STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

AFSCME, LOCAL 4041,

Complainant,

v.

STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, WARM SPRINGS CORRECTIONAL CENTER,

Respondents.

Case No. 2020-034

NOTICE OF ENTRY OF ORDER

PANEL D

ITEM NO. 875

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

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

PLEASE TAKE NOTICE that the **ORDER** was entered in the above-entitled matter on September 23, 2021.

A copy of said order is attached hereto.

DATED this 23rd day of September 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY _____
MARISU ROMUALDEZ ABELLAR
Executive Assistant

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Government Employee-Management Relations Board, and that on the 23rd day of Septemher 2021, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Fernando R. Colon, Representative
AFSCME Local 4041
1107 17th Street, N.W., Suite 900
Washington, DC 20036

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

AFSCME, LOCAL 4041, Complainant, v. STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, WARM SPRINGS CORRECTIONAL CENTER, Respondents.	Case No. 2020-034 **ORDER** **PANEL D** **ITEM NO. 875**

On September 9, 2021, this matter came before the State of Nevada, Government Employee-Management Relations Board (Board) for consideration and decision pursuant to the provisions of NRS Chapter 288, the Employee-Management Relations Act (EMRA); NAC Chapter 288 and NRS Chapter 233B.

Complainant claims that Respondents impermissibly unilaterally reduced correctional officers' shift lengths at the Warm Springs Correctional Center from 12 hours to 8 hours for the prison's 2021 shift bid without first bargaining with the certified exclusive representative for the employees, Complainant.

Complainant provided that there are 3 issues before the Board: (1) Whether Respondents violated NRS 288.620(1)(b) and 288.270(1)(a) by unilaterally changing mandatory subjects of bargaining, specifically employee shift lengths, without first bargaining with Complainant; (2) Did Complainant waive any right it may have had to bargain; and (3) Would Complainant's relief requested improperly deprive the Board of Examiners of the opportunity to review and approve the fiscal impact of Complainant's demands at a public hearing.[1]

[1] We note that Complainant also initially alleged that Warm Springs unilaterally changed shift-bidding procedures and gave the power to the designate all employees "warden exempt". However, Complainant seems to have abandoned these claims. Nonetbeless, the testimony at the hearing credibly establisbed that neither of

Respondents primarily counter that Complainant waived their claims here. Respondents argue that Warm Springs announced its plan, to move away from a mixed schedule of 8-hour and 12-hour shifts to institute a uniform schedule of 8-hour shifts in Summer 2020, several months before the changes were to take effect. Further, Complainant admits that it became aware of the plan in July 2020. Respondents contend the record showed Warm Springs delivered multiple emails with details about the plan to all staff, union members and nonmembers alike, beginning in August 2020. Nevertheless, Complainant did not put Warm Springs on notice of its opposition to the proposed changes until December 21, 2020. Further, even then, Complainant's notice did not consist of a request to bargain – Respondents stated that the first time they learned of Complainant's opposition was when they were served with the instant Complaint.

Additionally, Respondents argue that should there be any doubt as to waiver, Complainant eliminated this in bargaining. On July 1, 2021, the parties entered into a CBA that specifically addressed the subject issue. Respondents argue that by granting NDOC the right to establish and adjust work schedules in the negotiations, Complainant waived any right to object to the unilateral shift-length changes here.

In July 2020, Complainant learned from its members that NDOC planned to make changes to its employment policies affecting category III peace officers. Complainant learned from employees that NDOC was considering amendments to the procedures governing the annual shift-bidding process. On July 16, 2020, Complainant sent an email to NDOC Director Charles Daniels opposing the changes to the shift-bidding procedures. As Respondents provide, Complainant did not express opposition to, request bargaining over, or mention the elimination of 12-hours shifts.

In the months that followed, Lieutenant Frobes maintained communication with the staff at Warm Springs concerning the plan to eliminate 12s. Respondents provided that a Corrections Officer (Matthew Gregory), who is a member of the union, reached out to Lt. Frobes about the changes. While Gregory perhaps indicated he would discuss this with his labor representative, Respondents note that no

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these alleged changes occurred. Given that Respondents did not make a change to the terms and conditions of employment in this regard, the Board would have found no violation. *See, e.g, Jackson v. Clark County*, Case No. 2018-007, Item No. 837 (2019).

labor representative attempted to contact Lt. Frobes about the change. Gregory had never been involved in contract negotiations with the State on behalf of Complainant. As a union member, Gregory is not authorized to engage in collective bargaining with Respondents. In the same vein, Lt. Frobes' role was not as a bargaining agent.

