

FILED

JUL 02 2021

STATE OF NEVADA
E.M.R.B.

STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

LEONARD CARDINALE,

Complainant,

v.

CITY OF NORTH LAS VEGAS,

Respondent.

Case No. 2019-010

NOTICE OF ENTRY OF ORDER

PANEL C

ITEM NO. 871

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

TO: Respondent and their attorneys, Noel Eidsmore, Esq. and the North Las Vegas City Attorney's Office.

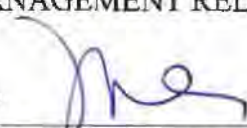
PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on July 2, 2021.

A copy of said order is attached hereto.

DATED this 2nd day of July 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY


MARISU ROMUALDEZ ABELLAR
Executive Assistant

1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Local Government Employee-Management
3 Relations Board, and that on the 2nd day of July 2021, I served a copy of the foregoing **NOTICE OF**
4 **ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

5 Law Office of Daniel Marks
6 Daniel Marks, Esq.
7 Adam Levine, Esq.
8 610 South Ninth Street
9 Las Vegas, NV 89101

10 Micaela Rustia Moore, City Attorney
11 Noel E. Eidsmore, Deputy City Attorney
12 North Las Vegas City Attorney
13 2250 Las Vegas Blvd. North, Suite 810
14 North Las Vegas, NV 89030

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16 _____
17 **MARISU ROMUALDEZ ABELLAR**
18 **Executive Assistant**
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STATE OF NEVADA
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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

LEONARD CARDINALE,

Complainant,

v.

CITY OF NORTH LAS VEGAS,

Respondent.

Case No. 2019-010

ORDER

PANEL C

ITEM NO. 871

On May 27, 2021, this matter came before the State of Nevada, Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of the Employee-Management Relations Act (EMRA, NRS Chapter 288), NAC Chapter 288, and NRS Chapter 233B. The Board held an administrative hearing on this matter in October 2020. The Board accepted post-hearing briefs.

In his Post-Hearing Brief, Complainant indicated that the issue to be determined by this Board is whether Respondent discriminated against Complainant for personal or political reasons in violation of NRS 288.270(1)(f) when they kept him on graveyard shift despite his seniority, denied him an Administrative Sergeant, leave and training opportunities.¹ Respondent contends the issue is whether Complainant's allegations are sufficient to prove the City engaged in a prohibited labor practice pursuant to NRS 288.270(1)(f). For the reasons provided below, we find in favor of Respondent.

Complainant has been employed by the North Las Vegas Police Department (Department) for over 23 years. Complainant was the first president of the North Las Vegas Police Supervisors Association (NLVPSA) serving from 2010 to 2016. During his tenure as President, the NLVPSA filed multiple grievances, lawsuits, and Board complaints against Respondent (Complainant pointed to

¹ Prior to the hearing, Complainant asserted the issue was whether Respondent violated NRS 288.270(1)(f) when it discriminated/retaliation against Complainant for the multiple lawsuits and EMRB charges authorized by Complainant during the period he was the President of the NLVPSA. See Operative Notice of Hearing; Supplemental Pre-Hearing Statement; Complaint.

1 specific instances from roughly 2011-2015). Complainant was promoted to Lieutenant in September of
2 2017.

3 On October 1, 2017, the Route 91 mass shooting occurred. Complainant was the Watch
4 Commander for Respondent that evening and as such oversaw the Lieutenants. After the incident,
5 memos were drafted from others, including now Chief Pam Ojeda (then Lieutenant), criticizing
6 Complainant's performance. Complainant was designated to draft the After Action Report, which
7 included taking these memos from each supervisor who responded. Thereafter, in November 2017,
8 Complainant submitted to Captain Carmody, Assistant Chief Noahr, and Chief of Police Alex Perez his
9 requests for formal investigation of certain individuals who drafted the memos including Chief Ojeda.

10 The collective bargaining agreement ("CBA") between Respondent and NLVPSA contains shift
11 bidding provisions which provide that shift bids begin on December 1st and must be completed by
12 January 15th. Further, at the completion of the initial shift selection, a supervisor's selected shift
13 preference cannot be changed by the supervisor for a period of one year unless good cause is shown and
14 approval given by the Department Chief. Complainant worked Graveyard Shift throughout 2018. On
15 December 1, 2018, the 2019 shift bid began. Complainant determined that only graveyard shifts were
16 still open after others had bid. Complainant suspected that decisions were made to keep him on
17 graveyard. On December 14, 2018, Complainant filed a grievance alleging that certain Lieutenant
18 positions were being left "strategically vacant", including Motor Lieutenant (Traffic Bureau) in order to
19 deny him his seniority to keep him on graveyard.

20 The 2020 shift bid commenced in December of 2019. Complainant bid and received Swing
21 shift B at South Area Command. Complainant was told he would have to cover Sergeant Ewertz at
22 North Area Command on swing shift. This lasted roughly two weeks. Complainant claimed that the
23 normal course would have been to use an administrative sergeant to cover for Sgt. Ewertz.

24 Respondent argues that the hearing in this matter confirmed that Complainant's complaint has
25 no basis in fact and provided nothing to support his over-arching conspiracy theory that Chief Ojeda
26 took steps to manipulate the shift bid process to his detriment. Specifically, Complainant's allegations
27 are simply speculation about the actions of Lt. Morrison and reference to an unrelated shift bid in the
28 past that Chief Ojeda was neither part of nor aware of. Respondent contends that Complainant did not

1 present sufficient evidence that Chief Ojeda told Lt. Morrison to bid for Swing Swift A, which
2 unbeknownst to the Chief, was Complainant's preferred shift; Complainant was not denied the
3 opportunity to attend either NW or the FBI Academy; there is no evidence that Chief Ojeda held
4 Complainant's previous time as Association president against him; there is no evidence that Chief
5 Ojeda held a grudge because of Complainant's request for investigation after the events of October 1;
6 there is no evidence that Chief Ojeda prevented Complainant from being in any specialized training
7 units because of retaliation for past-perceived wrongs; and there is no evidence that Lt. Morrison bid for
8 Swing Swift A at the behest of Chief Ojeda to discriminate against Complainant.

9 DISCUSSION

10 As indicated, Complainant alleges he was discriminated by Respondent due to personal or
11 political reasons in violation of NRS 288.270(1)(f). Discrimination of this sort is analyzed under the
12 framework set forth in *Reno Police Protective Ass'n v. City of Reno*, 102 Nev. 98, 715 P.2d 1321
13 (1986) and later modified in *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. Adv. Op. 36, 302 P.3d
14 1108 (2013).

15 An aggrieved employee must make a prima facie case showing sufficient to support the
16 inference that the protected conduct was a motivating factor in the employer's decision. Under the
17 revised framework, "it is not enough for the employee to simply put forth evidence that is capable of
18 being believed; rather, this evidence must actually be believed", *Bisch*, 302 P.3d at 1116. Once this
19 is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that
20 the same action would have been taken place even in the absence of the protected conduct. *Id.* The
21 employer's demonstration must meet "the test of reasonableness in light of the factual circumstances
22 and protected rights at issue in [the] case." *Reno Police Protective Ass'n*, 102 Nev. at 101. The
23 aggrieved employee may then offer evidence that the employer's proffered legitimate explanation is
24 merely pretextual. *Bisch*, 302 P.3d at 1116; *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017),
25 *aff'd*, Docket No. 76408, 2020 WL 3571914, at 1, filed June 30, 2020, unpublished deposition (Nev.
26 2020).

