. v. Daines*, 108 Nev. 15, 21, 824 P.2d 276, 279 (1992).

[3] As stated in a previous order in this case, Count 2 of the operative complaint is brought pursuant to NRS 288.270(1)(e) (which also derivatively violates NRS 288.270(1)(a)). Under NRS 288.620, it is a prohibited practice for the Department to engage in any prohibited practice applicable to a local government employer set forth in subsection 1 of NRS 288.270 "except paragraphs (e) and (g) of that subsection." While NRS 288.620(1)(b) provides a similar prohibited practice of refusing to collectively bargain in good faith, this is pursuant to NRS 288.565. NRS 288.270(1)(e) prohibits refusing to collectively bargain in good faith as required by NRS 288.150. NRS 288.150 provides the well-established laundry list of mandatory subjects of bargaining. NRS 288.656 provides that the parties shall engage in collective bargaining as required by NRS 288.540. NRS 288.540 provides that bargaining shall concern "the wages, hours and other terms and conditions of employment for the employees", modeling the NLRA. Significantly, NRS 288.500 provides that collective bargaining shall entail a mutual obligation to bargain in good faith with respect to any subject of mandatory bargaining set for in subjection 2 of NRS 288.150, except paragraph (f) of that subsection. Unless statutorily distinct, the general basic premise of a failure to bargain in good faith is applicable to the Executive Department. *See* NRS 288.620 ("To the greatest extent practicable, any decision issued by the Board before October 1, 2019, relating to the interpretation of, or the performance under, the provisions of NRS 288.270 shall be deemed to apply to any complaint arising out of the interpretation of, or performance under, the provisions of this section.").

In a recently issued order involving a related case[4], the Board held that a holding[5] in *Clark County Public Employees Ass'n, SEIU Local 1107 v. Housing Auth. Of the City of Las Vegas*, Case No. A1-045478, Item No. 270 (1991) could not be reconciled with the plain and unambiguous language of the EMRA, as amended applicable to the Executive Department, as well as with the NLRA and applicable NLRB precedent. *AFSCME, Local 4041 v. State of Nevada, Dep't of Health and Human Services*, Case No. 2020-001 (2021).

The Board held: "The plain and unambiguous language of the EMRA thus makes crystal clear that the duty to bargain does not arise until the Board designates an exclusive representation." *Id.* The Board explained that "the duty to bargain arises at different points in time under the NLRA and the EMRA (primarily after an election or showing of majority interest as further detailed herein under the NLRA and not until designation under the EMRA in regards to the current dispute)." *Id.* Further, "the federal precedent mandating maintaining the status quo (and not making unilateral changes) is based on when the duty to bargain arises under to the NLRA." *Id.* "Since the duty arises at different points in time pursuant to the plain and unambiguous language of the EMRA, the federal precedent is inapplicable to the case at hand." *Id.*

The Board concluded: "As Respondents were not subject to the duty to bargain in good faith, they were free to make unilateral changes without violating their duty to bargain in good faith." *Id.* "In other words, we find that the obligation to maintain the status quo and not make unilateral changes, in this context, does not attach until the duty to bargain arises." The Board found no violation of NRS 288.620(1)(b) and derivatively NRS 288.270(1)(a).

We adopt the analysis and holding of the Board as stated in *AFSCME, Local 4041 v. State of Nevada, Dep't of Health and Human Services*, Case No. 2020-001 (2021) regarding the duty to bargain in good faith allegation and incorporate the order herein by reference. Thus, we find no violation of NRS 288.620(1)(b) and derivatively NRS 288.270(1)(a).

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[4] The cases are related in that they involve similar legal issues as well as allegations, and the parties are represented by the same attorneys.

[5] The holding being that the employer was required to maintain the status quo (and hence not make unilateral changes) as this violated *the duty to bargain in good faith.*

NRS 288.500 RIGHTS

A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.[6] It is of critical importance when analyzing applicable NLRB related precedent to not confuse or conflate the rights upon which a NRS 288.270(1)(a) (or Sec. 8(a)(1) under the NLRA) violation is found.[7]

NRS 288.270(1)(a) provides that it is a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA. NRS 288.500 bestows certain rights including "[f]or the purposes of other mutual aid or protection" to "[o]rganize, form, join and assist labor organizations… and engage in other concerted activities".[8]

As we have explained, pursuant to NRS 288.270(1)(a), "[t]he test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Juvenile Justice Supervisors Ass'n v. County of Clark*, Case No. 2017-020, Item No. 834 (2018), *citing Clark Cty. Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item 237 (1989). There are three elements to a claim of interference with a protected right: "(1) the employer's action can be reasonably viewed as tending to interfere with, coerce, or deter; (2) the exercise of

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[6] As we explained in a prior order in this case: "Under NRS 288.620, it is a prohibited practice for the Department to engage in any prohibited practice applicable to a local government employer set forth in subsection 1 of NRS 288.270 'except paragraphs (e) and (g) of that subsection.'" "As such, NRS 288.270(1)(a) applies in this case." As should be obvious by the plain language in NRS 288.270(1)(a), we have not held that NRS 288.270(1)(a) may be violated absent some right guaranteed under the EMRA. *See, e.g., Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 100, 715 P.2d 1321, 1323 (1986); *Ormsby County Teachers Ass'n v. Carson City Sch. Dist.*, Case No. A1-045405, Item No. 197 (1987); *Cone v. Nevada Serv. Employees Union/SEIU Local 1107*, 116 Nev. 473, 476, 998 P.2d 1178, 1180 (2000); *Nevada Serv. Employees Union/SEIU Local 1107 v. Orr*, 121 Nev. 675, 678, 119 P.3d 1259, 1261 (2005); *Nevada Serv. Employees Union, Local 1107, AFL-CIO v. Clark County*, Case No. A1-045759, Item No. 540B(2005); *Kilgore v. City of Henderson*, Case No. A1-045763, Item No. 550H (2005); *Reno Police Supervisory and Employees Ass'n v. City of Reno*, Case No. A1-045923, Item No. 694 (2009); *Eason v. Clark County*, Case No. A1-046109, Item No. 798; *Am. Ship Bldg. Co. v. N. L. R. B.*, 380 U.S. 300, 308, 85 S. Ct. 955, 962, 13 L. Ed. 2d 855 (1965) ("To establish that this practice is a violation of s 8(a)(1), it must be shown that the employer has interfered with, restrained, or coerced employees in the exercise of some right protected by s 7 of the Act."); *N. L. R. B. v. Transp. Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971) ("Sections 8(a)(1) and 8(a)(3) implement the rights guaranteed to employees by § 7.")

[7] In addition to the distinction involving a violation of the duty to bargain in good faith (Sec. 8(a)(5) under the NLRA), we note that Complainant did not allege a violation of NRS 288.270(1)(c) (Sec. 8(a)(3) equivalent under the NLRA). As such, a violation of NRS 288.270(1)(c) is not at issue in this case. This is important when analyzing the various case applications.

[8] As explained in the related case, the EMRA and NLRA are substantially similar in this respect and, as such, the federal precedent is persuasive absent an indication to the contrary. *Compare* NRS 288.620, NRS 288.270, NRS 288.500(1)(a) *with* 29 U.S.C. § 158(a)(1) (Sec. 8) ("to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]"), 29 U.S.C. § 157 (Sec. 7) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, … and to engage in other concerted activities for the purpose of … other mutual aid or protection….").

protected activity [by NRS Chapter 288]; and (3) the employer fails to justify the action with a substantial and legitimate business reason." *Billings and Brown v. Clark County*, Item No. 751 (2012); *citing Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1988); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 101, 715 P.2d 1321, 1323 (1986).

Complainant asserts that Respondents violated Section (1)(a) by interfering with employee rights to organize and bargain collectively guaranteed under the EMRA. Specifically, Respondents' actions of unilaterally changing employees' shift length during Complainant's organizing campaign at High Desert. Complainant notes that employees, pursuant to NRS 288.500, have the right to "[o]rganize, form, join and assist labor organizations, engage in collective bargaining … and engage in other concerted activities".

Complainant argues that "[a]lthough unilateral changes to mandatory subjects of bargaining during a union's organizing campaign, like unilateral changes to mandatory subjects of bargaining during the collective bargaining relationship, are *per se* prohibited practices under NRS 288.270(a) and (e), the evidence demonstrates that Respondent's actions interfered with the employees' right to organize and bargain collectively guaranteed under NRS Chapter 288."

Respondents counter that the elimination of the pilot program did not interfere with Complainant's organization campaign. Respondents contend the Board follows the NLRB in applying the *American Freightways*, *infra*, test when considering a claim of an unlawful unilateral changes during an organizing campaign. Respondents additionally cite *In re Noah's Bay Area Bagels, infra*, as well as *True Temper, infra*, for the proposition that an employer may adduce "a persuasive business reason demonstrating the timing of the [alleged unilateral change] was governed by factors other than the union campaign."

Preliminarily, as explained, Respondents' actions did not interfere, restrain, or coerce any employees in the exercise of their right to engage in collective bargaining through their exclusive representative.

The question remains as to whether Respondents interfered, coerced, or restrained with employees' other NRS 288.500 rights.

