STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NEVADA CLASSIFIED SCHOOL EMPLOYEES ASSOCIATION CHAPTER 5, NEVADA AFT, Complainant, v. CHURCHILL COUNTY SCHOOL DISTRICT, Respondent.	Case No. 2019-014 **NOTICE OF ENTRY OF ORDER** **ITEM NO. 863**

TO: Complainant and its attorney, Michael E. Langton, Esq.;

TO: Respondent and its attorney, Sharla Hales, Esq;

PLEASE TAKE NOTICE that the attached **ORDER** was entered in the above-entitled matter on May 20, 2020.

A copy of said Stipulation is attached hereto.

DATED this 20 day of May 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
CHRISTOPHER ROSKE
Administrative Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 20 day of May 2020, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Michael E. Langton, Esq.
801 Riverside Drive
Reno, NV 89503

Sharla Hales, Esq.
883 Mahogany Drive
Minden, NV 89423

CHRISTOPHER ROSKE
Administrative Assistant

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

NEVADA CLASSIFIED SCHOOL EMPLOYEES ASSOCIATION CHAPTER 5, NEVADA AFT, Complainant, v. CHURCHILL COUNTY SCHOOL DISTRICT, Respondent.	Case No. 2020-008 **ORDER** **PANEL C** **ITEM NO. 863**

On April 28, 2020, 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 Government Employee-Management Relations Act ("EMRA"); NAC Chapter 288 and NRS Chapter 233B.

In its Complaint, Complainant alleges that Respondent engaged in a violation of the duty to bargain in good faith, including refusing to agree to negotiate mandatory subjects of bargaining and/or articles open for negotiations by Complainant as demanded in its letter of April 17, 2019. As further detailed below, the Board disagrees and finds that Respondent has not committed a violation of the EMRA based on the fact of this case and at this point in time.

In November 2018, Complainant sent a Notice of Intent to Negotiate to Respondent. The parties met in February 2019 to agree on ground rules. On April 17, 2019, Complainant sent a letter to Respondent's Superintendent and stated, in pertinent part: "The second issue is the reduction in hours of work per day/per week by I.A.'s." In response thereto, on April 26, 2019, the Superintendent indicated that Respondent would not agree to negotiate these reductions as the District has the right to determine the number of hours of work each year pursuant to Articles 23-3 and 23-8 of the parties' CBA. On April 30, 2019, Complainant responded that "we again demand that you negotiate this issue

with the Union."

DISCUSSION

The Act imposes a reciprocal duty on employers and bargaining agents to negotiate in good faith concerning the mandatory subjects of bargaining listed in NRS 288.150. *Juvenile Justice Supr. Ass'n v. County of Clark*, Case No. 2017-20 (2018). It is a prohibited practice for a local government employer willfully to refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150. NRS 288.270(1)(e); *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, EMRB Case No. A1-045965 (2010).

"A party's conduct at the bargaining table must evidence a sincere desire to come to an agreement. The determination of whether there has been such sincerity is made by drawing inferences from conduct of the parties as a whole." *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, Item No. 253-A (1991), *quoting NLRB v. Ins. Agent's Int'l Union*, 361 U.S. 488 (1970). The duty to bargain in good faith does not require that the parties actually reach an agreement but does require that the parties approach negotiations with a sincere effort to do so. *Ed. Support Employees Ass'n v. Clark County Sch. Dist.*, Case No. A1-046113, Item No. 809, 4 (2015), *citing City of Reno v. Int'l Ass'n of Firefighters, Local 731*, Item No. 253-A, Case No. A1-045472 (1991). "In order to show 'bad faith', a complainant must present 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Juvenile Justice Supr. Ass'n v. County of Clark*, Case No. 2017-20 (2018); *Boland v. Nevada Serv. Employees Union*, Item No. 802, at 5 (2015), *quoting Amalgamated Ass'n of St., Elec. Ry. And Motor Coach Emp. of America v. Lockridge*, 403 U.S. 274, 301 (1971); *Las Vegas Peace Officers Ass'n v. City of Las Vegas*, Case No. 2015-034, Item Nos. 821, 821-A (2018). Adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining. *Reno Municipal Employees Ass'n v. City of Reno*, Item No. 93 (1980).