27 In *Kilgore v. City of Henderson*, Item No. 550H, Case No. A1-045763 (2005), the Board stated
28 that "personal reasons" "can be best described as 'non-merit-or-fitness' factors, i.e., factors that are

1 unrelated to any job requirement and not otherwise made by law a permissible basis for
2 discrimination.” The Board went on to conclude: “Thus, the proper construction of the phrase ‘personal
3 reasons or affiliations’ include ‘non-merit-or-fitness’ factors, and would include the dislike of or bias
4 against a person which is based on an individual’s characteristics, beliefs, or activities that do not affect
5 the individual’s merit or fitness of any particular job.” This is an intense factual inquiry. *See also*
6 *Jackson v. Clark County*, Case No. 2018-007, Item No. 837 (2019).

7 Complainant alleges that the shift bidding process was manipulated in order to keep him on
8 graveyard. Specifically, Lt. Morrison, who was contemplating retirement, bid in order to facilitate the
9 personal or political discrimination against him. Complainant alleges that Chief Ojeda purposefully
10 manipulated and/or denied him the ability to obtain the Swing Swift A position.

11 Shift assignments are dictated by the CBA and are assigned based on annual bidding for terms
12 of one year. The CBA provides that officers may bid for shifts; however, it does not provide that an
13 officer is prohibited from doing so if the officer is contemplating retirement prior to the shift bid.

14 Further, the CBA between the City and NLVPSA states that shift bids shall begin December 1st
15 and shall be completed by January 15, based on classification seniority. “At the completion of the
16 initial shift selection, a supervisor’s selected shift preference cannot be changed by the supervisor for a
17 period of one year unless good cause is shown and approval given by the Department Chief.” Chief
18 Ryan explained that good cause was never shown by Complainant as to why they should upset the shift
19 bid and move Complainant into the spot he wanted.

20 During her roughly 25-year career with Respondent, Chief Ojeda had to go through the regular
21 shift bid process every year that she was not on specialized assignment (as she could not bid when on a
22 specialized assignment). Chief Ojeda’s first experience with the shift bid as Chief was for the 2019
23 process, and she had never been part of a rebid as an officer. Chief Ojeda explained that when she
24 became Chief, she did not know of any alleged rebid as part of some past practice. Further, there was
25 nothing in the CBA that spoke to the rebid process. Prior to the bid, she did not have a conversation
26 with Lt. Morrison in which she told her to bid for anything specific and had not spoken with Lt.
27 Morrison in six years. We find it credible that Chief Ojeda did not do anything special for Lt. Morrison
28 to get her to bid in some way to affect Complainant.

1 The shift bid opened on December 1st (Chief Ojeda had been Chief for roughly 20 days) and
2 was completed on December 15th. Lt. Morrison had not retired as of that date. As such, Lt. Morrison
3 was free to bid as she was told the Traffic Lieutenant position was eliminated and was placed into
4 patrol. Chief Ojeda indicated she put no thought into what Lt. Morrison was doing as related to the bid.

5 However, Former Assistant Chief Clinton Ryan had a conversation with Lt. Morrison regarding
6 the shift bid. Assistant Chief Ryan testified that a decision was made as part of a reorganization to take
7 the Traffic Division Lieutenant's position and reassign it to the Training Division and have a lieutenant
8 over the Training Division. He explained that, at that time, Lt. Morrison was the Traffic Lieutenant so
9 she was informed that she was going to be coming out of traffic and would be participating in the shift
10 bid for 2019. Assistant Chief Ryan further explained that there were rumors going around that Lt.
11 Morrison was going to retire at the end of 2019. As such, Assistant Chief Ryan had Lt. Morrison come
12 to his office to figure out if she was going to retire. He explained to her that if she participated in the
13 shift bid and then turned around and retired a month later, she could potentially be messing with
14 someone's opportunity to get a shift they wanted if she took a prime spot. However, Lt. Morrison
15 would not commit to retiring – instead, she told him that she wanted to keep her options open, and she
16 was not sure on retiring or not. Lt. Morrison explained to him that if something changed within the
17 next couple of months, she wanted to make sure she would have a shift that would be better for her
18 personal life. Assistant Chief Ryan explained that he did not have the right to stop her from bidding.
19 Lt. Morrison did bid (specifically Swing Shift A). When the shift bid ended in mid-December, Lt.
20 Morrison had not submitted for formal memo requesting retirement.

21 Assistant Chief Ryan explained that after she bid, she did give notice that she was going to retire
22 effective on January 30, 2019 (Lt. Morrison's memo was turned in late December). At this point, Chief
23 Ojeda had to complete the critical position justification form which had to be approved by the City
24 Manager to backfill that position. The backfill comes from a sergeant who was on the promotional list
25 for lieutenant. In this case, it was Sgt. John Cargile (who was eventually promoted to lieutenant).
26 Assistant Chief Ryan explained that this is the typical process for Chief Ojeda which we find credible.²

27
28 ² Moreover, Chief Ojeda credibly testified that the shift bid was closed December 15th, and the CBA provides that once a supervisor bids for a shift, their initial shift will not be changed unless approved by the chief of police and good cause is shown. As further explained herein, Chief Ojeda did not put Complainant into this spot as she did not believe there was

1 Association President Chris Cannon testified that he told Chief Ojeda, that certain members
2 would like to have a rebid because it was believed Lt. Morrison would retire, that he believed the CBA
3 had been followed because the shift bid was December 1st and it was up to the Chief's discretion as to
4 whether a rebid occurred (as Assistant Chief Ryan indicated as well). Lt. Cannon testified that it did
5 not violate the CBA when the command staff made the decision not to rebid. Lt. Cannon stated that he
6 was aware of shift bids occurring previously, but it was not a common occurrence. In this regard, Lt.
7 Cannon testified that at least in his experience it was not common practice to rebid – instead, once they
8 begin the bidding process on December 1st, it is usually completed in short order. Once the bidding is
9 complete, it stays that way, with very limited exceptions.

10 Complainant pointed to an incident when a shift rebid did occur with Sgt. Ramos. Regarding
11 Sgt. Ramos, Lt. Cannon explained that he never received information because he never was asked by
12 the Chief – they never discussed any type of different treatment. Lt. Cannon reiterated that the Chief
13 properly conducted the bid process, and that it was common for a promoted lieutenant to fill a spot after
14 retirement. Lt. Cannon further reiterated that while rebidding has occurred in the past, it's not common
15 practice (it is the exception). Moreover, the vast majority of the witnesses agreed that there was no
16 contractual requirement to rebid, and the only specific example given to the Board was Sgt. Ramos.
17 There was not sufficient credible evidence that Chief Ojeda was required by contract or past practice to
18 rebid in order to provide Complainant with his preferred shift.

19 The CBA is plain and unambiguous that the process shall be completed by January 15th (in
20 other words, the CBA does not state plainly state that it must remain open until January 15th and there
21 was not sufficient evidence presented that this was the intent or practice). As Chief Ojeda explained
22 credibly, the shift bid in question closed on December 15th, and the CBA stated that a supervisor's
23 initial shift bid will not be changed unless certain conditions are satisfied.³ When questioned why she
24 didn't just put Complainant in the spot since she as Chief had the authority to do so, she explained: "I
25 do not play friends and family. I'm not doing the [good] 'ole boys, and I will follow all of the contract

26
27 good cause shown, would not do "the [good] 'ole boys", and wanted to follow the policies and procedures as she believed
28 them to be. Upon Lt. Morrison's retirement, Chief Ojeda followed procedure by promoting Sgt. Cragile from the
Lieutenant's promotional list to fill Lt. Morrison's bid awarded swing shift A position.

³ Further, credible testimony verified that the process does not always stay open until mid-January (and usually does not).

1 ..., and I will follow policies and procedures.” While Chief Ojeda conceded she had the authority to do
2 so, the Board does not believe that a motivating factor for Chief Ojeda’s decision was out of personal or
3 political reasons. In other words, sufficient credible evidence was not presented that Chief Ojeda made
4 this decision in part because of dislike of or bias against Complainant based on Complainant’s
5 individual’s characteristics, beliefs, or activities.⁴ Even if there had been credible evidence of such
6 (which the Board does not find), it appeared Chief Ojeda made this decision out of fairness to others as
7 the shift bid had been completed, and she followed practice as she credibly believed it to be which the
8 Board finds reasonable in light of the factual circumstances and protected rights at issue in this case.
9 As such, Respondent demonstrated that the same action would have been taken place even in the
10 absence of the protected conduct. Furthermore, Complainant failed to offer evidence that Respondent’s
11 demonstration was merely pretextual.