In *American Freightways Co.*, 124 NLRB 146, 14 (1959)[9], the Board did not agree with the test applied by the Trial Examiner. The NLRB held: "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *Id.* "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Id.* The NLRB then applied the test and found "that by announcing its change in overtime policy during the course of the organization campaign among office employees, the Respondent violated Section 8(a)(1) of the Act." *Id.* As such, the NLRB provided for the additional conclusion of law:

> By granting certain benefits to its employees, and by changing certain terms and conditions of employment, including the advance posting of holidays, payment of overtime in a holiday week, and the changing of its emergency leave policy, at a time when the unions were seeking to organize the employees involved, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

Id.; see also In Re Am. Tissue Corp., 336 NLRB 435, 441-42 (2001) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed."); *Advanced Life Sys. Inc. v. Nat'l Labor Relations Bd.*, 898 F.3d 38, 47 (D.C. Cir. 2018) ("Unlike Section 8(a)(1), violations of Section 8(a)(3) require proof of the employer's motive or animus."); *Am. Fed'n of Teachers, Afl-Cio d/b/a Washington State Nurses Org. Project, &/or Am. Fed'n of Teachers, Afl-Cio & Washington State Nurses Org. Project & Commc'ns Workers of Am., Local 7901*, No. 19-CA-190619, 2019 WL 7168880 (Dec. 23,

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[9] Interestingly, in our 1991 decision of *Clark County Public Employees Ass'n, SEIU Local 1107, supra*, the case was primarily based on a violation of the duty to bargain in good faith, and derivatively, NRS 288.270(1)(a). Thus, the Board's citation to *American Freightways Co., Inc.* should be viewed with caution. *See supra* note 7 and accompanying text; *see also Clark County Public Employees Ass'n*, Item No. 270, at 1, 3-4, 21-22 ("The unilateral changes which the Authority implemented during the Association's organizing effort … were not constructively scheduled prior to commencement of the organizing effort, clearly alerted the status quo and constitute violations of the Authority's duty to bargain in good faith."), 22-23 ("in contravention of its duty to bargain regarding the changes in benefits … in contravention of its duty to bargain regarding said changes …."), 23 ("While the Authority's motivation for making the subject changes irrelevant and not at issue in the dispute" (citing *American Freightways Co.*) "the actions of the Authority … were designed and intended to circumvent the Authority's duty to bargain…." However, the Board did hold "it [was] clear that the unilateral implementation of said changes during the Association's organizing effort had the same effect as conduct which interferes with the rights of the employees to organize …." *Id.* at 23, 31. *See also, e.g.*, N.*L.R.B. v. Otis Hosp.*, 545 F.2d 252, 254 (1st Cir. 1976) (explaining that "[n]either the Administrative Law Judge nor the Board distinguished between sections 8(a)(1) and (a)(3), though the statutory language and case law suggest that the requirements for establishing violations of each section differ. An employer violates section 8(a)(1) if the effect and purpose of his actions can be said to impinge upon the employees' rights to unionize.").

2019) (citing to the *American Freightways* test with approval); *Prod. & Laquae Leslie, an Individual*, No. JD(NY)-06-17, 2017 WL 1295416 (Apr. 6, 2017) ("the Board's test for 8(a)(1) violations does not turn on the actor's motive or the success or failure of the attempted coercion."); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339, fn. 3 (2000) ("It is well established that the motive behind employer statements regarding the consequences of unionization is not relevant; rather, such statements violate Sec. 8(a)(1) if they have a reasonable tendency to interfere with, restrain, or coerce union activities"); *Caterpillar Tractor Co.*, 242 N.L.R.B. 523, 532, n. 30 (1979) ("We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act, *enforced*, 638 F.2d 140 (9th Cir. 1981)"); *National Aluminum*, 242 N.L.R.B. 294, 298 (1979) ("Defeat of those [Section 7] rights by employer action does not necessarily depend on the existence of an anti-union bias."); *Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item No. 237 (1989) ("some conduct by its very nature contains the implications of the required intent. In such cases the natural foreseeable consequences of an employer's actions may justify the conclusion that … interference was intended. Thus, the existence of … interference may be inferred by the Board based upon its experience in the labor management relations area."); *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227, 83 S. Ct. 1139, 1144, 10 L. Ed. 2d 308 (1963); *Ormsby County Teachers v. Carson City Sch. Dist.*, Item No. 197, Case No. A1-045405 (1987); *Caterpillar Tractor Co.*, 242 NLRB 523, 532 (1979) ("Contrary to Respondent's allegation, no proof of antiunion bias or coercive intent or effect is necessary for a finding of a Section 8(a)(1) violation, where the employer engages in conduct which, it may reasonably be said, interferes with the free exercise of employee rights under the Act.").

As indicated, while Respondents concede that *American Freightways, supra*, is applicable, they additionally cite *In re Noah's Bay Area Bagels, infra*, as well as *True Temper, infra*, for the proposition that an employer may adduce "a persuasive business reason demonstrating the timing of the [alleged unilateral change] was governed by factors other than the union campaign." As further detailed below, Respondents' primarily argue they simply ended a pilot program that proved unsuccessful.

As also indicated, the Board has generally stated that one component to the claim of interference with a protected right is that "the employer fails to justify the action with a substantial and legitimate business reason." *Billings and Brown v. Clark County*, Item No. 751 (2012), *citing Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1988); *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 101, 715 P.2d 1321, 1323 (1986)[10].

In *Medco*, when dealing with the Section 8(a)(3) discrimination claim, the Fourth Circuit noted that "an employer violates this section 'only if its actions are motivated by anti-union animus.'" *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d 733, 741 (4th Cir. 1998). In contrast, when analyzing the distinct Section 8(a)(1) interference of Section 7 rights claim, the Court explained, "If protected activity is implicated, the well-settled test for Section 8(a)(1) violations is whether, "under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees." *Id.* at 745. "It matters 'not whether the [employer's] language or acts were coercive in actual fact.' Our inquiry instead focuses on 'whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate.' This question of '[w]hether particular conduct is coercive is a 'question essentially for the specialized experience of the NLRB,' and we grant considerable deference to its determinations." *Id.* (internal citations omitted).

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[10] *Contra Reno Police Protective Ass'n*, 102 Nev. at 101, 715 P.2d at 1323 (applying the burden shifting approach common in cases of discrimination), *citing N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394, 103 S. Ct. 2469, 2470–71, 76 L. Ed. 2d 667 (1983), *abrogated on other grounds by Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994) (noting the "complaint alleg[ed] that an employee was discharged because of his union activities"); NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) ("by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"); *N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 909 (1st Cir. 1981), *abrogated on other grounds by N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983) ("Wright Line discharged Lamoureux because of his union activity, in violation of section 8(a)(3) of the Act."); *Champion Parts Rebuilders, Inc., Ne. Div. v. N.L.R.B.*, 717 F.2d 845, 853 (3d Cir. 1983) ("Under the Board's *Wright Line* analysis, the Company's failure to meet its burden of persuasion that it had a non-discriminatory reason for its action results in a finding for the General Counsel."); *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980) ("In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1)", "After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act."); *N.L.R.B. v. United Sanitation Serv., Div. of Sanitas Serv. Corp.*, 737 F.2d 936, 939 (11th Cir. 1984) ("The question of an employer's motivation in section 8(a)(3) cases is a question of fact to be resolved by the Board from a consideration of all the evidence."); *In the Matter of the Reno Police Protective Ass'n v. The City of Reno*, Case No. A1-045334, Item No. 115 (1981) ("The thrust of the complaint is … that by demoting Butterman from probationary sergeant to patrolman the city has engaged in a prohibited practice by discriminating against Butterman, president of the Association, because of his office in the Association…."); *Riebeling v. Housing Auth. of the City of N. Las Vegas*, Case No. A1-045552, Item No. 358 (1995) ("Eliminating the positions and contracting out the work of employees who are attempting to unionize certainly is discriminatory and does discourage union membership/organization"); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, at 2, filed June 30, 2020, unpublished deposition (Nev. 2020).

The Court continued: "We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement. '[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated.'" *Id.* "This determination is also squarely within the expertise of the Board. '[I]t is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *Id.* As such, the Court explained: "Consequently, an independent violation of § 8(a)(1) exists when (1) an employer's action can be reasonably viewed as tending to interfere with, coerce, or deter (2) the exercise of protected activity, and (3) the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's § 7 rights." *Id.*

The Court further explained: "An employer's coercive action affects protected rights whenever it can have a deterrent effect on protected activity." *Id.* "This is true even if an employee has yet to exercise a right protected by the Act." *Id.* "The rationale for this rule is straightforward. Section 8(a)(1) reaches all acts by employers that 'interfere with, restrain, or coerce' their employees' exercise of protected rights, *see* 29 U.S.C. § 158(a)(1), and this requires that the section reach employer conduct even when employees have yet to engage in protected activity." *Id.* "As we state above, the test is not whether the employer's action was coercive in fact, but whether it reasonably tends to coerce or deter the exercise of protected rights." *Id.* The protection afforded by Section 7 "applies even to activities that do not involve unions or collective bargaining." *Id.* at 746. The Court explained that "[u]nlike violations of § 8(a)(3), an employer's antiunion motivation is not a required element of § 8(a)(1)." *Id.* at 747.

Regardless, in this case, the distinction does not change the result – in other words, Respondents committed a violation even if Respondents' justification, purpose, or motive is irrelevant. Respondent did not engage in conduct which tended to interfere, restrain, or coerce employees in the free exercise of their rights under the EMRA. This is supported by over 50 years of federal persuasive precedent as well as the plain language of the EMRA and prior EMRB decisions (cited above and further below).

