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8 STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
9 RELATIONS BOARD

10 LAS VEGAS METRO POLICE MANAGERS
AND SUPERVISORS ASSOCIATION,

Case No. **2024-018**

11 Complainant,

**PETITION FOR DECLARATORY
ORDER**

12 and

13 LAS VEGAS METROPOLITAN POLICE
14 DEPARTMENT,

15 Respondent.

16 _____ /
17 **I. INTRODUCTION**

18 This Petition seeks a decision from the Board as to the bargaining obligation(s) of a
19 government employer subject to the Employee Management Relations Act when it seeks to take work
20 or positions filled by bargaining unit employees, and gives such work either to non-bargaining unit
21 and/or management employees.

22 ////

23 ////

24 ////

1 **II. IDENTIFICATION OF PETITIONER**

2 Pursuant to NAC 288.380(3) the Petitioner is the Las Vegas Metro Police Managers and
3 Supervisors Association (hereafter “PMSA”) whose offices are located at 801 S. Rancho Dr. #A1, Las
4 Vegas, NV 89106. The PMSA’s business telephone number is (702) 384-2924.

5 **III. STATEMENT OF THE NATURE OF THE PETITIONER’S INTEREST**

6 The PMSA is the recognized exclusive bargaining representative for Captains, Lieutenants,
7 Sergeants, and Digital Forensic Lab Supervisors employed by Respondent Las Vegas Metropolitan
8 Police Department (hereafter “LVMPD”). The reason for the submission of this Petition is to obtain
9 clarification of an employer’s obligation to impact bargaining when it removes work performed by
10 bargaining unit employees and transfers that work to non-bargaining unit employees. This situation
11 has been arising with repeated frequency at LVMPD. The issue preliminarily came before the Board
12 previously in *PMSA v. LVMPD* Case No. 2019-001 but was resolved by settlement between the parties
13 after the hearing, and before the matter was submitted to the Board for a decision.

14 The matter is also currently pending before the Board in the context of a prohibited practices
15 complaint in *PMSA v. LVMPD*, Case No. 2023-016 which involves LVMPD replacing Captains who
16 retire from certain positions with civilian Directors or other non-bargaining unit employees. This case
17 was the subject of a recent Settlement Conference ordered by the Board. At the settlement conference,
18 it was agreed by the parties to continue the hearing currently scheduled on the prohibited practices
19 complaint for July 8-10, 2024, and for this Petition to be filed so as to provide the parties some clarity
20 as to what is required.

21 **IV. SPECIFIC QUESTIONS PRESENTED TO THE BOARD**

22 1. When a specific job is being performed by a bargaining unit member, is the employer
23 required to provide advance notice and an opportunity for the union to impact bargain before such
24 work is assigned to a non-bargaining unit employee?

1 2. If “Yes” to question #1 then, is the employer prohibited from reassigning bargaining
2 unit work prior to the completion of impact bargaining, including if necessary, statutory impasse
3 proceedings under NRS 288.200 and/or NRS 288.215?

4 **V. DESIGNATION OF THE SPECIFIC STATUTORY PROVISIONS AND/OR**
5 **DECISIONS IN QUESTION.**

6 The issues raised by this Petition implicates NRS 288.050 (defining local government
7 employee); NRS 288.133 (defining bargaining agent) NRS 288.150(1) (obligation to bargain with a
8 bargaining agent), and NRS 288.150(2)(k) (“The method used to classify employees in the bargaining
9 unit”). It further implicates the Court’s prior decisions in *Teamsters Local 14 v. City of Henderson*,
10 Case No. A1-045605 Item No. 399A (April 3, 1997); *County of Washoe v. Washoe County Employees’*
11 *Association*, Case No. A1-045365 Items 159 (March 8, 1984) and *International Association of Fire*
12 *Fighters, Local 2423 vs. City of Elko*, Case No. A1-045377 (March 19, 1984).

13 **VI. STATEMENT OF THE PMSA’S POSITION**

14 The PMSA asks the Board to make the following declaration: An employer may not reassign
15 work performed by a member of the bargaining unit without first providing notice to the union and an
16 opportunity to bargain over the impacts of the reassignment of such work. In the event that an
17 agreement cannot be reached in such impact bargaining, the employer may not reassign such work
18 until the completion of the statutory impasse process under NRS 288.200 and/or 288.215.

19 **VII. MEMORANDUM OF POINTS AND AUTHORITIES**

20 **A. The Board Has Always Recognized The Obligation To Impact Bargain Where An**
21 **Employer Intends To Subcontract Work.**

22 In *County of Washoe v. Washoe County Employees’ Association*, Case No. A1-045365 Item
23 159 (March 8, 1984) Washoe County filed a complaint against the Washoe County Employees’
24

1 Association (“WCEA”) because the WCEA insisted on negotiating to the point of impasse over the
2 impact of subcontracting of work. The Board dismissed the County’s complaint holding that:

3 We agree with the position of the parties that a decision by an employer whether or not
4 to subcontract is within the exclusive province and prerogative of the employer, and, as
5 such, is not a mandatory subject of negotiation, within the provisions of NRS
6 288.150(2).