12 Lt. Perez (who was very complimentary of Complainant) indicated that while he didn’t believe
13 rebid was required under the CBA, it was customary to allow people to rebid. Lt. Perez stated he was
14 not aware why Lt. Morrison was taken out of Traffic and his involvement in the bidding process was
15 limited. Lt. Perez also agreed that it is common when a lieutenant’s spot comes open, that it is filled
16 from the lieutenant’s list. Lt. Perez heard “rumors” and testified that “it’s obvious when it’s going
17 around the Department and everybody knows what’s going on.” However, when questioned on
18 specifics, Lt. Perez testified: “You know, it’s hard to just be specific because it’s not something that I
19 just kind of document and instill in my memory.” Even when Lt. Perez was attempted by
20 Complainant’s counsel to be rehabilitated with a specific instance, he responded, “I do – I do remember
21 instances like that, but I can’t be specific.” And, even in that instance, he testified that Chief Ojeda was
22 not Chief at that time. Lt. Perez also agreed that just because it’s a rumor, that does not make it true.
23 Lt. Perez conceded that it was Lt. Morrison’s right to shift bid. While Lt. Perez believed the actions
24 were retaliatory, given the totality of the circumstances, the Board does not find this credible.

25
26 ⁴ When asked what evidence Complainant had regarding his allegation of why Respondent had Lt. Morrison bid for the
27 shift, Complainant responded, “Because she bid for it.” Complainant essentially testified that she was ordered by the
28 Department and the City to bid for Swing A. As explained above, we do not find this credible. Complainant agreed that
since Complainant choose not to subpoena Lt. Morrison, the Board cannot conclusively determine whether she was
instructed to or not. However, as indicated, we find it credible that she could neither be prevented from bidding nor was Lt.
Morrison instructed to bid in an effort to retaliate or discriminate against Complainant. The Board finds it credible that
Chief Ojeda’s actions were not done in an effort to circumvent seniority rights or to keep Complainant on graveyard.

1 Crespo simply indicated he retired in 2015 and in terms of the "games played", his knowledge is
2 only limited to before his retirement. He also admitted that he had no direct knowledge of any
3 discriminatory conduct by anybody in the current command staff, including Chief Ojeda, other than
4 from what Complainant told him. Similarly, Eric Smith also retired prior to the shift bid in question
5 and admitted that the instances he was involved in were not under Chief Ojeda. Smith stated that
6 rebidding is not in the CBA – he simply stated that it was granted from time to time depending on when
7 people put in for retirement, and "they don't want to mess up the shift bid and allow for seniority to bid
8 the shifts they want." Randy Slayer also has not worked for Respondent since 2015 and never worked
9 under Chief Ojeda. Lt. Slayer ran a shift bid as lieutenant and stated that if someone was retiring prior
10 to the shift bid taking effect in February of the new year, that person would not participate in the bid.
11 However, Lt. Slayer explained that he never experienced a situation in which a person made a bid and
12 then decided to retire. Slayer also reiterated that specialized assignments don't bid. Slayer was not
13 aware why Lt. Morrison wanted to bid.⁵

14 Moreover, Association President Cannon testified, in regards to Complainant's grievance
15 related to the shift bid that he alleged was manipulated against him, that they explained to Complainant
16 that the Association Board made the decision not to financially back Complaint's grievance (thus, he
17 would be required to pay for his own arbitration if he decided to move forward). The Association
18 Board and the general membership determined that his grievance lacked merit. The Association Board
19 expressed the opinion that command staff had fulfilled the obligations outlined within the CBA in
20 regards to bidding, and they did not feel they would be successful at arbitration. In other words, it was
21 the Association's conclusion that Chief Ojeda properly administrated the process that Complainant was
22 grieving. Lt. Cannon testified that if he believed that any portion of Complainant's grievance was a
23 violation of the CBA, he would have moved forward with the grievance. Complainant filed an
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26 ⁵ While Complainant attempted to argue that no rational supervisor would ever retire out of patrol if they were in an ADP
27 position, the testimony was clear that Respondent could not force Lt. Morrison in her decision to bid. Moreover, she
28 explained to Chief Ryan that she would not commit to retiring (as she was not sure she would), wanted to keep her options
open, and wanted to make sure she had a good shift that would be better for her personal life. The Board was not presented
with credible evidence that Lt. Morrison made this decision to further the alleged conspiracy.

1 additional grievance in 2020 related to his shift at that time. The Association Board concluded that this
2 grievance also lacked merit.⁶

3 Assistant Chief Ryan additionally explained that there was no reason to rebid – Assistant Chief
4 Ryan could not think of a time when that ever happened. He testified it is spelled out very clearly when
5 the shift bid will take place once a year at the beginning of December. Assistant Chief Ryan was not
6 familiar with a previous incident of a rebid for sergeants (and officers) because of the retirement of Sgt.
7 Ramos. Assistant Chief Ryan reiterated there is no requirement to rebid when someone retires. When
8 questioned about a 2018 rebid, Chief Ryan credibly testified that during that time he was a SWAT
9 commander and, as such, did not participate in the shift bid. In the same vein, Chief Ojeda credibly
10 explained that when she was in a special assignment or specialized unit, she was not part of the bidding
11 process and would not see it.

12 As indicated, Assistant Chief Ryan testified that a decision was made as part of a reorganization
13 to transfer the Traffic Division Lieutenant's position – take that position and reassign it to the Training
14 Division and have a lieutenant over the Training Division. The Training Lieutenant position was
15 initially offered to Lt. McCallister who turned it down and it eventually went to Lt. Laswell. Chief
16 Ryan explained that if Lt. McCallister had taken the position, this would have opened up a different
17 shift for Complainant (Lt. McCallister was senior to Complainant).⁷ Cannon explained that right
18 around shift bid command staff told them that a Lieutenant position in the Traffic Division was going to
19 be moved to Training, and this was not a violation of the CBA (he believed this was management right
20 for the Chief to reassign positions). While Complainant claimed this was intentionally done to
21 discriminate against him, Cannon, for his part as union president, stated that the Chief never
22
23

24 ⁶ While the Board does not find that Complainant met his initial burden (as further explained herein), we note that simply an
25 apparent lack of a breach of contract (which this Board has no jurisdiction over) does not indicate there was no
26 discrimination. However, the fact that the Association determined the bidding process was properly followed is at least
27 noteworthy in regard to whether Respondent's demonstration met the test of reasonableness in light of the factual
28 circumstances and protected rights at issue in this case (in other words following established procedures and policies). Chief
Ojeda explained that she wrote "denied" on the grievance and sent it through the proper channels. Cannon credibly testified
that it is common practice for there to be no written response (he also stated that the CBA does not require one).

⁷ Chief Ojeda indicated that Lt. McCallister declined the position and bid swing swift, thus taking up both spots. The Board
finds it noteworthy that Respondent selected Lt. McCallister which would have opened a spot for Complainant had it been
accepted.

1 discriminated against him in his role as president (and that she had been very open with unions as
2 further detailed below).