The pandemic pushed the normal shift bidding from November to December. The staff finished placing their bids on December 2, 2020, and Respondents state that Complainant had done nothing to put Warm Springs on notice of its objection to shift lengths. Respondents note that when Gregory submitted a grievance in December 2020 about the changes directly after the bidding, he did not state he intended to raise the issue on behalf of the bargaining unit employees. The first time Warm Springs learned that Complainant opposed the elimination of the 12-hour shifts was when it was served with the instant Complaint on December 21, 2020. The new 8-hour schedules went into effect on January 25, 2021.

While the Complaint was pending, the parties completed negotiations for their first CBA. The CBA contains a provision addressing the work schedules of employees including shift lengths. The provision also provides that "[t]he Employer may adjust the regular work schedule with fourteen (14) calendar days prior notice to the employees." Beyond that provision, the only other limitation is prohibiting employees from working more than 160 hours in a 28-day period. The parties "acknowledge[d] that during negotiation of this initial Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any matter appropriate for collective bargaining."

DISCUSSION

It a prohibited labor practice for the Executive Department to bargain in bad faith with a recognized exclusive representative and a unilateral change to the bargained for terms of employment is regarded as a *per se* violation of this statute. NRS 288.620(b), 288.270(1)(e); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-B (2021); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-B (2021). A unilateral change also violates NRS 288.270(1)(a). *Id.*; *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *Jackson v. Clark County*, Case No. 2018-007, Item No. 837 (2019). Under the unilateral change theory,

an employer commits a prohibited labor practice when it changes the terms and conditions of employment without first bargaining in good faith with the recognized bargaining agent. *Boykin v. City of N. Las Vegas Police Dep't*, Case No. A1-045921, Item No. 674E (2010); *City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 59 P.3d 1212 (2002); *Kerns v. LVMPD*, Case No. 2017-010 (2018). "Collective bargaining and supplemental bargaining entail a mutual obligation of the Executive Department and an exclusive representative to meet at reasonable times and to bargain in good faith with respect to" mandatory subjects of bargaining. NRS 288.500(2).

Preliminarily, in July 2020, Respondents concede that Complainant only learned from its members that NDOC planned to make changes to its employment policies affecting category III peace officers. In other words, Respondents concede that they failed to provide that requisite notice directly to the employees' chosen and exclusive representative – word of mouth is not sufficient even if notice is given to employees who are also members of the union, and we see the obvious dangers in allowing an employer to ignore its duty to provide proper notice (certainly in the context of a waiver of statutory rights which is disfavored as a matter of public policy).[2] *See, e.g., Am. Distrib. Co. v. N.L.R.B.*, 715 F.2d 446, 451 (9th Cir. 1983), *cert. denied*, 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984) ("that an employer must give express notice of specific proposals before implementing unilateral changes … by informing the unions of what might be lost if they fail to object or seek bargaining."); *N.L.R.B. v. Nat'l Car Rental Sys., Inc.*, 672 F.2d 1182, 1188–89 (3d Cir. 1982) ("Plant gossip, conjecture and

[2] Indeed, this very act could be viewed as an effort to undermine a union's status as the exclusive representative. Labor representative Kevin Ranft testified that in July 2020, they were told by members that Respondents decided to make changes to working conditions. Ranft further stated that Respondents never discussed these changes with the union, or sent them any express notice, and instead only heard of them from employees (Ranft testified there was a lot of confusion on what would occur). Further, Complainant's southern representative Jeanine Lake submitted by email an objection to the rumored shift bid changes on July 16, 2020 (as Ranft was on leave). Complainant did not receive a response to this email. Given Respondent's failures, we find no merit to Respondents' argument that Complainant had a continuous duty to constantly complain (including the period after this email was sent up until the independent grievance submitted by Gregory in December 2020). Indeed, Respondents placed the employees in the position of having to oppose the change (such as with Gregory) instead of providing express notice to Complainant. Finally, while Respondent summarily concludes in a footnote that it does not concede it had a duty to bargain prior to the effective date of the initial collective bargaining agreement, we have ruled at length on this issue. *See, e.g, AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-B (2020); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-002, Item No. 862-A (2021); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-A (2020); *AFSCME, Local 4041 v. State of Nevada*, Case No. 2020-001, Item No. 861-B (2021). We further note that this was not an issue properly before the Board. *See, e.g.*, Respondents' Posthearing Brief (Statement of Issues); Notice of Hearing.