When Warden Williams (now Deputy Director) started as warden in August 2016 there were three shifts (day, swing, and graveyard) consisting of 8-hour shifts. They also had some positions that

were 10-hour shifts (specialty positions such as prison industries, vocational classes, and education), though the majority of their posts were 8-hour shifts. These 8-hour posts had been in place roughly 9 years.[11]

Generally, Warden Williams had Monday morning meetings to meet with his associate wardens and most of his department heads to discuss anything that may have happened the week prior, and what they were going to be focusing on the week coming up. This was an opportunity for different departments to share any concerns or issues they had. They also had monthly meetings, which also consisted of his supervisors to be able to participate in that as well. Williams described this as sort of the same thing as the Monday morning meetings but a little more detailed as far as the agenda. They further had quarterly meet and confer meetings – Warden Williams would send an email out to associations prior thereto asking them to submit agenda items for anything they wanted to discuss including concerns, issues, or complaints. At these meet and confer meetings, they would discuss the issues and try to get to some type of resolution.

In 2017, Officer Aaron Dykas lobbied Williams for 12-hour shifts. Dykas requested this from Warden Williams from the time Williams started in August 2016 into 2017.[12] Williams started having discussions with his associate wardens, and Williams asked if they could make it happen to do a variation of 12-hour shifts (identify so many posts as 12s, have the other posts at 8s, and keep the 10s for the specialty positions). His associate wardens believed they could. Williams continued to meet with Dykas and with other associations, doing the meet and concerns as well as monthly meetings.

Warden Williams decided to give it a try – he testified that the staff had endured a lot, and he wanted to give them the opportunity. However, Williams cautioned that his overtime and sick leave needed to be reduced (in that, it could not be the way it currently was). Williams specifically noted not only could it not increase, but it had to be reduced. Williams stated, "I'm holding everybody who will

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[11] According to Williams, Warden Nevin (the prior warden before Williams), had given the staff an opportunity to work a variation of 12-hour shifts in the past – Williams could not remember specifically when but estimated that the last time they had any variation of 12-hours shifts was roughly 8 to 9 years ago. On the whole, we find Warden Williams to have been a credible witness as further detailed herein.

[12] Dykas requested this due to things taken away from the staff over the years including furloughs, travel pay, and step increases.

be on 12s, as well as the other officers accountable, and if can reduce our overtime and sick leave, you know, we'll stay with that schedule. But if we can't, we'll go back to 8s."

Also, prior to implementing what was deemed a pilot project or program, Warden Williams spoke with his Deputy Director (Wickham) and told him that he wanted to see if they could make it work since "they've suffered for many years as far as a lot of things being taken from them and not given back, and I just want to give them that opportunity." Deputy Dir. Wickham responded, "you can try it as a pilot project and if it works great. If it doesn't, we'll just convert back."

Thereafter they engaged in the annual shift bidding for the 12-hour shifts which became effective in January 2018. Williams testified that during the months of November and December in 2017, their overtime was skyrocketing, which had to do with the roughly 50 vacancies they had as well as certain inmates in hospitals (an inmate in hospital requires 2 officers). Right at the end of that in January, they had about 40 officers graduate from academy as well as the inmates in the hospital went away, so the initiation of the pilot project looked promising.

As the year went on, overtime started to increase as well as sick leave (which Williams testified was normal with an academy that graduates). Williams explained that they waited until probably April or May, still seeing an upward trend in overtime and sick leave use. Williams spoke with some of the officers to inform them of such, and they needed to watch it. They created a flow chart, sending it out to all staff in a warden's bulletin to help monitor it as well as put the pressure on one another to make sure they could come into work if they weren't sick.

For example, the August 22, 2018 Warden's Monthly Agenda noted that the High Desert had become a test pilot for 12-hour shifts "and Legislators are watching [them] closely to see how it works. All staff presence at work will be critical in maintaining the 12's, so let's work together and not abuse what we have." A May 27, 2019 Agenda noted that sick leave usage was higher than the prior year, which was disappointing, and "[i]f the pattern continues, [Williams] will need to determine if [they] remain on 12-hour shifts. The Dept as a whole has been questioned as it related to utilizing 12's. Part of our justification and argument was that 12's would reduce calls. (see attached report) [which showed sick leave rising]."

Williams explained that when they started the 12-hour shifts in January of 2018, they had a representative from the LCB come and meet with them. The representative at that time made a comment that they were only legislatively approved for 8-hour shifts, not 12s. Williams explained to her that they were doing a pilot program where they were not just 12s, but a combination of 8s, 10s, and 12s. Williams also had to send a report to his deputy director every pay period for the amount of overtime that was used. His deputy director made a comment that they had gotten questioned by their deputy director of fiscal as well as LCB about the amount of overtime. As such, Williams was trying to remind the staff that the department as a whole had been questions as it related to 12s, putting them on notice.

Williams also testified in regards to one of his weekly briefings, March 28, 2019, that the hours of sick leave had increased dramatically over the last year. It was noted, "If this continues we will see an end to 12 hours shifts in the coming budget." Moreover, "In a previous meeting the Legislative Counsel Bureau, see attachment LCB, has stated that we are funded and organized to be an 8 hour shift facility but the Wardens and Directors have argued that the 12 hour shifts will reduce the overall overtime. Director Dzurenda met wit the Subcommittee for Public on March 6, 2018 and went over our institutional expenditures. If the trend continues the way we will see some changes in our scheduling, including the removal of the 12-hour shifts."

Williams explained in another weekly briefing, May 20, 2019, that because of their overtime they were being scolded by LCB. Williams again reiterated that, "[a]s it stands unless there is a significant change in call offs HDSP will revert back to 8 hour shifts for the majority of the yard."

As such, in numerous meetings, they had discussed that they were going to have to revert back to 8-hour shifts due to pressure from the LCB due to overtime and sick leave not being reduced as they had initially hoped. At a June 18, 2019 meet and confer meeting, Complainant had this on the agenda wanting to discuss the item.

High Desert posted the seniority list and the rosters in the post in accordance with AR 301 in August and September of 2019. As Williams previously explained, under their established polices, August started the process, and they put a list out for seniority and then going into September the actual post for officers to be able to bid on is then posted that following month.

On November 15, 2019, Complainant sent a letter to Acting Director Wickham requesting they discontinue 8-hour shift posting instead of the then current 12-hour shifts and stated it was an unfair labor practice based on a mandatory subject of bargaining and unilateral change, along with noting NLRB and EMRB case law. Upon receipt of this letter, Deputy Dir. Wickham informed Williams that he was going to have to redo the post bid. Williams requested that until they get further clarification, he would like to continue with their shift bid, which they did. Later, Wickham directed Williams to let the staff known that they were going to redo the shift bid. Williams asked Wickham if they could confer or meet with the Office of the Attorney General to discuss whether or not this was required. Wickham said they had a new director coming in, and he would share this with the new director. At that time, however, he directed Williams to put a memo out which informed staff that they would be reconducting the annual bid (the memo was dated November 26, 2019). The memo indicated that prior to the start of the shift bid, employee associations met with High Desert Administration and submitted a reversal of the shift bid process to the Governor citing unilateral changes – which they interpreted as during any time employee associations are forming, bargaining items cannot be changed until they had been discussed and reached a final agreement. As a result of the interpretation, the bid would be reconducted to include 12-hour shifts. The memo noted, "[i]t is the desire of the HDSP Administration to serve the best interest of the staff and facility in this coming bid and see that it is completed correctly."

After this, Warden Williams continued to have conversations with Wickham and the Office of the Attorney General. Director Daniels then came on board (roughly December). He was briefed as to the decision that had been made, did not agree with it, and spoke with the OAG who supported his decision and advised their shift bid could remain and stay the same. As such, they did not reconduct the annual shift bid.

Warden Williams explained that Dir. Daniels agreed with Williams and the OAG and, in his experience (including director in several other department as well as the Federal Bureau of Prisons and labor relations), that they were correct in being able to continue with their bid.

As such, on December 3, 2019, Warden Williams emailed labor representative Kevin Ranft and asked if they could discuss his November 2019 letter regarding the posting and unilateral change. Williams noted, "[i]n discussing your request with the Director and AG's office, numerous concerns

and complaints from staff have been received. Based on these concerns and complaints I would like to make you aware and possibly discuss in an attempt to resolve and do what's best for all staff." Ranft responded, on December 10th, that "there will be no meetings or attempts at negotiations until process has been properly established." Further, "[o]nce established, we will seek to negotiate a complete collective agreement on all mandatory subjects of bargaining. Until you reconduct the bidding and include twelve (12) hours shifts, you remain in violation of unilateral changes. I encourage you to act on your November 26th memo and reconduct the bidding including the twelve (12) hour shifts."[13]

In a December 24, 2019, Memo to Director Charles Daniels (after he took over for Wickham who had been acting on a temporary basis), Williams explained the background including that, as of June 2019, sick leave and overtime continued to climb and they were left with no choice but to return to the 8-hour shifts. He noted that this decision was discussed with Human Resources and all associations that attended the meet and confer on June 18, 2019. Further, on November 18, 2019, they began their Annual Shift Bid which consisted of the legislatively approved 8-hour staffing pattern that they were returning to. This Annual Bid takes approximately 72 hours over a 5-day period to complete. However, they were notified by Complainant that they were in violation by doing so. Williams noted that per AR 301, "there are timelines that must be met in order to conduct a new bid which pushed any rebid into March of 2020 and the effective date of any new bid into April 2020." Further, "[a] large number of staff have begun planning their personal schedules … throughout 2020 based off of the 8-hour bid that was conducted." "Since the completion of this November shift bid and the announcement that there needs to be a rebid per AFSCME many staff have voiced their concerns and opinion as it related to retaining the 8 hours shifts rather than keeping the current staffing pattern and have to rebid." "It is estimated that only 7% of the officers working at HDSP would like to remain on the current 8-10-12 hour shifts."[14] Daniels supported Williams decision to revert back to 8s.