3 Chief Ojeda testified the Traffic position was eliminated when she was captain. The CNLV
4 hired Tom Roberts to do a report of the police department regarding a reorganization and what they can
5 do better. A recommendation from Robert's report was to create a single unit responsible for
6 recruiting, hiring, and training personnel, commanded by a lieutenant. The report concluded that
7 changes were needed to improve the recruiting, hiring and training of new employees to fill vacant
8 positions. Further, the responsibilities for recruiting, hiring and training were at the time spread
9 throughout the Department, and these functions needed to be consolidated under one unit. Roberts
10 indicated that the training section at that time had a large part of the responsibility and was the right
11 place for these units to be consolidated. Roberts concluded that the appropriate commander for that
12 unit should be a commissioned police Lieutenant. Chief Ojeda testified that part of the process which
13 lead to this conclusion came from sending out surveys to all supervisors along with one-on-one
14 meetings. Chief Ojeda testified that Lt. Morrison indicated that she did not have enough to keep her
15 busy, and they did not need a full-time position over there.

16 Regardless, given the report (as well as testimony related thereto), we find the Department
17 would have taken the same action regardless of Complainant's protected conduct, and the Department's
18 reorganization of removing the Traffic Division Lieutenant's position and reassigning it to the Training
19 Division was reasonable in light of the factual circumstances and protected rights at issue in this case.
20 Moreover, we find that Complainant failed to offer sufficient evidence that Respondent's explanation
21 was merely pretextual.⁸

22 Furthermore, Chief Ojeda credibly testified that she did not hold Complainant's role in the
23 union against him. Chief Ojeda had an extensive history as part in unions during her career.

24
25 ⁸ However, we note that Complainant failed to meet his initial burden as further explained herein. As indicated, Assistant
26 Chief Ryan testified that a decision was made as part of a reorganization that they were going to remove the Traffic Division
27 Lieutenant's position - they were going to take that position and reassign it to the Training Division and have a Lieutenant
28 over the Training Division. The Training Lieutenant position was initially offered to Lt. McCallister who turned it down
and it eventually went to Lt. Laswell. While Complainant claimed that it was improper to remove or eliminate the Traffic
Lieutenant position as bargaining was required with NLVPSA, a claim of unilateral change or failure to bargain in good
faith is not before this Board. See *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408,
2020 WL 3571914, at 3, filed June 30, 2020, unpublished deposition (Nev. 2020).

1 Complainant was president of the Association when Chief Ojeda left the Association, and Chief Ojeda
2 credibly testified that she had no grudge against him.⁹

3 Additionally, as indicated, at the time of the October 1 shooting, Chief Ojeda was a detective
4 lieutenant. As policy, she had to submit a memo which became part of an After Action Report. Chief
5 Ojeda was critical of some of Complainant's decision-making by Complainant. Chief Ojeda learned
6 that Complainant wrote a memo to have her written up (she had not seen the memo until the day before
7 her testimony). However, Chief Ojeda indicated she was never investigated and there was no formal
8 complaint. Chief Ojeda also stated that she in no way suggested that Complainant face any punishment
9 for his conduct and that was not the purpose of her memo. We do not find it credible that Chief Ojeda
10 had a grudge or otherwise retaliated against Complainant as related to this incident.

11 Chief Ojeda also credibly testified that she has never spoken with Ryan Juden about trying to
12 thwart the career progress of Complainant. It is the Department who has final say on personal
13 decisions, and Juden cannot circumvent the Chief. Credible evidence was not presented that Juden
14 conspired with Respondent to hinder Complainant's progression with the Department. Further, the
15 evidence established that Complainant voluntarily chose to not pursue the position of captain and there
16 was not credible evidence presented that he would have been given this position in an effort to punish
17 him had he pursued it.

18 Moreover, the Board was not presented with sufficient evidence that Complainant's litigious
19 history was a motivating factor in Respondent's actions. Chief Ojeda credibly testified that she did not
20 hold any of his prior actions in this regard against him. Moreover, Complainant was promoted to
21 Lieutenant in September of 2017 after he ended his tenure as PSA president in 2016.

22 Finally, as indicated, Complainant bid and received Swing Shift B at South Area Command for
23 the 2020 shift bid. However, Complainant claims that regardless of being out of graveyard, Respondent
24 continued the discrimination in their action of having Complainant cover Sergeant Ewertz at North
25

26 ⁹ Moreover, as indicated above, Cannon credibly testified that Chief Ojeda was open with unions, and he did not experience
27 any discrimination against him in his role as union president. Complainant failed to meet his burden in establishing that his
28 union activity was a motivating factor in Respondent's actions. Slayer, when asked about specific comments Chief Ojeda
made regarding Complainant, could not recall what she said but simply stated that she didn't hold him "in very high regard."
Slayer was not aware why Chief Ojeda left the union. Slayer conceded that Chief Ojeda didn't say anything specific to him
about what she disliked about Complainant (anything personal about him).

1 Area Command on swing shift. After Complainant suffered a worker's compensation injury (roughly 2
2 or so weeks), Respondent assigned an another person to cover. However, Complainant claims that the
3 normal course would have been to use an administrative sergeant to cover for Sgt. Ewertz initially.
4 Yet, Complainant failed to provide any evidence that such was required and conceded there was no
5 policy on it. Complainant stated that Sgt. Ewertz contracted cancer and was on extended leave.
6 Complainant simply stated that he was told by Donnie Collins (Captain at the time of the North) that he
7 would have to cover for her. Complainant conceded that asking him to fill in would have been common
8 at least for annual or sick leave. Complainant failed to make a prima facie case showing sufficient to
9 support the inference that his protected conduct was a motivating factor in the decision here. Moreover,
10 Complainant noted that he was told by Captain Collins that the supposed Sergeant who should have
11 done it (Sgt. Ellis), had other duties. We do not believe that personal or political reasons were a
12 motivating factor in the decision here.

13 Likewise, we do not believe Complainant's protected conduct was a motivating factor in
14 denying leave time and training to him, and Complainant failed to establish a prima facie case showing
15 in this regard sufficient to support the inference.

16 Regarding leave time, Complainant's grievances were denied without explanation. As
17 explained, this was customary. While Complainant believed there was no reason to deny his leave
18 because he was on light duty, he did not put forth evidence sufficient to support the inference that
19 personal or political reasons were a motivating factor in the decision.¹⁰

20 Regarding training, Chief Ryan had a conversation with Complainant about the FBI academy
21 towards the end of 2018 (a meeting between them as well as Chief Ojeda). Complainant expressed a
22 desire to attend the academy. Chief Ojeda informed him that due to some recent changes, there was a
23 five-year commitment. Once one attends the FBI Academy, they have to commit to stay five years with

24 ¹⁰ Moreover, as Respondent objected to at the hearing, this was not put forth in the Complaint (nor Opposition to
25 Respondent's Motion to Dismiss, Notice of hearing, or Complainant's pre-hearing statement and supplement thereto) which
26 were are bound by (and such this claim was not properly before the Board). See, e.g., *Int'l Ass'n of Fire Fighters, Local*
27 *5046 v. Elko County Fire Prot. Dist.*, Case No. 2019-011, Item No. 847-A, at 21 n. 5 (2020), citing *Nye County Management*
28 *Employees Ass'n v. Nye County*, Case No. 2018-012 (2019), *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 308,
721 P.2d 378 (1986); NRS 233B.121(9), *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1253, 78 Cal. Rptr. 3d 372,
381-82 (2008); *Hutton v. Fid. Nat'l Title Co.*, 213 Cal. App. 4th 486, 493, 152 Cal. Rptr. 3d 584, 590 (2013); *Bonner v. City*
of North Las Vegas, Docket No. 76408, 2020 WL 3571914, at 3, n. 2, filed June 30, 2020, unpublished deposition (Nev.
2020). See also *supra* note 1.

1 the agency. Credible testimony indicated that Complainant would not be willing to commit five years.
2 Moreover, there was no line established for who would be next to go. Furthermore, Complainant did
3 not credibly establish that he met the requirements to attend.