rumors cannot take the place of formal notice"); *Nw. Administrators, Inc. v. Roundy*, 42 Wash. App. 771, 775, 713 P.2d 1127, 1130 (1986) ("Oral notification is insufficient …, the record shows no written notification to the Union …."); *N.L.R.B. v. Compact Video Servs., Inc.*, 121 F.3d 478, 481 (9th Cir. 1997) ("An employer must provide express notice of changes in terms and conditions of employment before implementing such changes unilaterally."); *Stone Boat Yard v. N.L.R.B.*, 715 F.2d 441, 445 (9th Cir. 1983); *Loc. Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1079 (9th Cir. 2008); *N.L.R.B. v. Great W. Coca-Cola Bottling Co.*, 740 F.2d 398, 404 (5th Cir. 1984); *Am. Diamond Tool, Inc. & United Steel Workers of Am., AFL-CIO-CLC*, 306 NLRB 570 (1992) (**emphasis** added) ("Based on this finding, the judge concluded that the Respondent had no backpay liability **beyond January 18** for unlawful unilateral layoffs on January 2 and that the Respondent did not further violate Section 8(a)(5) of the Act by unilateral layoffs on February 5."). As such, standing in isolation, Respondents, upon making the change, would have violated their duty to bargain in good faith and made an impressible unilateral change.

However, equally clear from the record is Complainant's waiver in this case based on the parties' subsequent negotiations.

"To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." *Krumme v. Las Vegas Metropolitan Police Dep't*, Case No. 2016-010, Item No. 822 (2017); *American Distrib. Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983) (citations omitted); *see also Washoe County Teachers Ass'n v. Washoe County Sch. Dist.*, Case No. A1-045678, Item No. 470C (2001), at 4, *citing Ormsby County Educ. Ass'n v. Carson City Sch. Dist.*, Case No. A10945527, Item No. 311; *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...."); *Resorts Int'l Hotel Casino v. N.L.R.B.*, 996 F.2d 1553, 1559 (3d Cir. 1993) ("the employer bears the weighty burden of demonstrating that the waiver was clear and unmistakable.").

"Because 'national labor policy disfavors waivers of statutory rights by unions,' the purported waiver 'must be clear and unmistakable.'" *N.L.R.B. v. United Techs. Corp.*, 884 F.2d 1569, 1575 (2d

Cir. 1989) (internal citations omitted). "Such waiver may be found in an express provision in the parties' collective bargaining agreement, or by the conduct of the parties, including their past practices and bargaining history, or by a combination of the two." *Id.* "An employer relying on a claim of waiver of a duty to bargain bears the burden of demonstrating it clearly and unmistakably." *Id.* "Whether a party has waived its right to bargain is a question within the Board's specialized expertise and factfinding authority." *Id., citing American Distrib. Co.*, 715 F.2d at 450.

On July 1, 2021, the parties entered into a CBA. This agreement addresses the "regular work schedule for full-time Category III Peace Officers," who make up the relevant bargaining unit in this case. The CBA defines a "[w]ork schedule" as "the workweeks and work shifts of different numbers of hours that are established by the Employer in order to meet business and customer service needs." The agreement further provides that the departments or divisions are responsible for determining the schedules employees will work based on operational need. Moreover, the agreement provides the employee the ability to file a grievance should they feel their schedule was changed for arbitrary reasons or for punitive measures. The CBA is thus plain and unambiguous in granting Respondents the discretion to determine the length or number of hours on a shift. *See, e.g., Nevada Classified School Employees Ass'n Chapter 5 v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020); *Krumme v. Las Vegas Metropolitan Police Dep't*, Case No. 2016-010, Item No. 822 (2017). The only restrictions provided regard a prohibition on scheduling any officer to work more than 160 hours in a 28-day period, and the 14-day notice provision to employees. There is nothing in the CBA that would prevent Respondents from implementing a uniform schedule of 8-hour shifts as to the subject unit.