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[13] Yet, in Ranft's November 15, 2019 letter to Acting Director Wickham, he stated that "[g]iven that the posting has begun, this matter requires your immediate attention for resolution. If this cannot be resolve[d] with you, we will have no other options but proceed with an unfair labor practice claim."

[14] Williams also estimated that roughly 35-40% on the employees were on 12-hours shifts, with the others on 8 and 10 hour shifts. We find Warden Williams testimony credible including his prior response indicating that they received numerous concerns and complaints from staff regarding reconducting the bid.

In a December 31, 2019, in a Warden Bulletin to all staff, Williams explained that after discussion with Dir. Daniels, and the OAG as well as other legal entities, it was determined that High Desert would continue with the 2020 8-hour shift bid as conducted in November 2019. The correspondence noted that the 2020 shift bid goes into effect January 13, 2020.

As explained, the EMRA was amended in 2019 to grant certain rights for state employees becoming effective on June 12, 2019. While Complainant has been generally organizing for quite some time, Kevin Ranft testified that Complainant began actively engaging in a specific campaign to organize employees at the NDOC at High Desert in May 2018 (when they started obtaining authorization cards and engaging in a full campaign). Specifically, "AFSCME started really working with its members and with the chapter officers that [were] elected for that corrections chapter." The organizing campaign came into full swing specifically for the purpose of obtaining exclusive representation under Senate Bill 135 with the expectation of the EMRA's amendment coming to fruition.[15]

Complainant filed their petition seeking to be designated as the exclusive representative for Bargaining Unit I on August 23, 2019. On October 30, 2019, Board staff issued its audit report on the petition which was presented to the Board at our December 17, 2019 meeting. On January 14, 2020, the Board met and orally designated Complainant as the exclusive representative (obtaining 52.8% showing of interest), with the formal designation order issued on January 22, 2020.

Here, Respondents began their annual shift bid reverting back to 8-hour shifts in November 2019, and in a December 31, 2019, Warden Bulletin to all staff, explaining that the 2020 8-hour shift bid would continue as conducted in November 2019. The shift bid, as they customarily do according to established policy and procedure, went into effect in January 2020 (specifically on the 13th).

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[15] As we explained in a prior order in this case, "Indeed, in our designation orders we noted that the Board will process a petition supported by a showing of interest even if it was gathered prior to the time when a question concerning representation could be raised." NLRB: AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, AT SEC. 5 (2017); *see also, e.g.*, *Sheffield Corp.*, 108 NLRB 349, 350 (1954); *Covenant Aviation Sec., LLC*, 349 NLRB 699, 703 (2007); *A. Werman & Sons*, 114 NLRB 629 (1956). Senate Bill 135 (the bill granting collective bargaining rights to state employees) was introduced in February 2019. At a minimum, it was reasonable for Complainant to ramp up organizing efforts at this time. As should be obvious, it is often an enormous undertaking to organize employees – hence the guidance provided by the NLRB and Office of the General Counsel. Ranft stated they "worked with various legislators to really create and draft a bill draft request through the legislators …."

As detailed in the related matter of *State of Nevada, Dep't of Health and Human Services*, "Though we note the important point is not simply the timing of the announcement, but whether based on the totality of circumstances, Respondents' actions interfered, restrained, or coerced employees in their right to organize." As further explained herein, in distinction to the related matter, we do not find that Respondents' actions here tended to interfere, restrain, or coerce employees in the exercise of their NRS 288.500 rights.

In *True Temper Corp.*, 127 NLRB 839, 840 (1960), the NLRB affirmed the Trial Examiner's order. In that matter, during the organizational campaign, the employer announced and granted a wage increase to its employees. "The complaint alleges that during the month of April 1958, Plant Manager Borer announced and granted a wage increase to its employees for the purpose of discouraging union activities."[16] *Id.* at 842.

"Respondent, on the other hand, adduced evidence to establish that the wage scale at the Union City plant when Respondent purchased that plant in 1955 was very low, and that its April and July increases were part of an overall plan, in effect long before organizational activities began, to bring the wage scale at Union City in line with comparable 'captive handle' plants operated by Respondent as production and efficiency improved at the newly remodeled and enlarged Union City plant." *Id.* at 843. "Respondent likewise adduced testimony to establish that the granting of fringe benefits in the way of paid holidays, rest periods, and installation of vending machines was merely designed to, and had the effect of, equating the working conditions at the newly remodeled and enlarged Union City plant to the working conditions at plants of Respondent which had already been established for some time." *Id.*

The Trial Examiner held: "I am satisfied and I find that the announcement and granting of the wage increases on April 21 and July 21 was an implementation of an overall wage program for the Union City plant which had been in effect long before the union activities began, and was not for the purpose of undermining the Union's organizational campaign." *Id.* "I find also the granting of the

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[16] As indicated above, under the NLRA (and corresponding provision of the EMRA not alleged here), it is an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Sec. 8(a)(3) [§ 158]. "General Counsel disclaims any suggestion that the April 23 letter was independently violative of Section 8(a)(1) of the Act." *Id.* at 843, n. 4.

fringe benefits was attributable to Respondent's desire to bring the working conditions at the newly reopened Union City plant to at par with the working conditions at Respondent's other plants and to do so as quickly as the physical and operating conditions of the plant permitted." *Id.*

In rejecting a *per se* violation, the Trial Examiner cited to *Hudson Hosiery Company*, 72 NLRB 1434, 1437 (a case decided before *American Freightways*), noting that "[w]hat is unlawful under the Act is the employer's granting or announcing such benefits (although previously determined upon bona fide) for the purpose of causing the employees to accept or reject a representative for collective bargaining." *Id.*[17]

The Trial Examiner noted: "The doctrine here enunciated serves the purpose of immunizing employees from economic coercion in their choice of a bargaining representative. At the same time, it avoids the otherwise paradoxical result of compelling employees to forfeit benefits which would otherwise accrue merely because they are seeking to exercise their statutory right to select a bargaining representative." *Id.* at 843.

In analyzing the general test of *American Freightways*, *supra*, the Trial Examiner reasoned:

> On its face this broad language would seem to overrule, at least *sub silentio*, the rulings in cases like *Hudson Hosiery*. However, it is an elementary principle of Anglo-American jurisprudence that a judicial or quasi-judicial tribunal normally passes only on the case before it and, absent cogent indication to the contrary, the tribunal should not be taken as having laid down a broad new principle of law or as having overruled, *sub silentio*, a prior line of authority. I do not believe the Board has done so in the *American Freightways* case. It is significant, it seems to me, **that in that case some of the changes made were unexplained departures from company policy not previously contemplated or in effect. Moreover, in that case the changes were announced a month and a half after a petition for representation was filed with the Board. Under these circumstances the Board could reasonably conclude as it did that Respondent's conduct necessarily tended to interfere with the free exercise of employee rights under the Act and that the employer's lack of an antiunion motive was immaterial.** Viewed from another perspective, the Board could conclude that under the circumstances of the *American Freightways* case, the employees there involved, on

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[17] *See also, e.g., N.L.R.B. v. Otis Hosp.*, 545 F.2d 252, 254 (1st Cir. 1976) ("On a similar theory, to grant benefits during a union organizing campaign has been held to violate section 8(a)(1) if, at the time, the employer knew or should have known that a union was organizing or that an election was pending, and if the benefits were granted with the purpose of interfering with the employees' rights to organize."); *Struthers-Dunn, Inc.*, 228 NLRB 49, 69 (1977) ("The Board's test for determining the validity of a wage increase during the pendency of a representation petition is whether it is given 'for the purpose of inducing employees to vote against the union'. *Tonkawa Refining Co.*, 175 NLRB 619 (1969), enfd. 434 F.2d 1041 (C.A. 10, 1970). And the burden is on the employer to come forward with an explanation for the timing other than the election.").

> the basis of their knowledge, would be restrained in the exercise of their organizational rights.
>
> **This is a far cry, it appears to me, from saying that under any set of facts and at any stage of an organizational campaign, 'it may reasonably be said' that a change in wages or working conditions 'tends to interfere with the free exercise of employee rights under the Act.'** *American Freightways*, *supra*. I do not read the cited case as so holding. **In the instant case where the changes in wages and working conditions were made at the preliminary stages of an organizational campaign, where they were made pursuant to company policy and pattern which had been established before the organizational campaign started, where information concerning that policy and pattern was made available to the employees, and where there is no probative evidence that the changes were made 'for the purpose of' coercing the employees in their choice of a bargaining representative, I perceive no basis for concluding that Respondent's action tended to interfere with the free exercise of employee rights under the Act.**
>
> Accordingly, I find that Respondent did not, by granting the wage raises of April 21 and July 21, and by granting fringe benefits during that period, violate Section 8(a)(1) of the Act.

Id. at 843-44 (**emphasis** added).