The main dispute between the parties is the District's unilateral reduction of two hours per week of student contact classified employees' schedules. There is no dispute that the total hours of work in a workweek is a subject of mandatory bargaining. However, paragraph 23-3 of the parties' CBA, provides in pertinent part: "The actual work schedules and duty assignments for all employees will be

determined by the immediate supervisor and/or the Superintendent or designee." The CBA grants this right to Respondent. *See IAFF v. The City of Reno*, Item No. 257, Case No. A1-04504466 (1990), at 5 ("a party may contractually waive its right to bargain about a particular subject"); *Kerns v. LVMPD*, Case No. 2017-010 (2018) (the Department followed the parties' CBA and thus did not commit a unilateral change in this regard); *Douglas County. Support Staff Org. v. Douglas County Sch. Dist.*, Case No. A1-046105, Item No. 797 (2014) ("A party that adheres to the terms of a collective bargaining agreement does not commit a unilateral change for the self-evident reasons that nothing is actually changed from what has been negotiated."). As such, Respondent was granted, via the CBA, the right to unilaterally reduce the subject hours in this case without negotiation.

While it was argued that the language above does not allow for the actual reduction in hours, for example which hours are worked rather than how many hours are worked, the plain language does not support this limited interpretation. The CBA is plain and unambiguous in this regard.[1] Indeed, we generally assign common or normal meanings to words in a contract. *Ebarb v. Clark County*, Case No. 2018-006 (2019), *citing* Am. *First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015); *Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983). Furthermore, "[a] court should not interpret a contract so as to make meaningless its provisions," and "[e]very word must be given effect if at all possible.'" *Mendenhall v. Tassinari*, 403 P.3d 364, 373 (2017); *see also Yu v. Las Vegas Metropolitan Police Dep't*, Case No. 2017-025 (2018). The CBA plainly provides for "[t]he actual works schedules…." "Schedule" is defined as "a procedural plan that indicates the time *and* sequence of each operation." Merriam-Webster.com (*emphasis* added); *see also* Dictionary.com (*emphasis* added) ("a plan of procedure, usually written, for a proposed objective, especially with reference to the sequence of *and* time allotted for each item or operation necessary to its

[1] The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed. This is well established. *Jackson v. Clark County*, Case no. 2018-007 (2019); *Boykin v. City of N. Las Vegas Police Dept.*, Item No. 674E, Case No. A1-045921 (2010), *citing NLRB v. Strong Roofing & Ins. Co.*, 393 U.S. 357 (1969), *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967); *N.L.R.B. v. Ne. Oklahoma City Mfg. Co.*, 631 F.2d 669, 675 (10th Cir. 1980); *Jim Walter Resources*, 289 NLRB 1441, 1449 (1988); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. Las Vegas Metropolitan Dep't*, Case No. 2017-025, Item No. 829 (2018); *Int'l Ass'n of Fire Fighters, Local 4068 v. Town of Pahrump*, Case No. 2017-009 (2018).

completion.").

Moreover, the narrow interpretation argued by Complainant is undermined by other provisions of the CBA, specifically paragraph 23-8 which provides that Respondent will submit to Complainant "the schooled working hours for all classified employees .... This will provide a record for the Association to allow each classified employee who requests it, to review for their own planning purposes."

Furthermore, if the Board were to delve into the intent of the parties, the evidence established that this language was intended to provide notice for planning purposes and flexibility to the District. *See, e.g., Jackson v. Clark County*, Case no. 2018-007 (2019); *Douglas County. Support Staff Org. v. Douglas County Sch. Dist.*, Case No. A1-046105, Item No. 797 (2014) ("At the hearing the District presented evidence as to both the intent behind this article and how the article has been historically applied in the dealings between the District and the Organization."). Dr. Stephens explained that this language is intended to require the District to give notice when hours are being decreased or increased, which the Board finds credible. These provisions have been given to the District for flexibility.