Even if the agreement was not plain and unambiguous, and the Board was thus inclined to delve into the parties bargaining history, Complainant failed to provide this Board with a contradictory intent. Indeed, the Board does not find it credible that Complainant would not have expressly reserved this right (to bargain 12s in supplemental bargaining) when the issue was well known and a complaint was already on file with this Board. The CBA further makes clear that supplemental bargaining will involve procedures governing the "shift bid process", not length of shifts. We were not presented with credible evidence that the shift bid process necessary includes length of shifts, and we do not find the testimony

related thereto credible.[3] Moreover, this would seem to contradict the plain and unambiguous language of the parties' negotiated agreement. Respondents' pertinent administrative regulation also does not specifically mention shift lengths. As such, we simply do not find it credible that Complainant would have failed in any manner to memorialize its intent to reserve this right to further negotiate when the CBA is clear (Complainant failed to provide this Board with bargaining notes or any other credible evidence to indicate a contrary intent).

In *Am. Diamond Tool, Inc. & United Steel Workers of Am., Afl-Cio-Clc*, 306 NLRB 570 (1992), the NLRB found:

> Several factors combine to support a finding of waiver. First, the Union had actual notice of the Respondent's unilateral layoffs shortly after they took place on January 2. Second, the Union had an opportunity to object to these layoffs and to the possibility of future unilateral layoffs at the parties' initial bargaining session on January 18 and in numerous subsequent bargaining sessions. Third, the Respondent engaged in good-faith bargaining and there is no evidence that it would not have bargained about layoffs. Indeed, the parties did bargain on this subject. The Union itself proposed at the January 18 bargaining session a management-rights provision which, if implemented as part of a complete contract, would have permitted the Respondent unilaterally to lay off employees by inverse seniority. On January 25, Respondent tentatively accepted the proposal. Finally, in light of this good-faith bargaining, we would not conclude that the unilateral changes of January 2 necessarily tainted the bargaining.

In the same vein, Complainant had ample opportunity to bargain over the changes during their negotiations for the CBA. As indicated, there was not sufficient credible evidence presented that Complainant reserved the right to subsequently bargain over unilateral changes to shift lengths. The CBA is plain and unambiguous in granting Respondents that unilateral right and this was bargained. As the NLRB held: "Collectively, they present a situation in which the Union had an opportunity to request bargaining about unilateral layoffs by the Respondent, failed without excuse to do so, and expressly signaled its willingness to permit such conduct in the future." *Id.* at 571. The NLRB held: "This conduct amounts to waiver." *Id.* Further, "[p]articularly in the context of initial collective bargaining, where parties have no contract, past practice, or established relationships to guide them, it was

[3] Ranft conceded that the regulation does not reference lengths of shifts. Indeed, this regulation provides what shift bidding does include such as seniority, who may bid, and the process. The regulation is not clear enough to overcome the plain and unambiguous terms of the parties' negotiated agreement in regard to shift lengths (*e.g.*, "shift" could refer to swing shift). Furthermore, this regulation was enacted prior to the effective date of the CBA.

incumbent on the Union to take more affirmative action in order to preserve its right to protest unilateral layoffs by the Respondent." *Id.* The NLRB succinctly stated: "In our view, the Union could not accept such unilateral conduct without challenge at the bargaining table and thereafter seek to assert a bargaining right merely by the filing of an unfair labor practice charge." *Id.*

Thus, we find that Complainant waived its right to further bargain over the change. As such, we can find no violation on behalf of Respondent. *See also N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) ("However, the duty to bargain under the NLRA does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment."); *see contra The Bohemian Club & Unite Here! Loc. 2*, 351 NLRB 1065, 1068 (2007) ("Here, by contrast, the Union vigorously—and successfully— opposed the 2004 change and never indicated that it would permit similar changes in the future"); *Deming Hosp. Corp. v. N.L.R.B.*, 665 F.3d 196, 203 (D.C. Cir. 2011) ("The Union's conduct here does not approach that level of acquiescence."); *Harvey's Hotel Casino & Int'l All. of Theatrical Stage Emps., Loc. No. 363*, No. ES 32-CA-11608, 1993 WL 1609405 (Apr. 22, 1993) ("Thus, the Union would not accept Respondent's unilateral conduct and clearly voiced its objection to the unilateral discontinuance of the merit evaluation/raise system and similarly expressed its objection to the unilateral implementation of increases."); *Saint Marys Hosp. for Child. & 1199seiu United Healthcare Workers E.*, 198 L.R.R.M. (BNA) ¶ 1316 (N.L.R.B. Div. of Judges Dec. 26, 2013) ("there was no agreement to a management rights clause or anything else that would privilege the unilateral action. Indeed, at the very next bargaining session after the unilateral action, the Union did strongly protest the Respondent's actions.").