Unlike the related matter of *State of Nevada, Dep't of Health and Human Services*, Respondents clearly communicated that the change from 8s to 12s was a pilot program. We find Warden Williams credible that this process began in 2016, into 2017, which culminated in the 2018 annual shift going into effect in January 2018. This was before the union began their active organizing campaign even using the date of Complainant's own witnesses (*i.e.*, May 2018). The change was then made pursuant to company policy and established procedures which were established before the organizational campaign – indeed, Warden Williams was also very active and transparent in updating and informing employees during the entire pilot program. *See also, e.g.*, *N.L.R.B. v. Curwood Inc.*, 397 F.3d 548, 554 (7th Cir. 2005) ("Thus, for example, an employer does not commit an unfair labor practice when it is merely following an established practice of pay raises predating a union campaign."); *see contra Ohio New & Rebuilt Parts, Inc.*, 267 NLRB 420, 422 (1983) ("Respondent did not, however, adduce any testimony which would reveal that the new safety director promulgated the attendance policy under discussion prior to the commencement of the union organizational campaign, and it offered no reason for selecting July 20 as the date for implementation of the policy.").

Also, in contrast to the related matter of *State of Nevada, Dep't of Health and Human Services*, this was not the case in which Respondents seemed to ramp up efforts to make the reversion in response

to union organization – in other words, Warden Williams was credible that he continually updated the employees on the progress of the pilot program including, for example, in August 2018 (warning that LCB was monitoring this closely and not to abuse what they have), March 2019 (sick leave dramatically increasing and their argument to LCB that 12s would reduce overtime (even if not legislatively approved for 12s), and if the trend continued reversion would be required), and May 2019 (noting that it appeared the pilot program was not successful, if the patterned continued they would have to revert, and they were being scolded by LCB). *See contra Tonkawa Ref. Co.*, 175 NLRB 619 (1969) ("Respondent had exhibited little urgency about honoring this pledge until the Union appeared on the scene [and] the announcement and granting of the raises were timed during the preelection campaign'".).

As cited to in the related matter, the First Circuit, in *N.L.R.B. v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275, 276 (1st Cir. 1975), dealt with a section 8(a)(1) violation case based upon an employer's granting of benefits to his employees. The First Circuit held: "However, we believe that the timing of the company's August 20 announcement of wage benefits, made two weeks before the election, does support the Board's finding of a violation on that basis." *Id.* "**Merely by coming on the scene and starting to organize, a union cannot prevent management from taking reasonable steps to run its business properly.**" *Id.* (**emphasis** added). "This is an entirely different situation from one where a sluggish and apathetic employer is suddenly galvanized into action by the appearance on the scene of a union." *Id.* "The company was, of course, entitled to try to explain why the particular date was selected; and the Board was entitled, if it chose, to believe the explanation." *Id.*; *see also contra Overstreet v. David Saxe Prods., LLC*, No. 218CV02187APGNJK, 2019 WL 332406, at *3 (D. Nev. Jan. 24, 2019) (**emphasis** added) ("An important indicator of [the employer's] motive is whether there has been a change from the status quo. The timing of the wage increase and variations **from the company's usual course of conduct can be evidence of improper motive.**"); *N.L.R.B. v. State Plating & Finishing Co.*, 738 F.2d 733, 740 (6th Cir. 1984) ("The presumption of improper motive has only been found rebutted when the details of the raises were established before the start of the election campaign.").

Further, Respondents justified the timing of their actions. The annual shift bid was conducted in accordance with their established policies and procedure going into effect in January as it customarily did. Moreover, they followed the pre-determined guidelines of the pilot program. Simply because Respondents attempted at a resolve after conducting the bid in response to Complainant's letter alleging violations, is not enough to convert Respondents' actions into a prohibited labor practice. *See, e.g.*, *In Re Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) ("we find that the Respondent has established that the timing of the announcement and implementation of the restoration of Prudential plan benefits was governed by factors other than the union campaign."); *Ampex Corp.*, 164 NLRB 224, 229 (1967) ("I am satisfied that Beumer announced the plan on June 10 rather than on some later day in June or July because he wanted to get it underway for reasons unrelated to the union campaign."); *see contra Am. Feather Prod.*, 248 NLRB 1102, 1108 (1980) ("there is no persuasive showing why they were precipitously announced and implemented immediately following the Union's demand for recognition and its petition for an election. Such timing compels the inference that the purpose of the improvements was to discourage employee interest in the Union. There is no apparent sound business reason which required these measures in mid-October or why management's promises, already long delayed, could not have waited until after the election."); *U Save Foods d/b/a Sun Mart Foods & United Food & Com. Workers Loc. No. 7, Petitioner*, 341 NLRB 161, 164–65 (2004) ("the Employer has shown no business reason or necessity for announcing the benefits at the time and in the manner that it did."). It is clear that Respondents were stuck in a tough situation once they received Complainant's letter – either being forced to continue with a costly and ineffective situation[18] until the next annual shift bid (or until bargaining an initial CBA according to Complainant) or continue with their initial decision to end the pilot program and thus return to 8 hour shifts.

Additionally, based on all the evidence presented, we do not find credible testimony that Respondents' actions tended to interfere with employees' rights to organize, form, join and assist Complainant. When questioned on the employees' specific concerns, Ranft testified that he was

[18] Which was against legislative mandates and their established plan predating Complainant's campaign. As indicated, Warden Williams also credibly testified that reconducting the shift bid would cause numerous problems and received numerous complaints.

informed about the disruption this caused to 12-hour shift employees' schedules – "It really provided them an opportunity to become refreshed so when they come back to work, they can really be functionable and really not break down in regards to being overwhelmed and overworked." Ranft testified that "[t]he biggest component was family. It gives them an opportunity to spend time with their children, their spouse, and they also enroll in college. And we get a lot of complaints that the 12-hours versus the 8s, the 12-hours is easier for them to schedule daycare."[19]

However, Ranft also testified, specifically in regards to the organizing efforts, that "the 8-hour shifts being imposed was a direct, we feel, it was a direct attack to ensure that AFSCME could not get the certification." Ranft based this on the allegation that "other groups specific on one of them an [FOP], was walking around telling them our officers or our members that was AFSCME's fault that the 8-hours were being imposed versus the 12, the loss of the 12s were AFSCME's fault and it made – it made the AFSCME looks and certifications were just hard to get at that point." Yet, credible evidence was not presented that Respondents had anything to do with the tactics of other associations (or even that this was a natural foreseeable consequence of Respondents' actions). Moreover, unlike the related matter of *State of Nevada, Dep't of Health and Human Serv.*, there was no credible evidence presented of employee desertion from the union (such as rescinding authorization cards). Given the totality the evidence, we do not find credible that Ranft's general assertion (when asked of the actions to eliminate the 12-hour shifts, that one "would see more interactions with the staff at the gate house, and the parking lot, and our organizer reported that people were just walking by them versus engaging in conversation as in prior to this announcement") was related to Respondents' actions.[20]

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[19] Cook additionally stated that the other correctional officers' complaints were due to childcare problems and preparations. Harry Schiffman testified, when asked how the change affected Complainant's organizing campaign, that it hurt them in their eventual contract negotiations because "it somewhat weakens [their] position with negotiating." Schiffman further testified that as soon as the SB 135 was signed into law that the status quo was required to be maintained. Moreover, unlike the general testimony presented in the related matter, James Cook specifically testified that he actually got involved in Complainant's organizing campaign because "they took away our 12-hour shifts."

[20] On cross-examination, Ranft reiterated the same allegation when questioned (adding they would ignored attempts to get them to sign) – while the Chair allowed the testimony (after a hearsay objection), he specifically noted that the objection and response would be given due weight in the course of the Board's deliberation. *See* NAC 288.322 ("The rules of evidence of courts of the State will be generally followed but may be relaxed at the discretion of the Board or the presiding officer when deviation from the technical rules of evidence will aid in ascertaining the facts."). Again, based on the totality of the evidence presented, we do not find credible that this general conduct was related to Respondents' actions (instead, Ranft's testimony seem to indicate it may have been due to a rival union's actions (specifically FOP)). In the same vein, Schiffman testified that they "also [had] another unions or organizations out there that are, you know, trying to do the same. So it gets in the way of our exclusivity being allowed to do this." Of note, it was conceded that Complainant was not the exclusive

Furthermore, in the same vein and based on the totality of the evidence, we do not find credible Cook's general testimony that officers expressing that they didn't "believe in them wholeheartedly" was related to Respondents' action. Cook also clarified that the harm was seemingly not due to the initial decision to revert back to 8s but instead, "The harm was because of the shifts – before when we were on 12s, we got told that were going to stay on the 12-hour shift. Then … they rescinded."[21] Importantly, based on the totality of the evidence, we do not find that Respondents' conduct tended to interfere, restrain, or coerce employees in the exercise of the right to organize, form, join, and assist labor organizations and engage in other concerted activities. *In Re Am. Tissue Corp.*, 336 NLRB at 441-42 ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn … on whether the coercion succeeded or failed."); *Medeco Sec. Locks, Inc. v. N.L.R.B.*, 142 F.3d at 741 ("It matters 'not whether the [employer's] language or acts were coercive in actual fact.' Our inquiry instead focuses on 'whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate.'").