4 At that time, Chief Ryan was also not offering officers the ability to attend the Northwestern
5 Academy. The decision was made by the previous administration that they were no longer going to
6 host or send supervisors to that course anymore. During his time as Assistant Chief, Chief Ojeda and
7 him never had a discussion or talked about reestablishing their connection with the Northwestern
8 Academy. Moreover, Chief Ojeda previously requested to be sent to Northwestern and she was not
9 allowed to go. When Chief Ojeda was part of command staff, the decision was made by then Assistant
10 Chief Noahr that they were not going to use Northwestern University anymore because they did not feel
11 they were getting their money's worth and the benefit. At the time it was an online program whereas
12 previously it was in-person where they actually came to the police department two weeks every month
13 to complete the program.¹¹

14 In summary, as indicated, Complainant was required to make a prima facie case showing
15 sufficient to support the inference that his protected conduct was a motivating factor in Respondent's
16 decisions. Under the revised framework, "it is not enough for the employee to simply put forth
17 evidence that is capable of being believed; rather, this evidence must actually be believed" *Bisch*,
18 302 P.3d at 1116. For the reasons stated above, we find that Complainant failed to make a sufficient
19 showing. Based on the evidence presented (and the totality of the circumstances as detailed above), the
20 Board does not believe the acts were taken for discriminatory purposes. Moreover, assuming,
21 *arguendo*, Complainant had satisfied his initial burden (which we do not find), Respondent presented

22 ¹¹ Likewise, we find Complainant failed to meet his burden regarding the POST management certification. Moreover, Chief
23 Ojeda testified that the email in question was referring to the NRS mandated POST training that all police officers must
24 attend (thus the "extenuating circumstances" would not apply). Further, as the Chief credibly explained, any of
25 Complainant's mandated POST training that he had to attend, he would attend, and the specific POST training at issue was
26 an outside POST class that Complainant just wanted to attend (not a mandated POST class). The email specifically
27 explained (to numerous individuals, not just Complainant) that "[u]nder normal circumstances those officers who are not on
28 full duty status cannot attend training classes." Chief Ojeda explained that he was not denied any mandatory POA training.
Chief Ojeda reiterated on cross that the training Complainant put in for was not a required class that he needed to be certified
in – the email specifically indicated "training required for certifications". Even if Complainant met his burden (which we do
not find as Complainant failed to show that his protected activities were a motivating factor in the decision to ultimately
deny this training), Respondent demonstrated they would have taken the same action regardless of Complainant's protected
conduct and the demonstration was reasonable. Complainant failed to offer sufficient evidence that Respondent's
explanation was merely pretextual.

1 credible evidence that the same actions would have taken place even in the absence of the
2 Complainant's protected conduct, and Respondent's demonstration met the test of reasonableness in
3 light of the factual circumstances and protected rights at issue in this case. As detailed above,
4 Complainant failed to offer evidence that Respondent's proffered legitimate explanations were merely
5 pretextual.

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

8 FINDINGS OF FACT

9 1. Complainant has been employed by the North Las Vegas Police Department
10 (Department) for over 23 years.

11 2. Complainant was the first president of the North Las Vegas Police Supervisors
12 Association (NLVPSA) serving from 2010 to 2016.

13 3. During his tenure as President, the NLVPSA filed multiple grievances, lawsuits, and
14 Board complaints against Respondent (Complainant pointed to specific instances from roughly 2011-
15 2015).

16 4. Complainant was promoted to Lieutenant in September of 2017.

17 5. On October 1, 2017, the Route 91 mass shooting occurred.

18 6. Complainant was the Watch Commander for Respondent that evening and as such
19 oversaw the Lieutenants.

20 7. After the incident, memos were drafted from others, including now Chief Pam Ojeda
21 (then Lieutenant), criticizing Complainant's performance.

22 8. Complainant was designated to draft the After Action Report which included taking
23 these memos from each supervisor who responded.

24 9. Thereafter, in November 2017, Complainant submitted to Captain Carmody, Assistant
25 Chief Noahr, and Chief of Police Alex Perez his requests for formal investigation of certain individuals
26 who drafted the memos including Chief Ojeda.

27 10. The CBA between Respondent and NLVPSA contains shift bidding provisions which
28 provide that shift bids begin on December 1st and must be completed by January 15th.

1 11. Further, at the completion of the initial shift selection, a supervisor's selected shift
2 preference cannot be changed by the supervisor for a period of one year unless good cause is shown and
3 approval given by the Department Chief.

4 12. Complainant worked Graveyard Shift throughout 2018.

5 13. On December 1, 2018, the 2019 shift bid began.

6 14. Complainant determined that only graveyard shifts were still open after others had bid.
7 Complainant suspected that decisions were made to keep him on graveyard.

8 15. On December 14, 2018, Complainant filed a grievance alleging that certain Lieutenant
9 positions were being left "strategically vacant", including Motor Lieutenant (Traffic Bureau) in order to
10 deny him his seniority to keep him on graveyard.

11 16. The 2020 shift bid commenced in December of 2019.

12 17. Complainant bid and received Swing shift B at South Area Command.

13 18. Complainant was told he would have to cover Sergeant Ewertz at North Area Command
14 on swing shift.

15 19. This lasted roughly two weeks.

16 20. Shift assignments are dictated by the CBA and are assigned based on annual bidding for
17 terms of one year.

18 21. The CBA provides that officers may bid for shifts; however, it does not provide that an
19 officer is prohibited from doing so if the officer is contemplating retirement prior to the shift bid.

20 22. The CBA between the City and NLVPSA states that shift bids shall begin December 1st
21 and shall be completed by January 15, based on classification seniority.

22 23. "At the completion of the initial shift selection, a supervisor's selected shift preference
23 cannot be changed by the supervisor for a period of one year unless good cause is shown and approval
24 given by the Department Chief."

25 24. Chief Ryan explained that good cause was never shown by Complainant as to why they
26 should upset the shift bid and move Complainant into the spot he wanted.

1 25. During her roughly 25-year career with Respondent, Chief Ojeda had to go through the
2 regular shift bid process every year that she was not on specialized assignment (as she could not bid
3 when on a specialized assignment).

4 26. Chief Ojeda's first experience with the shift bid as Chief was for the 2019 process, and
5 she had never been part of a rebid as an officer.

6 27. Chief Ojeda explained that when she became Chief, she did not know of any alleged
7 rebid as part of some past practice.

8 28. Further, there was nothing in the CBA that spoke to the rebid process.

9 29. Prior to the bid, she did not have a conversation with Lt. Morrison in which she told her
10 to bid for anything specific and had not spoken with Lt. Morrison in six years.

11 30. We find it credible that Chief Ojeda did not do anything special for Lt. Morrison to get
12 her to bid in some way to affect Complainant.

13 31. The shift bid opened on December 1st (Chief Ojeda had been Chief for roughly 20 days)
14 and was completed on December 15th.

15 32. Lt. Morrison had not retired as of that date.

16 33. As such, Lt. Morrison was free to bid as she was told the Traffic Lieutenant position was
17 eliminated and was placed into patrol.

18 34. Chief Ojeda indicated she put no thought into what Lt. Morrison was doing as related to
19 the bid.

20 35. However, Former Assistant Chief Clinton Ryan had a conversation with Lt. Morrison
21 regarding the shift bid.

22 36. Assistant Chief Ryan testified that a decision was made as part of a reorganization to
23 take the Traffic Division Lieutenant's position and reassign it to the Training Division and have a
24 lieutenant over the Training Division.

25 37. He explained that, at that time, Lt. Morrison was the Traffic Lieutenant so she was
26 informed that she was going to be coming out of traffic and would be participating in the shift bid for
27 2019.

1 38. Assistant Chief Ryan further explained that there were rumors going around that Lt.
2 Morrison was going to retire in 2019.

3 39. As such, Assistant Chief Ryan had Lt. Morrison come to his office to figure out if she
4 was going to retire.

5 40. He explained to her that if she participated in the shift bid and then turned around and
6 retired a month later, she could potentially be messing with someone's opportunity to get a shift they
7 wanted if she took a prime spot.