Even if Respondent's action were not permissible pursuant to the plain language of the CBA, the Board would have found a waiver in this case by virtue of past practice. *See also Grunwald v. Las Vegas Metropolitan Police Dep't*, Case No. 2017-006 (2017) (a past practice by the parties may evidence that a party waived a statutory or contractual right, but such waiver must be clear and unmistakable), *citing* W*ashoe County Teachers Ass'n v. Washoe County Sch. Dist.*, Case No. A1-045678, Item No. 470C (2001), at 4, *Ormsby County Educ. Ass'n v. Carson City Sch. Dist.*, Case No. A10945527, Item No. 311. For decades, Complainant has acquiesced to the District's unilateral adjustment of the number of hours and days worked pursuant to paragraph 23-3 of the parties' CBA. Complainant's waiver of the right to bargain hours was clear and unmistakable as evident from its long-standing agreement to the District's changes without objection, and the language of the paragraph 23-3 throughout past collective bargaining agreements. Exhibit 5 detailed all decreases and increases since 2013. Complainant conceded that numerous changes were made without negotiation. Those changes were as small as .25 hour and as large as 60 days – none negotiated. The current contract was also signed in June 2018 with no changes to paragraphs 23-3 or 23-8. *See also Krumme v. Las Vegas*

Metropolitan Police Dep't, Case No. 2016-010 (2017); *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 705, 103 S. Ct. 1467, 1476, 75 L. Ed. 2d 387 (1983) (stating that the courts have "long recognized that a union may waive a member's statutorily protected rights....").[2]

Finally, with regards to the parties' dispute on whether a sufficient intent to negotiate was made, the evidence at the hearing established that there was a simple misunderstanding as to what was being requested to negotiate. As indicated above, the determination of whether there has been bad faith bargaining is made by drawing inferences from conduct of the parties as a whole as well as the totality of the circumstances, and, in order to show bad faith, Complainant must present "substantial evidence of fraud, deceitful action or dishonest conduct." Based on the evidence presented, the Board finds Complainant failed to present as such – in other words, in this case, the testimony showed that there was miscommunication between the parties as to what was being requested to negotiate (the contractual language vs. the actual reduction in hours), and the Board does not find that said misunderstanding arose to the level of bad faith bargaining based on the facts of this case. The Board finds Dr. Stephens' testimony credible that she did not interpret the demand to negotiate as a demand to negotiate the CBA (specifically Article 23-3) but instead simply a demand to negotiate the actual reduction in hours. Indeed, Dr. Stephens testified that if Complainant had requested to negotiate a specific article, she "certainly would engage in conversation about the language of the contract in the negotiations process.").[3]

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[2] As further explained below, the Board finds credible the testimony of Dr. Stephens and Kevin Lords, Director of Human Resources – Lords explained that had a request been made to negotiate the actual CBA, Respondents would have complied. In other words, there is no dispute that Complainant sought to negotiate the actual reduction in hours, but Respondent believed in good faith that Complainant did not seek to negotiate the contractual provisions themselves. The Board however notes the distinction in this case that the reduction was not established by past practice but by contract. If the reduction had been established by past practice, Respondent would have been required to negotiate it in good faith (the notice of intent would have also been clearer in this case). *See, e.g.*, *Krumme v. Las Vegas Metropolitan Police Dep't*, Case No. 2016-010 (2017); *Grunwald v. Las Vegas Metropolitan Police Dep't*, Case No. 2017-006 (2017). Dr. Stephens conceded as such in her testimony. *See also infra* note 4 and accompanying text.

[3] Complainant additionally argued that because the salary article was open for negotiation, Complainant had clearly demanded to negotiate the particular provision at issue. However, Complainant conceded that it did not specifically request to negotiate Article 23-3. While the Board does not find that there are any specific magic words Complainant was required to use, the evidence established that there was miscommunication between the parties as what was being sought. As indicated above, this does not

The Board, however, further notes, that Respondent is required to negotiate in good faith the above provisions should Complainant so request as mandatory subjects of bargaining. *See, e.g.*, *IAFF v. The City of Reno*, Item No. 257, Case No. A1-04504466 (1990); *Douglas County. Support Staff Org. v. Douglas County Sch. Dist.*, Case No. A1-046105, Item No. 797 (2014) (no dispute on whether there was a request to negotiate and only whether a unilateral change had been committed); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1220 (2002); *Ebarb v. Clark County*, Case No. 2018-006 (2019) ("a unilateral change to the bargained for terms of employment is regarded as a *per se* violation of [NRS 288.270(e)]"); *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *Jenkins v. Las Vegas Metropolitan Police Dep't*, Case No. A1-046020, Item 775A (2013) ("[i]t is a violation of the Act for an employer to depart from the bargained-for disciplinary process without first bargaining over the change with the recognized bargaining agent"); *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, EMRB Case No. A1-045965 (2010).[4]

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amount to bad faith bargaining based on the facts of this case including the parties' conduct as a whole and the totality of the circumstances.