In conclusion, while we also view this as a close case, Respondents' actions did not tend to interfere, restrain, or coerced any employee in the exercise of their rights under the EMRA. In other words, Respondents did not engage in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act. For the purposes of this order, we treated Respondents' motive in this case as irrelevant. However, we also note that Respondents justified the action with a substantial and legitimate business reason that outweighed the employees' NRS 288.500 rights.[22]

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representative at the time of the reversion (Schiffman also stated they walked out of the June 2019 meet and confer meeting because other associations were present, Complainant was the exclusive representative, and Respondents "could only meet with members of AFSCME Local 4041 and no one else.").

[21] Likewise, we do not find credible Schiffman's general testimony regarding the actions making them look weak sufficient to conclude that Respondents' actions tended to interfere, restrain, or coerce with employees' exercise of NRS 288.500 rights (again, in consideration with the totality of evidence including the initiation of the pilot program, constant communications with employees related thereto, and evidence submitted in support thereof that the pilot program was not successful pursuant to pre-determined and established criteria).

[22] *See also supra* Discussion regarding attempted resolve. Under Ranft's argument, High Desert would have to wait until an initial collective bargaining agreement would be reached despite the fact that the 12-hour shifts were directly communicated as a pilot program that would only remain in effect if it met certain criteria. Warden Williams testimony was credible that the program continued to fail to meet these criteria along with receiving pressure from the LCB (included being "scolded"). It is clear from Warden Williams' credible testimony that he was attempting a good deed in trying to help his employees with the initiation of the pilot program (which was done before the union campaign came into full swing) – given the totality of the circumstances, including the frequent, clear, and open communications to employees, we do not believe this is a case were the proverb no good deed goes unpunished should come to fruition. More importantly, Respondents actions simply did

Finally, based on the facts in this case and the issues presented, the Board declines to award cost and fees in this matter. As to the remaining issues to be resolved, as they are not necessary to our determination, we do not address them.[23]

FINDINGS OF FACT

1. The Department operates High Desert.

2. High Desert employees previously worked schedules consisting primarily of 8-hour shifts, although a few employees who worked in specialty positions also worked 10-hour shifts.

3. In 2017, some employees lobbied then-Warden Brian Williams (now Deputy Director of Operations) to include 12-hour shifts in the 2018 schedules.

4. Williams decided to implement 12-hour shifts as a pilot program in 2018.

5. On June 18, 2019, Williams announced that 12-hour shifts would not be included in the 2020 shift bid.

6. Correctional officers bid on shifts at High Desert.

7. Specifically, the shift bidding process starts roughly in August where they post the seniorities list up for officers to review.

8. The next step is they would make available posts that were available to bid on (including certain exempt posts).

9. Then, normally, the bid process would begin sometime in the middle of November (roughly before Thanksgiving) – staff would come in, bid on their post or shift.

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not tend to interfere, restrain, or coerce employees' in the exercise of their NRS 288.500 rights. *See also, e.g., United States Postal Serv. & Richard Santiago, an Individual*, No. 28-CA-175106, 2018 WL 1255491 (Mar. 9, 2018) (noting that while "[n]o discriminatory intent is necessary to find an independent violation" pursuant to *American Freightways*, the NLRB has explained that we "[a]pply[] a balancing test" that "is consistent with its duty to weigh 'asserted business justifications' against 'the invasion of employee rights in light of the Act and its policy."); *Ampex Corp.*, 164 NLRB 224, 229 (1967) ("The program had in fact been instituted on an experimental basis before the announcement … I am satisfied that neither of these announcements as to proposed 'benefit' was prompted by the incipient union campaign or was undertaken in order to impinge on the employees' freedom of choice, nor are they reasonably calculated to have that effect."). As also noted, the conduct must be done "willfully" under the EMRA, and we find that actions here do not contain the implications of the required intent (*i.e.*, the natural foreseeable consequences of Respondents' actions do not justify the conclusion that the interference was intended). *Classroom Teachers Ass'n v. Clark County Sch. Dist.*, Item No. 237 (1989).

[23] *Ebarb v. Clark County*, Case No. 2018-006, Item No. 843-C (2020), *citing 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).

10. The bidding then goes into effect in the first half of January.

11. This is done every year in accordance with Administrative Regulation 301.

12. These are part of their policies and procedures – specifically, AR 301 as related to shift bids.

13. It gives them a step-by-step guide of what is required in regards to posting the seniority list as well as the posts that staff would bid on (including certain exempt posts).

14. In November 2019, Complainant demanded the Department include 12-hour shifts in the 2020 schedules.

15. Warden Williams initially informed employees that High Desert would reconduct the 2020 shift bid.

16. However, after further discussion, Williams decided to honor the results of the initial 2020 shift bid.

17. On December 31, 2019, Williams issued a memorandum to employees explaining that High Desert would continue with the 2020 8-hour shift bid as was conducted in November 2019.

18. The 2020 shift bid went into effect on January 13, 2020.

19. Complainant filed their petition seeking to be designated as the exclusive representative for Bargaining Unit I on August 23, 2019.

20. On October 30, 2019, Board staff issued its audit report on the petition which was presented to the Board at our December 17, 2019 meeting.

21. On January 14, 2020, the Board met and orally designated Complainant as the exclusive representative (obtaining 52.8% showing of interest), with the formal designation order issued on January 22, 2020.

22. When Warden Williams (now Deputy Director) started as warden in August 2016 there were three shifts (day, swing, and graveyard) consisting of 8-hour shifts.

23. They also had some positions that were 10-hour shifts (specialty positions such as prison industries, vocational classes, and education), though the majority of their posts were 8-hour shifts.

24. These 8-hour posts had been in place roughly 9 years.

25. Generally, Warden Williams had Monday morning meetings to meet with his associate wardens and most of his department heads to discuss anything that may have happened the week prior, and what they were going to be focusing on the week coming up.

26. This was an opportunity for different departments to share any concerns or issues they had.

27. They also had monthly meetings, which also consisted of his supervisors to be able to participate in that as well.

28. Williams described this as sort of the same thing as the Monday morning meetings but a little more detailed as far as the agenda.

29. They further had quarterly meet and confer meetings – Warden Williams would send an email out to associations prior thereto asking them to submit agenda items for anything they wanted to discuss including concerns, issues, or complaints.

30. At these meet and confer meetings, they would discuss the issues and try to get to some type of resolution.

31. In 2017, Officer Aaron Dykas lobbied Williams for 12-hour shifts.

32. Dykas requested this from Warden Williams from the time Williams started in August 2016 into 2017.

33. Williams started having discussions with his associate wardens, and Williams asked if they could make it happen to do a variation of 12-hour shifts (identify so many posts as 12s, have the other posts at 8s, and keep the 10s for the specialty positions).

34. His associate wardens believed they could.

35. Williams continued to meet with Dykas and with other associations, doing the meet and concerns as well as monthly meetings.

36. Warden Williams decided to give it a try – he testified that the staff had endured a lot, and he wanted to give them the opportunity.

37. However, Williams cautioned that his overtime and sick leave needed to be reduced (in that, it could not be the way it currently was).

38. Williams specifically noted not only could it not increase, but it had to be reduced.

39. Williams stated, "I'm holding everybody who will be on 12s, as well as the other officers accountable, and if can reduce our overtime and sick leave, you know, we'll stay with that schedule. But if we can't, we'll go back to 8s."

40. Prior to implementing what was deemed a pilot project or program, Warden Williams spoke with his Deputy Director (Wickham) and told him that he wanted to see if they could make it work since "they've suffered for many years as far as a lot of things being taken from them and not given back, and I just want to give them that opportunity."

41. Deputy Dir. Wickham responded, "you can try it as a pilot project and if it works great. If it doesn't, we'll just convert back."

42. They engaged in the annual shift bidding for the 12-hour shifts which became effective in January 2018.

43. Williams testified that during the months of November and December in 2017, their overtime was skyrocketing, which had to do with the roughly 50 vacancies they had as well as certain inmates in hospitals (an inmate in hospital requires 2 officers).

44. Right at the end of that in January, they had about 40 officers graduate from academy as well as the inmates in the hospital went away, so the initiation of the pilot project looked promising.

45. As the year went on, overtime started to increase as well as sick leave (which Williams testified was normal with an academy that graduates).

46. Williams explained that they waited until probably April or May, still seeing an upward trend in overtime and sick leave use.

47. Williams spoke with some of the officers to inform them of such, and they needed to watch it.

48. They created a flow chart, sending it out to all staff in a warden's bulletin to help monitor it as well as put the pressure on one another to make sure they could come into work if they weren't sick.

49. For example, the August 22, 2018 Warden's Monthly Agenda noted that the High Desert had become a test pilot for 12-hour shifts "and Legislators are watching [them] closely to see how it

works. All staff presence at work will be critical in maintaining the 12's, so let's work together and not abuse what we have."

50. A May 27, 2019 Agenda noted that sick leave usage was higher than the prior year, which was disappointing, and "[i]f the pattern continues, [Williams] will need to determine if [they] remain on 12-hour shifts. The Dept as a whole has been questioned as it related to utilizing 12's. Part of our justification and argument was that 12's would reduce calls. (see attached report) [which showed sick leave rising]."

51. Williams explained that when they started the 12-hour shifts in January of 2018, they had a representative from the LCB come and meet with them.

52. The representative at that time made a comment that they were only legislatively approved for 8-hour shifts, not 12s.

53. Williams explained to her that they were doing a pilot program where they were not just 12s, but a combination of 8s, 10s, and 12s.