8 41. However, Lt. Morrison would not commit to retiring – instead, she told him that she
9 wanted to keep her options open, and she was not sure on retiring or not.

10 42. Lt. Morrison explained to him that if something changed within the next couple of
11 months, she wanted to make sure she would have a shift that would be better for her personal life.

12 43. Assistant Chief Ryan explained that he did not have the right to stop her from bidding.
13 Lt. Morrison did bid (specifically Swing Shift A).

14 44. When the shift bid ended in mid-December, Lt. Morrison had not retired at that time.

15 45. Assistant Chief Ryan explained that after she bid, she did give notice that she was going
16 to retire effective on January 30, 2019 (Lt. Morrison's memo was turned in late December).

17 46. At this point, Chief Ojeda had to complete the critical position justification form which
18 had to be approved by the City Manager to backfill that position.

19 47. The backfill comes from a sergeant who was on the promotional list for lieutenant.

20 48. In this case, it was Sgt. John Cargile (who was eventually promoted to lieutenant).

21 49. Assistant Chief Ryan explained that this is the typical process for Chief Ojeda which we
22 find credible.

23 50. Chief Ojeda credibly testified that the shift bid was closed December 15th, and the CBA
24 provides that once a supervisor bids for a shift, their initial shift will not be changed unless approved by
25 the chief of police and good cause is shown.

26 51. Chief Ojeda did not put Complainant into this spot as she did not believe there was good
27 cause shown, would not do "the [good] 'ole boys", and wanted to follow the policies and procedures as
28 she believed them to be.

1 52. Upon Lt. Morrison's retirement, Chief Ojeda followed procedure by promoting Sgt.
2 Cragile from the Lieutenant's promotional list to fill Lt. Morrison's bid awarded swing shift A position.

3 53. Association President Chris Cannon testified that he told Chief Ojeda, when discussing
4 that certain members would like to have a rebid because it was believed Lt. Morrison would retire, that
5 he believed the CBA had been followed because the shift bid was December 1st and it was up to the
6 Chief's discretion as to whether a rebid occurred (as Assistant Chief Ryan indicated as well).

7 54. Lt. Cannon testified that it did not violate the CBA when the command staff made the
8 decision not to rebid.

9 55. Lt. Cannon stated that he was aware of shift bids occurring previously, but it was not a
10 common occurrence.

11 56. In this regard, Lt. Cannon testified that at least in his experience it was not common
12 practice to rebid – instead, once they begin the bidding process on December 1st, it's usually completed
13 in short order.

14 57. Once the bidding is complete, it stays that way, with very limited exceptions.

15 58. Complainant pointed to an incident when a shift rebid did occur with Sgt. Ramos.

16 59. Regarding Sgt. Ramos, Lt. Cannon explained that he never received information because
17 he never was asked by the Chief – they never discussed any type of different treatment.

18 60. Lt. Cannon reiterated that the Chief properly conducted the bid process, and that it was
19 common for a promoted lieutenant to fill a spot after retirement.

20 61. Lt. Cannon further reiterated that while rebidding has occurred in the past, it's not
21 common practice (it is the exception).

22 62. Moreover, the vast majority of the witnesses agreed that there was no requirement to
23 rebid, and the only specific example given to the Board was Sgt. Ramos.

24 63. There was not sufficient credible evidence that Chief Ojeda was required by contract or
25 past practice to rebid in order to provide Complainant with his preferred shift.

26 64. The CBA does not state plainly state that it must remain open until January 15th and
27 there was not sufficient evidence presented that this was the intent or practice.
28

1 65. As Chief Ojeda explained credibly, the shift bid in question closed on December 15th,
2 and the CBA stated that a supervisor's initial shift bid will not be changed unless certain conditions are
3 satisfied.

4 66. Credible testimony verified that the process does not always stay open until mid-January
5 (and usually does not).

6 67. When questioned why she didn't just put Complainant in the spot since she as Chief had
7 the authority to do so, she explained: "I do not play friends and family. I'm not doing the [good] 'ole
8 boys, and I will follow all of the contract ..., and I will follow policies and procedures."

9 68. While Chief Ojeda conceded she had the authority to do so, the Board does not believe
10 that a motivating factor for Chief Ojeda's decision was out of personal or political reasons.

11 69. In other words, sufficient credible evidence was not presented that Chief Ojeda made
12 this decision in part because of dislike of or bias against Complainant based on Complainant's
13 individual's characteristics, beliefs, or activities.

14 70. When asked what evidence Complainant had regarding his allegation of why
15 Respondent had Lt. Morrison bid for the shift, Complainant responded, "Because she bid for it."

16 71. Complainant essentially testified that she was ordered by the Department and the City to
17 bid for Swing A.

18 72. We do not find this credible.

19 73. Complainant agreed that since Complainant chose not to subpoena Lt. Morrison, the
20 Board cannot conclusively determine whether she was instructed to or not.

21 74. However, as indicated, we find it credible that she could neither be prevented from
22 bidding nor was Lt. Morrison instructed to bid for a specific shift in an effort to retaliate or discriminate
23 against Complainant.

24 75. The Board finds it credible that Chief Ojeda's actions were not done in an effort to
25 circumvent seniority rights or to keep Complainant on graveyard.

26 76. Even if there had been credible evidence of such (which the Board does not find), it
27 appeared Chief Ojeda made this decision out of fairness to others as the shift bid had been completed,
28

1 and she followed practice as she credibly believed it to be which the Board finds reasonable in light of
2 the factual circumstances and protected rights at issue in this case.

3 77. Lt. Perez (who was very complimentary of Complainant) indicated that while he didn't
4 believe rebid was required under the CBA, it was customary to allow people to rebid.

5 78. Lt. Perez stated he was not aware why Lt. Morrison was taken out of Traffic and his
6 involvement in the bidding process was limited.

7 79. Lt. Perez also agreed that it is common when a lieutenant's spot comes open, that it is
8 filled from the lieutenant's list.

9 80. Lt. Perez heard "rumors" and testified that "it's obvious when it's going around the
10 Department and everybody knows what's going on."

11 81. However, when questioned on specifics, Lt. Perez testified: "You know, it's hard to just
12 be specific because it's not something that I just kind of document and instill in my memory."

13 82. Even when Lt. Perez was attempted by Complainant's counsel to be rehabilitated with a
14 specific instance, he responded, "I do -- I do remember instances like that, but I can't be specific."

15 83. And, even in that instance, he testified that Chief Ojeda was not Chief at that time. Lt.
16 Perez also agreed that just because it's a rumor, that does not make it true.

17 84. Lt. Perez conceded that it was Lt. Morrison's right to shift bid.

18 85. While Lt. Perez believed the actions were retaliatory, given the totality of the
19 circumstances, the Board does not find this credible.

20 86. Crespo simply indicated he retired in 2015 and in terms of the "games played", his
21 knowledge is only limited to before his retirement.

22 87. He also admitted that he had no direct knowledge of any discriminatory conduct by
23 anybody in the current command staff, including Chief Ojeda, other than from what Complainant told
24 him.

25 88. Similarly, Eric Smith also retired prior to the shift bid in question and admitted that the
26 instances he was involved in were not under Chief Ojeda.

1 89. Smith stated that rebidding is not in the CBA – he simply stated that it was granted from
2 time to time depending on when people put in for retirement, and “they don’t want to mess up the shift
3 bid and allow for seniority to bid the shifts they want.”

4 90. Randy Slayer also has not worked for Respondent since 2015 and never worked under
5 Chief Ojeda.

6 91. Lt. Slayer ran a shift bid as lieutenant and stated that if someone was retiring prior to the
7 shift bid taking effect in February of the new year, that person would not participate in the bid.

8 92. However, Lt. Slayer explained that he never experienced a situation in which a person
9 made a bid and then decided to retire.

10 93. Slayer also reiterated that specialized assignments don’t bid. Slayer was not aware why
11 Lt. Morrison wanted to bid.