[4] Respondent asserted in its closing brief that there was "confusion" created at the hearing and "District administrators now understand that because management rights are not a mandatory subject of bargaining under NRS 288.150, the District may not be obligated to negotiate paragraph 23-3. With this more accurate understanding, District administrators may not agree to negotiate paragraph 23-3." NRS 288.150(3) is plain and unambiguous as to "[t]hose subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation" and does not include the right to determine total hours of work required. Indeed, NRS 288.150(2) (mandatory subjects of bargaining) specifically includes "total hours of work required of an employee on each workday or workweek." NRS 288.150(2)(g). Respondent's apparent argument that it now has no obligation to negotiate Article 23-3 in the future because the parties previously agreed to this provision would not only create a right in perpetuity (which is not provided for expressly in the contract) but would also render the above-referenced statutory subsection meaningless and be in direct contravention to the purposes and polices of the EMRA as well as extensive precedent of this Board. *See, e.g.*, Accompanying text hereto. Respondent conceded as such – "The District's position is the right to reduce was already negotiated. It's a mandatory subject of bargaining and it was bargained and it's in the contract.... But the District's understanding is that the Association gets to bring up contract language when it wants to make changes in the contract and that the District would have a duty to negotiate in good faith when contract language is brought up." Tr., at 161-62. There is a distinction between management rights created via contract and via the EMRA – as counsel agreed, "I don't know that the District ever really claimed this as a set management right. They claimed it as a right that had been bargained in the contract, and until that contract was changed, they had the right to make changes

FINDINGS OF FACT

1. In November 2018, Complainant sent a Notice of Intent to Negotiate to Respondent.

2. The parties met in February 2019 to agree on ground rules.

3. On April 17, 2019, Complainant sent a letter to Respondent's Superintendent and stated, in pertinent part: "The second issue is the reduction in hours of work per day/per week by I.A.'s."

4. In response thereto, on April 26, 2019, the Superintendent indicated that Respondent would not agree to negotiate these reductions as the District has the right to determine the number of hours of work each year pursuant to Articles 23-3 and 23-8 of the parties' CBA.

5. On April 30, 2019, Complainant responded that "we again demand that you negotiate this issue with the Union."

6. Paragraph 23-3 of the parties' CBA, provides in pertinent part: "The actual work schedules and duty assignments for all employees will be determined by the immediate supervisor and/or the Superintendent or designee."

7. The CBA grants this right to Respondent - the right to unilaterally reduce the subject hours in this case without negotiation.

8. The narrow interpretation argued by Complainant is undermined by other provisions of the CBA, specifically paragraph 23-8 which provides that Respondent will submit to Complainant "the schooled working hours for all classified employees …. This will provide a record for the Association to allow each classified employee who requests it, to review for their own planning purposes."

9. If the Board were to delve into the intent of the parties, the evidence established that this language was intended to provide notice for planning purposes and flexibility to the District.

10. Dr. Stephens explained that this language is intended to require the District to give notice when hours are being decreased or increased, which the Board finds credible.

11. These provisions have been given to the District for flexibility.

12. For decades, Complainant has acquiesced to the District's unilateral adjustment of the number of hours and days worked pursuant to paragraph 23-3 of the parties' CBA.

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in hours." *Id.* As such, the Board cautions that the apparent shift in the closing brief could amount to bad faith bargaining in the future.

13. Exhibit 5 detailed all decreases and increases since 2013.

14. Complainant conceded that numerous changes were made without negotiation.

15. Those changes were as small as .25 hour and as large as 60 days – none negotiated.

16. The current contract was also signed in June 2018 with no changes to paragraphs 23-3 or 23-8.

17. The Board finds credible the testimony of Dr. Stephens and Kevin Lords, Director of Human Resources – Lords explained that had a request been made to negotiate the actual CBA, Respondents would have complied.