7 However, once the decision to subcontract is made by the employer, the impact or that
8 decision on employees is, in our view, a proper subject of mandatory negotiation under
9 provisions of NRS 288.150(2).

10 Item No. 159 at p. 5.

11 In *International Association of Fire Fighters, Local 2423 vs. City of Elko*, Case No. A1-
12 045377 Item No. 160 (March 19, 1984) the Board reiterated its holding from *County of Washoe v.*
13 *Washoe County Employees’ Association* that the “impact and effect of subcontracting is a subject of
14 mandatory bargaining” citing cases from New York and Pennsylvania. Item No. 160 at p. 2.

15 **B. The Impact and Effects Of Transferring Bargaining Unit Work To Management
16 Is No Different Than Subcontracting.**

17 In *Teamsters Local 14 v. City of Henderson*, Case No. A1-045605 Item No. 399A (April 3,
18 1997) the City of Henderson removed the positions of Project Engineer and Survey/Right of Way
19 Supervisor from the bargaining unit and created two (2) new non-bargaining unit positions of Project
20 Engineer III and Survey/Right of Way Coordinator whose duties were substantially similar to the two
21 positions removed from the bargaining unit.

22 The City asserted that “it could, if it so chose, promote all of the bargaining unit positions into
23 management positions without negotiating with the union.” Then recently retired Local 14 Secretary-
24 Treasurer Jim Wilkerson testified that prior to any transfer, he was always contacted by the City prior

1 to the transfer.¹ *Teamsters Local 14 v. City of Henderson* at p. 2. The Board’s conclusion supported a
2 finding of failure to negotiate the transfer of work out of the bargaining unit in violation of NRS
3 288.150(2)(a) and (k). *Id.*

4 If the subcontracting of work out of the bargaining unit to the private sector requires impact
5 bargaining as the Board held in *County of Washoe v. Washoe County Employees’ Association* and
6 *International Association of Fire Fighters, Local 2423 vs. City of Elko*, the same bargaining obligation
7 must be imposed when such work is taken out of the bargaining unit and given to management as the
8 impact on the bargaining unit and the employees is exactly the same. This was the basis for the
9 holding in *Teamsters Local 14 v. City of Henderson* where the work was not transferred to the private
10 sector, but rather to newly created management positions.

11 **C. The Obligation To Impact Bargain Removal Of Work From The Bargaining Unit**
12 **Has Been Recognized By The NLRB And Other Jurisdictions.**

13 The obligation to bargain over the transfer of bargaining unit work recognized by this Board is
14 fully consistent with the approach taken by the National Labor Relations Board. See *Geiger Ready Mix*
15 *Co. of Kansas City, Inc.*, 323 NLRB 507 (1997); *Int’l Harvester Co.*, 236 NLRB 712 (1978). *Sumpter*
16 *Electric Cooperative, Inc.*, Advice Memorandum No. 12-CA-25384 (2008).

17 In *Mount San Antonio College Faculty Association, v. Mount San Antonio Community College*
18 *District*, PERB Decision No. 334, 1983 Cal. PERB LEXIS 168 (1993) the California Public
19 Employment Relations Board (“PERB”) found the employer violated its duty to negotiate in good faith
20 by creating the new positions of “division chairperson” and transferring some of the duties previously

23 ¹ Jim Wilkerson was later appointed to this Board and was a Board Member when undersigned counsel
24 first began practicing in this area of law in the early 2000s.

1 performed by bargaining unit department chairpersons to non-unit employees employed in the new
2 positions. Affirming an Administrative Law Judge's findings of labor practices, PERB held:

3 The Board has long held that an employer may violate its duty to negotiate in good faith
4 by making unilateral changes of matters within the scope of representation. *Pajaro*
5 *Valley Unified School District* (5/22/78) PERB Decision No. 51; *Grant Joint Union*
6 *High School District* (2/26/82) PERB Decision No. 196; accord *NLRB v. Katz* (1962)
7 369 U.S. 736 [50 LRRM 2177].

8

9 In *Alum Rock Union Elementary School District* (6/27/83) PERB Decision No. 322, the
10 Board, applying the test for negotiability set forth in *Anaheim Union High School*
11 *District* (10/28/81) PERB Decision No. 177, found that "where management seeks to
12 create a new classification to perform a function not previously performed . . . by
13 employees . . . it need not negotiate its decision." However, as the Board indicated in
14 *Alum Rock*, supra, at p. 11, "those aspects of the creation . . . of a classification which
15 merely transfer existing functions and duties from one classification to another involve
16 no overriding managerial prerogative," and are, therefore, negotiable. Thus, where the
17 assignment of duties to employees would transfer work previously performed by
18 bargaining unit members out of the bargaining unit, the employer is obligated to
19 negotiate. *Rialto Unified School District* (4/30/82) PERB Decision No. 209; *Solano*
20 *County Community College District* (6/30/82) PERB Decision No. 219.