54. Williams also had to send a report to his deputy director every pay period for the amount of overtime that was used.

55. His deputy director made a comment that they had gotten questioned by their deputy director of fiscal as well as LCB about the amount of overtime.

56. As such, Williams was trying to remind the staff that the department as a whole had been questions as it related to 12s, putting them on notice.

57. Williams also testified in regards to one of his weekly briefings, March 28, 2019, that the hours of sick leave had increased dramatically over the last year.

58. It was noted, "If this continues we will see an end to 12 hours shifts in the coming budget."

59. Moreover, "In a previous meeting the Legislative Counsel Bureau, see attachment LCB, has stated that we are funded and organized to be an 8 hour shift facility but the Wardens and Directors have argued that the 12 hour shifts will reduce the overall overtime.

60. Director Dzurenda met with the Subcommittee for Public on March 6, 2018 and went over our institutional expenditures.

61. If the trend continues the way we will see some changes in our scheduling, including the removal of the 12 hour shifts."

62. Williams explained in another weekly briefing, May 20, 2019, that because of their overtime they were being scolded by LCB.

63. Williams again reiterated that, "[a]s it stands unless there is a significant change in call offs HDSP will revert back to 8 hour shifts for the majority of the yard."

64. As such, in numerous meetings, they had discussed that they were going to have to revert back to 8-hour shifts due to pressure from the LCB due to overtime and sick leave not being reduced as they had initially hoped.

65. At a June 18, 2019 meet and confer meeting, Complainant had this on the agenda wanting to discuss the item.

66. High Desert posted the seniority list and the rosters in the post in accordance with AR 301 in August and September of 2019.

67. As Williams previously explained, under their established polices, August started the process, and they put a list out for seniority and then going into September the actual post for officers to be able to bid on is then posted that following month.

68. On November 15, 2019, Complainant sent a letter to Acting Director Wickham requesting they discontinue 8-hour shift posting instead of the then current 12-hour shifts and stated it was an unfair labor practice based on a mandatory subject of bargaining and unilateral change, along with noting NLRB and EMRB case law.

69. Upon receipt of this letter, Deputy Dir. Wickham informed Williams that he was going to have to redo the post bid.

70. Williams requested that until they get further clarification, he would like to continue with their shift bid, which they did.

71. Later, Wickham directed Williams to let the staff known that they were going to redo the shift bid.

72. Williams asked Wickham if they could confer or meet with the Office of the Attorney General to discuss whether or not this was required.

73. Wickham said they had a new director coming in, and he would share this with the new director.

74. At that time, however, he directed Williams to put a memo out which informed staff that they would be reconducting the annual bid (the memo was dated November 26, 2019).

75. The memo indicated that prior to the start of the shift bid, employee associations met with High Desert Administration and submitted a reversal of the shift bid process to the Governor citing unilateral changes – which they interpreted as during any time associations are forming, bargaining items cannot be changed until they had been discussed and reached a final agreement.

76. As a result of the interpretation, the bid would be reconducted to include 12-hour shifts. The memo noted, "[i]t is the desire of the HDSP Administration to serve the best interest of the staff and facility in this coming bid and see that it is completed correctly."

77. After this, Warden Williams continued to have conversations with Wickham and the Office of the Attorney General. Director Daniels then came on board (roughly December).

78. He was briefed as to the decision that had been made, did not agree with it, and spoke with the OAG who supported his decision and advised their shift bid could remain and stay the same.

79. Respondents did not reconduct the annual shift bid.

80. Warden Williams explained that Dir. Daniels agreed with Williams and the OAG and, in his experience (including being director in several other departments as well as the Federal Bureau of Prisons and labor relations), that they were correct in being able to continue with their bid.

81. On December 3, 2019, Warden Williams emailed labor representative Kevin Ranft and asked if they could discuss his November 2019 letter regarding the posting and unilateral change.

82. Williams noted, "[i]n discussing your request with the Director and AG's office, numerous concerns and complaints from staff have been received. Based on these concerns and complaints I would like to make you aware and possibly discuss in an attempt to resolve and do what's best for all staff."

83. Ranft responded, on December 10th, that "there will be no meetings or attempts at negotiations until process has been properly established." Further, "[o]nce established, we will seek to negotiate a complete collective agreement on all mandatory subjects of bargaining. Until you reconduct

the bidding and include twelve (12) hours shifts, you remain in violation of unilateral changes. I encourage you to act on your November 26th memo and reconduct the bidding including the twelve (12) hour shifts."

84. In Ranft's November 15, 2019 letter to Acting Director Wickham, he stated that "[g]iven that the posting has begun, this matter requires your immediate attention for resolution. If this cannot be resolve[d] with you, we will have no other options but proceed with an unfair labor practice claim."

85. In a December 24, 2019 Memo to Director Charles Daniels (after he took over for Wickham who had been acting on a temporary basis), Williams explained the background including that, as of June 2019, sick leave and overtime continued to climb and they were left with no choice but to return to the 8-hour shifts.

86. He noted that this decision was discussed with Human Resources and all associations that attended the meet and confer on June 18, 2019.

87. Further, on November 18, 2019, they began their Annual Shift Bid which consisted of the legislatively approved 8-hour staffing pattern that they were returning to.

88. This Annual Bid takes approximately 72 hours over a 5-day period to complete. However, they were notified by Complainant that they were in violation by doing so.

89. Williams noted that per AR 301, "there are timelines that must be met in order to conduct a new bid which pushed any rebid into March of 2020 and the effective date of any new bid into April 2020."

90. Further, "[a] large number of staff have begun planning their personal schedules … throughout 2020 based off of the 8 hour bid that was conducted."

91. "Since the completion of this November shift bid and the announcement that there needs to be a rebid per AFSCME many staff have voiced their concerns and opinion as it related to retaining the 8 hours shifts rather than keeping the current staffing pattern and have to rebid."

92. "It is estimated that only 7% of the officers working at HDSP would like to remain on the current 8-10-12 hour shifts."

93. Williams also estimated that roughly 35-40% on the employees were on 12-hours shifts, with the others on 8 and 10-hour shifts.

94. We find Warden Williams testimony credible including his prior response indicating that they received numerous concerns and complaints from staff regarding reconducting the bid

95. Daniels supported Williams decision to revert back to 8s.

96. In a December 31, 2019, in a Warden Bulletin to all staff, Williams explained that after discussion with Dir. Daniels, and the OAG as well as other legal entities, it was determined that High Desert would continue with the 2020 8-hour shift bid as conducted in November 2019.

97. The correspondence noted that the 2020 shift bid goes into effect January 13, 2020.

98. Respondents clearly communicated that the change from 8s to 12s was a pilot program.

99. We find Warden Williams credible that this process began in 2016, into 2017, which culminated in the 2018 annual shift going into effect in January 2018.

100. This was before the union began their active organizing campaign even using the date of Complainant's own witnesses (*i.e.*, May 2018).

101. The change was then made pursuant to company policy and established procedures which were established before the organizational campaign – indeed, Warden Williams was also very active and transparent in updating and informing employees during the entire pilot program.

102. This was not the case in which Respondents seemed to ramp up efforts to make the reversion in response to union organization.

103. Warden Williams was credible in that he continually updated the employees on the progress of the pilot program including, for example, in August 2018 (warning that LCB was monitoring this closely and not to abuse what they have), March 2019 (sick leave dramatically increasing and their argument to LCB that 12s would reduce overtime (even if not legislatively approved for 12s), and if the trend continued reversion would be required), and May 2019 (noting that it appeared the pilot program was not successful, if the patterned continued they would have to revert, and they were being scolded by LCB).

104. Respondents justified the timing of their actions.

105. The annual shift bid was conducted in accordance with their established policies and procedure going into effect in January as it customarily did.

106. Moreover, the followed they pre-determined guidelines of the pilot program.

107. Simply because Respondents attempted at a resolve after conducting the bid in response to Complainant's letter alleging violations, is not enough to convert Respondents' actions into a prohibited labor practice.

108. It is clear that Respondents were stuck in a tough situation once they received Complainant's letter – either being forced to continue with a costly and ineffective situation until the next annual shift bid (or until bargaining an initial CBA according to Complainant) or continue with their initial decision to end the pilot program and thus return to 8 hour shifts.

109. The pilot program was against legislative mandates.

110. Warden Williams also credibly testified that reconducting the shift bid would cause numerous problems and received numerous complaints.

111. When questioned on the employees' specific concerns, Ranft testified that he was informed about the disruption this caused to 12-hour shift employees' schedules – "It really provided them an opportunity to become refreshed so when they come back to work, they can really be functionable and really not break down in regards to being overwhelmed and overworked."

112. Ranft testified that "[t]he biggest component was family. It gives them an opportunity to spend time with their children, their spouse, and they also enroll in college. And we get a lot of complaints that the 12-hours versus the 8s, the 12-hours is easier for them to schedule daycare."

113. Cook additionally stated that the other correctional officers' complaints were due to childcare problems and preparations.

114. Harry Schiffman testified, when asked how the change affected Complainant's organizing campaign, that it hurt them in their eventual contract negotiations because "it somewhat weakens [their] position with negotiating."

115. Schiffman further testified that as soon as the SB 135 was signed into law that the status quo was required to be maintained.

116. James Cook specifically testified that he actually got involved in Complainant's organizing campaign because "they took away our 12-hour shifts."