18. Respondent believed in good faith that Complainant did not seek to negotiate the contractual provisions themselves.

19. The evidence at hearing established that there was a simple misunderstanding as to what was being requested to negotiate.

20. The testimony showed that there was miscommunication between the parties as to what was being requested to negotiate (the contractual language vs. the actual reduction in hours).

21. The Board finds Dr. Stephens' testimony credible that she did not interpret the demand to negotiate as a demand to negotiate the CBA (specifically Article 23-3) but instead simply a demand to negotiate the actual reduction in hours.

22. Dr. Stephens testified that if Complainant had requested to negotiate a specific article, she "certainly would engage in conversation about the language of the contract in the negotiations process."

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

CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the 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.

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3. The Act imposes a reciprocal duty on employers and bargaining agents to negotiate in good faith concerning the mandatory subjects of bargaining listed in NRS 288.150.

4. It is a prohibited practice for a local government employer willfully to refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150.

5. A party's conduct at the bargaining table must evidence a sincere desire to come to an agreement.

6. The determination of whether there has been such sincerity is made by drawing inferences from conduct of the parties as a whole.

7. The duty to bargain in good faith does not require that the parties actually reach an agreement but does require that the parties approach negotiations with a sincere effort to do so.

8. In order to show bad faith, a complainant must present substantial evidence of fraud, deceitful action or dishonest conduct.

9. Adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining.

10. Total hours of work in a workweek is a subject of mandatory bargaining.

11. A party may contractually waive its right to bargain about a particular subject.

12. A party that adheres to the terms of a collective bargaining agreement does not commit a unilateral change for the self-evident reasons that nothing is actually changed from what has been negotiated.

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

14. While it was argued that the language in the CBA does not allow for the actual reduction in hours, for example which hours are worked rather than how many hours are worked, the plain language does not support this limited interpretation.

15. The CBA is plain and unambiguous in this regard – the CBA plainly provides for "[t]he actual works schedules…."

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

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17. A court should not interpret a contract so as to make meaningless its provisions and every word must be given effect if at all possible.

18. "Schedule" is defined as "a procedural plan that indicates the time *and* sequence of each operation." Merriam-Webster.com (*emphasis* added); *see also* Dictionary.com (*emphasis* added) ("a plan of procedure, usually written, for a proposed objective, especially with reference to the sequence of *and time allotted* for each item or operation necessary to its completion.").

19. Even if Respondent's actions were not permissible pursuant to the plain language of the CBA, the Board would have found a waiver in this case by virtue of past practice.

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

21. Complainant's waiver of the right to bargain hours was clear and unmistakable as evident from its long-standing agreement to the District's changes without objection, and the language of the paragraph 23-3 throughout past collective bargaining agreements.

22. Based on the testimony presented, the Board finds Complainant failed to present substantial evidence of fraud, deceitful action or dishonest conduct.

23. The Board does not find that a misunderstanding arises to the level of bad faith bargaining based on the facts of this case.

24. The Board, however, further notes, that Respondent is required to negotiate in good faith the contractual provisions at issue in this case should Complainant so request, as mandatory subjects of bargaining.

25. NRS 288.150(3) is plain and unambiguous as to "[t]hose subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation" and does not include the right to determine hours of work required.

26. NRS 288.150(2) (mandatory subjects of bargaining) specifically includes "total hours of work required of an employee on each workday or workweek." NRS 288.150(2)(g).

27. Respondent's apparent argument that it now has no obligation to negotiate Article 23-3 in the future because the parties previously agreed to this provision would not only create a right in perpetuity (which is not provided for expressly in the contract) but would also render the above-

referenced statutory subsection meaningless and be in direct contravention to the purposes and polices of the EMRA as well as extensive precedent of this Board.

28. There is a distinction between management rights created via contract and via the EMRA.

29. 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 Respondent as set forth above. Complainant shall take nothing by way of its Complaint.

Dated this 20 day of May 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
SANDRA MASTERS, Vice-Chair

By: _____
GARY COTTINO, Board Member

By: _____
BRETT HARRIS, Board Member