As such, even if we found a violation by Respondents' initial conduct, the Board would not have ordered the requested relief sought by Complainant as they subsequently waived their right to further bargain over the change and expressly permitted Respondents' unliteral changes to shift lengths.

As the above analysis is dispositive, the remaining issues are not necessary to this Board's determination. *See also Ebarb v. Clark County*, Case No. 2018-006, Item No. 843-C (2020); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 136, 206 P.3d 572, 574 (2009); *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 623, n. 30, 188 P.3d 1092, 1099 (2008); *Gaxiola v. State*, 121 Nev. 638, 651,

119 P.3d 1225, 1234 (2005); *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 593, 600, 260 P.3d 408, 412 (2011).

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

FINDINGS OF FACT

1. In July 2020, Complainant learned from its members that NDOC planned to make changes to its employment policies affecting category III peace officers.

2. Complainant learned from employees that NDOC was considering amendments to the procedures governing the annual shift-bidding process.

3. On July 16, 2020, Complainant sent an email to NDOC Director Charles Daniels opposing the changes to the shift-bidding procedures.

4. Complainant did not express opposition to, request bargaining over, or mention the elimination of 12-hours shifts.

5. In the months that followed, Lieutenant Frobes maintained communication with the staff at Warm Springs concerning the plan to eliminate 12s.

6. Officer Gregory, who is a member of the union, reached out to Lt. Frobes about the changes.

7. While Gregory perhaps indicated he would discuss this with his labor representative, Respondents note that no labor representative attempted to contact Lt. Frobes about the change.

8. Gregory had never been involved in contract negotiations with the State on behalf of Complainant.

9. As a union member, Gregory is not authorized to engage in collective bargaining with Respondents.

10. Lt. Frobes' role was not as a bargaining agent.

11. Respondents note that when Gregory submitted a grievance in December 2020 about the changes directly after the bidding, he did not state he intended to raise the issue on behalf of the bargaining unit employees.

. . .

12. In July 2020, Respondents concede that Complainant only learned from its members that NDOC planned to make changes to its employment policies affecting category III peace officers.

13. Respondents concede that they failed to provide that requisite notice directly to the employees' chosen and exclusive representative.

14. Ranft testified that in July 2020, they were told by members that Respondents decided to make changes to working conditions.

15. Ranft further stated that Respondents never discussed these changes with the union, or sent them any express notice, and instead only heard of them from employees (Ranft testified there was a lot of confusion on what would occur).

16. Complainant's southern representative Lake submitted by email an objection to the rumored shift bid changes on July 16, 2020 (as Ranft was on leave).

17. Complainant did not receive a response to this email.

18. Respondents placed the employees in the position of having to oppose the change (such as with Gregory) instead of providing express notice to Complainant.

19. The pandemic pushed the normal shift bidding from November to December.

20. The staff finished placing their bids on December 2, 2020, and Respondents state that Complainant had done nothing to put Warm Springs on notice of its objection to shift lengths.

21. The first time Warm Springs learned that Complainant opposed the elimination of the 12-hour shifts was when it was served with the instant Complaint on December 21, 2020.

22. The new 8-hour schedules went into effect on January 25, 2021.

23. While the Complaint was pending, the parties completed negotiations for their first CBA.

24. On July 1, 2021, the parties entered into a CBA.

25. The CBA contains a provision addressing the work schedules of employees including shift lengths.

26. This agreement addresses the "regular work schedule for full-time Category III Peace Officers," who make up the relevant bargaining unit in this case.

. . .

27. The CBA defines a "[w]ork schedule" as "the workweeks and work shifts of different numbers of hours that are established by the Employer in order to meet business and customer service needs."