117. However, Ranft also testified, specifically in regards to the organizing efforts, that "the 8-hour shifts being imposed was a direct, we feel, it was a direct attack to ensure that AFSCME could not get the certification."

118. Ranft based this on the allegation that "other groups specific on one of them an [FOP], was walking around telling them our officers or our members that was AFSCME's fault that the 8-hours were being imposed versus the 12, the loss of the 12s were AFSCME's fault and it made – it made the AFSCME looks and certifications were just hard to get at that point."

119. Yet, credible evidence was not presented that Respondents had anything to do with the tactics of other associations (or even that this was a natural foreseeable consequence of Respondents' actions).

120. There was no credible evidence presented of employee desertion from the union (such as rescinding authorization cards).

121. Given the totality of the evidence, we do not find credible that Ranft's general assertion (when asked of the actions to eliminate the 12-hour shifts, that one "would see more interactions with the staff at the gate house, and the parking lot, and our organizer reported that people were just walking by them versus engaging in conversation as in prior to this announcement") was related to Respondents' actions.

122. On cross-examination, Ranft reiterated the same allegation when questioned (adding they would ignored attempts to get them to sign) – while the Chair allowed the testimony (after a hearsay objection), he specifically noted that the objection and response would be given due weight in the course of the Board's deliberation.

123. Based on the totality of the evidence presented, we do not find credible that this general conduct was related to Respondents' actions (instead, Ranft's testimony seem to indicate it may have been due to a rival union's actions (specifically FOP)).

124. Schiffman testified that they "also [had] another unions or organizations out there that are, you know, trying to do the same. So it gets in the way of our exclusivity being allowed to do this."

125. Of note, it was conceded that Complainant was not the exclusive representative at the time of the reversion (Schiffman also stated they walked out of the June 2019 meet and confer meeting

because other associations were present, Complainant was the exclusive representative, and Respondents "could only meet with members of AFSCME Local 4041 and no one else.").

126. Based on the totality of the evidence, we do not find credible Cook's general testimony that officers expressing that they didn't "believe in them wholeheartedly" was related to Respondents' action.

127. Cook also clarified that the harm was seemingly not due to the initial decision to revert back to 8s but instead, "The harm was because of the shifts – before when we were on 12s, we got told that were going to stay on the 12-hour shift. Then … they rescinded."

128. We do not find credible Schiffman's general testimony regarding the actions making them look weak sufficient to conclude that Respondents' actions tended to interfere, restrain, or coerce with employees' exercise of NRS 288.500 rights (again, in consideration with the totality of evidence including the initiation of the pilot program, constant communications with employees related thereto, and evidence submitted in support thereof that the pilot program was not successful pursuant to pre-determined and established criteria).

129. Under Ranft's argument, High Desert would have to wait until an initial collective bargaining agreement would be reached despite the fact that the 12-hour shifts were directly communicated as a pilot program that would only remain in effect if it met certain criteria.

130. Warden Williams' testimony was credible that the program continued to fail to meet these criteria along with receiving pressure from the LCB (included being "scolded").

131. It is clear from Warden Williams' credible testimony that he was attempting a good deed in trying to help his employees with the initiation of the pilot program (which was done before the union campaign came into full swing) – given the totality of the circumstances, including the frequent, clear, and open communications to employees, we do not believe this is a case were the proverb no good deed goes unpunished should come to fruition.

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

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CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the 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 EMRA was amended in 2019 to grant certain rights for state employees, becoming effective on June 12, 2019.

4. 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.

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

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

7. Under NRS 288.620, it is a prohibited practice for the Department to engage in any prohibited practice applicable to a local government employer set forth in subsection 1 of NRS 288.270 "except paragraphs (e) and (g) of that subsection."

8. NRS 288.656 provides that the parties shall engage in collective bargaining as required by NRS 288.540.

9. NRS 288.540 provides that bargaining shall concern "the wages, hours and other terms and conditions of employment for the employees", modeling the NLRA.

10. Significantly, NRS 288.500 provides that collective bargaining shall entail a mutual obligation to bargain in good faith with respect to any subject of mandatory bargaining set for in subjection 2 of NRS 288.150, except paragraph (f) of that subsection.

11. Unless statutorily distinct, the general basic premise of a failure to bargain in good faith is applicable to the Executive Department.

12. In a recently issued order involving a related case, the Board held that a holding in *Clark County Public Employees Ass'n, SEIU Local 1107 v. Housing Auth. Of the City of Las Vegas*, Case No.

A1-045478, Item No. 270 (1991) (specifically, the employer was required to maintain the status quo (and hence not make unilateral changes) as this violated the duty to bargain in good faith) could not be reconciled with the plain and unambiguous language of the EMRA, as amended applicable to the Executive Department, as well as with the NLRA and applicable NLRB precedent. *AFSCME, Local 4041 v. State of Nevada, Dep't of Health and Human Services*, Case No. 2020-001 (2021).

13. The plain and unambiguous language of the EMRA thus makes crystal clear that the duty to bargain does not arise until the Board designates an exclusive representation.

14. The duty to bargain arises at different points in time under the NLRA and the EMRA (primarily after an election or showing of majority interest as further detailed herein under the NLRA and not until designation under the EMRA in regards to the current dispute).

15. The federal precedent mandating maintaining the status quo (and not making unilateral changes) is based on when the duty to bargain arises under to the NLRA.

16. Since the duty arises at different points in time pursuant to the plain and unambiguous language of the EMRA, the federal precedent is inapplicable to the case at hand.

17. As Respondents were not subject to the duty to bargain good faith, they were free to make unilateral changes without violating their duty to bargain in good faith.

18. In other words, we find that the obligation to maintain the status quo and not make unilateral changes, in this context, does not attach until the duty to bargain arises.

19. We adopt the analysis and holding of the Board as stated in *AFSCME, Local 4041 v. State of Nevada, Dep't of Health and Human Services*, Case No. 2020-001 (2021) regarding the duty to bargain in good faith allegation and incorporate the order herein by reference.

20. Thus, we find no violation of NRS 288.620(1)(b) and derivatively NRS 288.270(1)(a).

21. A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

22. Under NRS 288.620, it is a prohibited practice for the Department to engage in any prohibited practice applicable to a local government employer set forth in subsection 1 of NRS 288.270 'except paragraphs (e) and (g) of that subsection.

23. It is of critical importance when analyzing applicable NLRB related precedent to not confuse or conflate the rights upon which a NRS 288.270(1)(a) (or Sec. 8(a)(1) under the NLRA) violation is found.

24. NRS 288.270(1)(a) provides that it a prohibited practice for the employer to willfully interfere, restrain, or coerce any employee in the exercise of any right guaranteed under the EMRA.

25. A violation of NRS 288.270(1)(a) hinges upon interfering, restraining, or coercing any employee in the exercise of any right guaranteed under the EMRA.

26. NRS 288.500 bestows certain rights including "[f]or the purposes of other mutual aid or protection" to "[o]rganize, form, join and assist labor organizations… and engage in other concerted activities".

27. Pursuant to NRS 288.270(1)(a), "[t]het test is whether the employer engaged in conduct, which may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

28. There are three elements to a claim of interference with a protected right: "(1) the employer's action can be reasonably viewed as tending to interfere with, coerce, or deter; (2) the exercise of protected activity [by NRS Chapter 288]; and (3) the employer fails to justify the action with a substantial and legitimate business reason."

29. We must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement.

30. Respondents' actions did not interfere, restrain, or coerce any employees in the exercise of their right to engage in collective bargaining through their exclusive representative.

31. Respondents committed a violation even if Respondents' justification, purpose, or motive is irrelevant.

32. Respondent did not engage in conduct which tended to interfere, restrain, or coerce employees in the free exercise of their rights under the EMRA.

33. Senate Bill 135 (the bill granting collective bargaining rights to state employees) was introduced in February 2019.

34. At a minimum, it was reasonable for Complainant to ramp up organizing efforts at this time.

35. We note the important point is not simply the timing of the announcement, but whether based on the totality of circumstances, Respondents' actions interfered, restrained, or coerced employees in their right to organize.

36. We do not find that Respondents' actions here tended to interfere, restrain, or coerce employees in the exercise of their NRS 288.500 rights.

37. Based on all the evidence presented, we do not find credible testimony that Respondents' actions tended to interfere with employees' rights to organize, form, join and assist Complainant.

38. Based on the totality of the evidence, we do not find that Respondents' conduct tended to interfere, restrain, or coerce employees in the exercise of the right to organize, form, join, and assist labor organizations and engage in other concerted activities.

39. The test of interference, restraint, and coercion NRS 288.270(1)(a) does not turn on whether the coercion succeeded or failed.

40. Our inquiry instead focuses on whether the conduct in question had a reasonable tendency in the totality of circumstances to intimidate.

41. Respondents' actions did not tend to interfere, restrain, or coerce any employee in the exercise of their rights under the EMRA.

42. Respondents did not engage in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

43. For the purposes of this order, we treated Respondents' motive in this case as irrelevant.

44. However, we also note that Respondents justified the action with a substantial and legitimate business reason that outweighed the employees' NRS 288.500 rights.

45. The conduct must be done "willfully" under the EMRA, and we find that actions here do not contain the implications of the required intent (*i.e.*, the natural foreseeable consequences of Respondents' actions do not justify the conclusion that the interference was intended).

46. An award of fees and costs is not warranted in this case.

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

ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondents.

Dated this 15th day of April 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
GARY COTTINO, Board Member