12 94. While Complainant attempted to argue that no rational supervisor would ever retire out
13 of patrol if they were in an ADP position, the testimony was clear that Respondent could not force Lt.
14 Morrison in her decision to bid.

15 95. Moreover, she explained to Chief Ryan that she would not commit to retiring (as she
16 was not sure she would), wanted to keep her options open, and wanted to make sure she had a good
17 shift that would be better for her personal life.

18 96. The Board was not presented with credible evidence that Lt. Morrison made this
19 decision to further the alleged conspiracy.

20 97. Association President Cannon testified, in regards to Complainant’s grievance related to
21 the shift bid that he alleged was manipulated against him, that they explained to Complainant that the
22 Association Board made the decision not to financially back Complaint’s grievance (thus, he would be
23 required to pay for his own arbitration if he decided to move forward).

24 98. The Association Board and the general membership determined that his grievance lacked
25 merit.

26 99. The Association Board expressed the opinion that command staff had fulfilled the
27 obligations outlined within the CBA in regards to bidding, and they did not feel they would be
28 successful at arbitration.

1 100. In other words, it was the Association's conclusion that Chief Ojeda properly
2 administrated the process that Complainant was grieving.

3 101. Lt. Cannon testified that if he believed that any portion of Complainant's grievance was
4 a violation of the CBA, he would have moved forward with the grievance.

5 102. Complainant filed an additional grievance in 2020 related to his shift at that time.

6 103. The Association Board concluded that this grievance also lacked merit.

7 104. The fact that the Association determined the bidding process was properly followed is at
8 least noteworthy in regard to whether Respondent's demonstration met the test of reasonableness in
9 light of the factual circumstances and protected rights at issue in this case (in other words following
10 established procedures and policies).

11 105. Chief Ojeda explained that she wrote "denied" on the grievance and sent it through the
12 proper channels.

13 106. Cannon credibly testified that it is common practice for there to be no written response
14 (he also stated that the CBA does not require one).

15 107. Assistant Chief Ryan additionally explained that there was no reason to rebid – Assistant
16 Chief Ryan could not think of a time when that ever happened.

17 108. He testified it's spelled out very clearly when the shift bid will take place once a year at
18 the beginning of December.

19 109. Assistant Chief Ryan was not familiar with a previous incident of a rebid for sergeants
20 (and officers) because of the retirement of Sgt. Ramos.

21 110. Assistant Chief Ryan reiterated there is no requirement to rebid when someone retires.

22 111. When questioned about a 2018 rebid, Chief Ryan credibly testified that during that time
23 he was a SWAT commander and, as such, did not participate in the shift bid.

24 112. In the same vein, Chief Ojeda credibly explained that when she was in a special
25 assignment or specialized unit, she was not part of the bidding process and wouldn't see it.

26 113. Assistant Chief Ryan testified that a decision was made as part of a reorganization to
27 transfer the Traffic Division Lieutenant's position – take that position and reassign it to the Training
28 Division and have a lieutenant over the Training Division.

1 114. The Training Lieutenant position was initially offered to Lt. McCallister who turned it
2 down and it eventually went to Lt. Laswell.

3 115. Chief Ryan explained that if Lt. McCallister had taken the position, this would have
4 opened up a different shift for Complainant (Lt. McCallister was senior to Complainant).

5 116. Cannon explained that right around shift bid command staff told them that a Lieutenant
6 position in the Traffic Division was going to be moved to Training, and this was not a violation of the
7 CBA (he believed this was management right for the Chief to reassign positions).

8 117. While Complainant claimed this was intentionally done to discriminate against him,
9 Cannon, for his part as union president, stated that the Chief never discriminated against him in his role
10 as president (and that she had been very open with unions as further detailed below).

11 118. Chief Ojeda indicated that Lt. McCallister declined the position and bid swing swift,
12 thus taking up both spots.

13 119. The Board finds it noteworthy that Respondent selected Lt. McCallister which would
14 have opened a spot for Complainant had it been accepted.

15 120. Chief Ojeda testified the Traffic position was eliminated when she was captain.

16 121. The CNLV hired Tom Roberts to do a report of the police department regarding a
17 reorganization and what they can do better.

18 122. A recommendation from Robert's report was to create a single unit responsible for
19 recruiting, hiring, and training personnel, commanded by a lieutenant.

20 123. The report concluded that changes were needed to improve the recruiting, hiring and
21 training of new employees to fill vacant positions.

22 124. The responsibilities for recruiting, hiring and training were at the time spread throughout
23 the Department, and these functions needed to be consolidated under one unit.

24 125. Roberts indicated that the training section at that time had a large part of the
25 responsibility and was the right place for these units to be consolidated.

26 126. Roberts concluded that the appropriate commander for that unit should be a
27 commissioned police Lieutenant.
28

1 127. Chief Ojeda testified that part of the process which lead to this conclusion came from
2 sending out surveys to all supervisors along with one-on-one meetings.

3 128. Chief Ojeda testified that Lt. Morrison indicated that she didn't have enough to keep her
4 busy, and they did not need a full-time position over there.

5 129. The Department's reorganization of removing the Traffic Division Lieutenant's position
6 and reassigning it to the Training Division was reasonable in light of the factual circumstances and
7 protected rights at issue in this case.

8 130. Assistant Chief Ryan testified that a decision was made as part of a reorganization that
9 they were going to remove the Traffic Division Lieutenant's position - they were going to take that
10 position and reassign it to the Training Division and have a Lieutenant over the Training Division.

11 131. The Training Lieutenant position was initially offered to Lt. McCallister who turned it
12 down and it eventually went to Lt. Laswell.

13 132. Chief Ojeda credibly testified that she did not hold Complainant's role in the union
14 against him.

15 133. Chief Ojeda had an extensive history participating in unions during her career.

16 134. Complainant was president of the Association when Chief Ojeda left the Association,
17 and Chief Ojeda credibly testified that she had no grudge against him.

18 135. Cannon credibly testified that Chief Ojeda was open with unions, and he did not
19 experience any discrimination against him in his role as union president.

20 136. Complainant failed to meet his burden in establishing that his union activity was a
21 motivating factor in Respondent's actions.

22 137. Slayer, when asked about specific comments Chief Ojeda made regarding Complainant,
23 could not recall what she said but simply stated that she didn't hold him "in very high regard."

24 138. Slayer was not aware why Chief Ojeda left the union.

25 139. Slayer conceded that Chief Ojeda didn't say anything specific to him about what she
26 disliked about Complainant (anything personal about him).

27 140. At the time of the October 1 shooting, Chief Ojeda was a detective lieutenant.
28

1 141. As policy, she had to submit a memo which became part of an After Action Report.
2 Chief Ojeda was critical of some of Complainant's decision-making by Complainant.

3 142. Chief Ojeda learned that Complainant wrote a memo to have her written up (she had not
4 seen the memo until the day before her testimony).

5 143. However, Chief Ojeda indicated she was never investigated and there was no formal
6 complaint.

7 144. Chief Ojeda also stated that she in no way suggested that Complainant face any
8 punishment for his conduct and that was not the purpose of her memo.

9 145. We do not find it credible that Chief Ojeda had a grudge or otherwise retaliated against
10 Complainant as related to this incident.

11 146. Chief Ojeda also credibly testified that she has never spoken with Ryan Juden about
12 trying to thwart the career progress of Complainant.

13 147. It is the Department which has final say on personal decisions, and Juden cannot
14 circumvent the Chief.

15 148. Credible evidence was not presented that Juden conspired with Respondent to hinder
16 Complainant's progression with the Department.

17 149. Further, the evidence established that Complainant voluntarily chose to not pursue the
18 position of captain and there was not credible evidence presented that he would have been given this
19 position in an effort to punish him had he pursued it.

20 150. The Board was not presented with sufficient evidence that Complainant's litigious
21 history was a motivating factor in Respondent's actions.