28. The agreement further provides that the departments or division are responsible for determining the schedules employees will work based on operational need.

29. The agreement provides the employee the ability to file a grievance should they feel their schedule was changed for arbitrary reasons or for punitive measures.

30. The CBA also provides that "[t]he Employer may adjust the regular work schedule with fourteen (14) calendar days prior notice to the employees."

31. Employees are prohibited from working more than 160 hours in a 28-day period.

32. The parties "acknowledge[d] that during negotiation of this initial Agreement, each party had the unlimited right and opportunity to make demand and proposals with respect to any matter appropriate for collective bargaining."

33. There is nothing in the CBA that would prevent Respondents from implementing a uniform schedule of 8-hour shifts as to the subject unit.

34. Even if the agreement was not plain and unambiguous, and the Board was thus inclined to delve into the parties bargaining history, Complainant failed to provide this Board with a contradictory intent.

35. The Board does not find it credible that Complainant would not have expressly reserved this right (to bargain 12s in supplemental bargaining) when the issue was well known and a complaint was already on file with this Board.

36. The CBA further makes clear that supplemental bargaining will involve procedures governing the "shift bid process", not length of shifts.

37. We were not presented with credible evidence that the shift bid process necessary includes length of shifts, and we do not find the testimony related thereto credible.

38. Ranft conceded that the regulation does not reference lengths of shifts.

39. Indeed, this regulation provides what shift bidding does include such as seniority, who may bid, and the process.

40. Respondents' pertinent administrative regulation also does not specifically mention shift lengths.

41. We do not find it credible that Complainant would have failed in any manner memorialize its intent to reserve this right to further negotiate when the CBA is clear (Complainant failed to provide this Board with bargaining notes or any other credible evidence to indicate a contrary intent).

42. Complainant had ample opportunity to bargain over the changes during their negotiations for the CBA.

43. There was not sufficient credible evidence presented that Complainant reserved the right to subsequently bargain over unilateral changes to shift lengths.

44. Furthermore, this regulation was enacted prior to the effective date of the CBA.

45. 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. It a prohibited labor practice for the Executive Department to bargain in bad faith with a recognized exclusive representative and a unilateral change to the bargained for terms of employment is regarded as a *per se* violation of this statute.

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

5. Collective bargaining and supplemental bargaining entail a mutual obligation of the Executive Department and an exclusive representative to meet at reasonable times and to bargain in good faith with respect to mandatory subjects of bargaining.

. . .

6. Notice of proposed changes to mandatory subjects by word of mouth alone to the union is not sufficient even if notice is given to employees who are also members of the union, and we see the obvious dangers in allowing an employer to ignore its duty to provide proper notice (certainly in the context of a waiver of statutory rights which is disfavored as a matter of public policy).

7. An employer must give express notice of specific proposals before implementing unilateral changes by informing the unions of what might be lost if they fail to object or seek bargaining.

8. Gossip, conjecture and rumors cannot take the place of formal notice.

9. To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change.

10. Because labor policy disfavors waivers of statutory rights by unions, the purported waiver must be clear and unmistakable.

11. Such waiver may be found in an express provision in the parties' collective bargaining agreement, or by the conduct of the parties, including their past practices and bargaining history, or by a combination of the two.

12. An employer relying on a claim of waiver of a duty to bargain bears the burden of demonstrating it clearly and unmistakably.

13. The CBA is plain and unambiguous in granting Respondents the discretion to determine the length or number of hours on a shift.

14. This was bargained in good faith.

15. The regulation is not clear enough to overcome the plain and unambiguous terms of the parties' negotiated agreement in regard to shift lengths.

16. Complainant's interpretation contradicts the plain and unamhiguous language of the CBA.

17. Complainant waived its right to further bargain over the subject change to shift lengths.

. . .

. . .

18. Even if we found a violation by Respondents' initial conduct, the Board would not have ordered the requested relief sought by Complainant as they subsequently waived their right to further bargain over the change and expressly permitted Respondents' unliteral changes to shift lengths.

19. Thus, we find no violation.

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

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

ORDER

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

Dated this 23rd day of September 2021.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By: _____
BRENT ECKERSLEY, ESQ., Chair

By: _____

By: _____
MICHAEL J. SMITH, Board Member