22 151. Chief Ojeda credibly testified that she did not hold any of his prior actions in this regard
23 against him.

24 152. Complainant was promoted to Lieutenant in September of 2017 after he ended his tenure
25 as PSA president in 2016.

26 153. Complainant hid and received Swing Shift B at South Area Command for the 2020 shift
27 bid.
28

1 154. Complainant claims that regardless of being out of graveyard, Respondent continued the
2 discrimination in their action of having Complainant cover Sergeant Ewertz at North Area Command
3 on swing shift.

4 155. After Complainant suffered a worker's compensation injury (roughly 2 or so weeks),
5 Respondent assigned an another to cover.

6 156. Complainant claims that the normal course would have been to use an administrative
7 sergeant to cover for Sgt. Ewertz initially.

8 157. Complainant failed to provide any evidence that such was required and conceded there
9 was no policy on it.

10 158. Complainant stated that Sgt. Ewertz contracted cancer and was on extended leave.
11 Complainant simply stated that he was told by Donnie Collins (Captain at the time of the North) that he
12 would have to cover for her.

13 159. Complainant conceded that asking him to fill in would have been common at least for
14 annual or sick leave. Moreover, Complainant noted that he was told by Captain Collins that the
15 supposed Sergeant who should have done it (Sgt. Ellis), had other duties. We do not believe that
16 personal or political reasons were a motivating factor in the decision here.

17 160. Complainant noted that he was told by Captain Collins that the supposed Sergeant who
18 should have done it (Sgt. Ellis), had other duties.

19 161. We do not believe that personal or political reasons were a motivating factor in the
20 decision here.

21 162. Regarding leave time, Complainant's grievances were denied without explanation.

22 163. This was customary.

23 164. Regarding training, Chief Ryan had a conversation with Complainant about the FBI
24 academy towards the end of 2018 (a meeting between them as well as Chief Ojeda).

25 165. Complainant expressed a desire to attend the academy.

26 166. Chief Ojeda informed him that due to some recent changes, there was a five-year
27 commitment.
28

1 167. Once one attends the FBI Academy, they have to commit to stay five years with the
2 agency.

3 168. Credible testimony indicated that Complainant would not be willing to commit five
4 years.

5 169. There was no list established for who would be next to go.

6 170. Complainant did not credibly establish that he met the requirements to attend.

7 171. At that time, Chief Ryan was also not offering officers the ability to attend the
8 Northwestern Academy.

9 172. The decision was made by the previous administration that they were no longer going to
10 host or send supervisors to that course anymore.

11 173. During his time as Assistant Chief, Chief Ojeda and Chief Ryan never had a discussion
12 or talked about reestablishing their connection with the Northwestern Academy.

13 174. Chief Ojeda previously requested to be sent to Northwestern, and she was not allowed to
14 go.

15 175. When Chief Ojeda was part of command staff, the decision was made by then Assistant
16 Chief Noahr that the department was not going to use Northwestern University anymore because they
17 did not feel they were getting their money's worth and the benefit.

18 176. At the time it was an online program whereas previously it was in-person where they
19 actually came to the police department two weeks every month to complete the program.

20 177. Chief Ojeda testified that the email in question was referring to the NRS mandated
21 POST training that all police officers must attend (thus the "extenuating circumstances" would not
22 apply).

23 178. As the Chief credibly explained, any of Complainant's mandated POST training that he
24 had to attend, he would attend, and the specific POST training at issue was an outside POST class that
25 Complainant just wanted to attend (not a mandated POST class).

26 179. The email specifically explained (to numerous individuals, not just Complainant) that
27 "[u]nder normal circumstances those officers who are not on full duty status cannot attend training
28 classes."

180. Chief Ojeda explained that Complainant was not denied any mandatory POA training.

181. Chief Ojeda reiterated on cross that the training Complainant put in for was not a required class that he needed to be certified in – the email specifically indicated “training required for certifications”.

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

183. Respondent’s demonstration met the test of reasonableness in light of the factual circumstances and protected rights at issue in this case.

184. 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.

3. Complainant alleges he was discriminated against by Respondent due to personal or political reasons in violation of NRS 288.270(1)(f).

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

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

6. Under the revised framework, it is not enough for the employee to simply put forth evidence that is capable of being believed; rather, this evidence must actually be believed.

7. Once this is established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have been taken place even in the absence of the protected conduct.

1 8. The employer's demonstration must meet the test of reasonableness in light of the
2 factual circumstances and protected rights at issue in the case.

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

5 10. Personal reasons can be best described as non-merit-or-fitness factors, i.e., factors that
6 are unrelated to any job requirement and not otherwise made by law a permissible basis for
7 discrimination.

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

12 12. The CBA is plain and unambiguous that the process shall be completed by January 15th.

13 13. Respondent demonstrated that the same action would have been taken place even in the
14 absence of the protected conduct.

15 14. Complainant failed to offer evidence that Respondent's demonstration was merely
16 pretextual.

17 15. While the Board does not find that Complainant met his initial burden (as further
18 explained herein), we note that simply an apparent lack of a breach of contract (which this Board has no
19 jurisdiction over) does not indicate there was no discrimination.

20 16. We find the Department would have taken the same action regardless of Complainant's
21 protected conduct.

22 17. Complainant failed to offer sufficient evidence that Respondent's explanation was
23 merely pretextual.

24 18. However, we note that Complainant failed to meet his initial burden.

25 19. A claim of unilateral change or failure to bargain in good faith is not before this Board.

26 20. Complainant failed to make a prima facie showing sufficient to support the inference
27 that his protected conduct was a motivating factor in the decision regarding the incident related to Sgt.
28 Ewertz.

1 21. Respondent demonstrated that the same action would have been taken place even in the
2 absence of the protected conduct.

3 22. Complainant failed to offer evidence that Respondent's demonstration was merely
4 pretextual.

5 23. Complainant's protected conduct was not a motivating factor in denying leave time and
6 training to him, and Complainant failed to establish a prima facie showing in this regard sufficient to
7 support the inference.

8 24. While Complainant believed there was no reason to deny his leave because he was on
9 light duty, he did not put forth evidence sufficient to support the inference that personal or political
10 reasons were a motivating factor in the decision.

11 25. As Respondent objected to at the hearing, this was not put forth in the Complaint (nor
12 Opposition to Respondent's Motion to Dismiss, Notice of hearing, or Complainant's pre-hearing
13 statement and supplement thereto) which were are bound hy (and such this claim was not properly
14 before the Board).

15 26. Complainant failed to meet his burden regarding the POST management certification.

16 27. Even if Complainant met his burden (which we do not find as Complainant failed to
17 show that his protected activities were a motivating factor in the decision to ultimately deny this
18 training), Respondent demonstrated they would have taken the same action regardless of Complainant's
19 protected conduct and the demonstration was reasonable.

20 28. Complainant failed to offer sufficient evidence that Respondent's explanation was
21 merely pretextual.

22 29. Complainant was required to make a prima facie case showing sufficient to support the
23 inference that his protected conduct was a motivating factor in Respondent's decisions.

24 30. Under the revised framework, "it is not enough for the employee to simply put forth
25 evidence that is capable of being believed; rather, this evidence must actually be believed". *Bisch*,
26 302 P.3d at 1116.

27 31. Complainant failed to make a sufficient showing.
28

32. Assuming, *arguendo*, Complainant had satisfied his initial burden (which we do not find), Respondent presented credible evidence that the same actions would have taken place even in the absence of the Complainant's protected conduct.

33. Complainant failed to offer evidence that Respondent's proffered legitimate explanations were merely pretextual.

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

35. 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.

Dated this 2nd day of July 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: Gary A. Cottino
GARY COTTINO, Presiding Officer

By: Sandra Masters
SANDRA MASTERS, Vice-Chair

By: Brett Harris
BRETT HARRIS, ESQ., Board Member