21 **D. Once PMSA Requests To Bargain The Impact Of A Management Decision,
22 LVMPD Is Prohibited From Unilaterally Implementing Its Decision Until
23 The Completion Of Bargaining, Or The Completion Of Fact Finding
24 And/Or Interest Arbitration If Impasse Is Reached.**

1 In the private sector governed by the National Labor Relations Act, sections 8(a)(1) and 8(a)(5)
2 prohibit an employer from implementing "a unilateral change of an existing term or condition of
3 employment" without first bargaining to impasse. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190,
4 198, 111 S. Ct. 2215, (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 8 L. Ed. 2d 230
5 (1962)); see also *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 25 (1st Cir. 1999)
6 (finding failure to bargain to impasse prior to unilateral change constitutes an unfair labor practice
7 under the Act). A good-faith impasse occurs when "the parties are deadlocked so that any further
8 bargaining would be futile," and "no realistic prospect" exists that continued bargaining would be
9 "fruitful." *Beverly Enters.-Mass., Inc.*, 174 F.3d at 27 (quoting *Teamsters Local Union No. 639 v.*

1 *NLRB*, 924 F.2d 1078, 1083, 288 U.S. App. D.C. 121 (D.C. Cir. 1991)). Once true impasse is reached,
2 a private sector employer is permitted to implement the unilateral change offered at the bargaining
3 table. *NLRB v. Katz*, supra. However, the union has the corresponding right to strike.

4 In contrast, there is no right to strike for public sector employees in Nevada. See NRS 288.230
5 *et seq.* Instead, when impasse is reached either party may resort to the statutory impasse mechanisms
6 of NRS 288.200 (civilians), NRS 280.215 (police and firemen) and/or 288.217 (licensed teaching
7 professionals). Such statutory impasse proceedings are a substitute for the right to strike in the public
8 sector. See e.g. *Nat'l Union of Hosp. & Health Care Employees Dist. No. 1199*, 149 N.M. 107, 111,
9 245 P.3d 51, 55 (2010) citing Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 *Indus.*
10 *Rel.* 302 (Oct. 1975); *AFSCME Council 83 v. Pennsylvania Labor Relations Board*, 123 Pa. Commw.
11 205, 211, 553 A.2d 1030, 1033 (1989); *Dearborn Fire Fighters Union v. Dearborn*, 394 Mich. 229,
12 317, 231 N.W.2d 226, 264 (1975).²

13 It is beyond dispute that statutory impasse procedures under NRS 288.200 *et seq.* are part and
14 parcel of the collective bargaining process itself. See e.g. *Carson City Firefighters Association v.*
15 *Carson City Board of Supervisors et. al*, Case No. A1-045285 Item No. 39 (1975) (“Bargaining
16 collectively is defined as the entire bargaining process, including factfinding”); *Stationery Engineers,*
17 *Local 39 v. City of Elko*, Case No. A1-045505 Item No. 295 (1992) (failure of City to participate in
18 fact-finding constituted a failure to bargain in good faith). California’s PERB has held that statutory
19 fact-finding and interest arbitration procedures are not limited to disputes for a new contract, but also

21 ² For this reason, arbitrators have held that “[I]t is reasonable for a Fact Finder to consider what result the
22 parties may have reached if there had been a strike or a continuation of a strike” *In Re Hurley Hospital and*
23 *American Federation of State, County And Municipal Employees, Council 29, Locals 1603, 1603b And 825*, 56
24 *Lab. Arb. Rep.* (BNA) 209 (Roumell 1971).

1 apply to all bargaining disputes concerning matters within the scope of representation including mid-
2 term reopeners and effects bargaining over non-mandatory subjects. *City and County of San Francisco*
3 *and SEIU Local 1021*, 2014 Cal. PERB LEXIS 48 (November 24, 2014); *County of Contra Costa and*
4 *AFSCME Local 2700*, 2014 Cal. PERB LEXIS 14 (April 16, 2014).

5 The California courts and the PERB have further held that the prohibition against unilateral
6 change extends through the completion of any impasse procedures. As noted by the *California Court*
7 *of Appeals in Moreno Valley Unified School Dist. v. PERB*, 142 Cal. App. 3d 191, 199 (1983):

8 The [PERB]s conclusion that impasse under the EERA is, unlike NLRA impasse, a
9 continuation of mutual dispute resolution efforts and not a signal that economic pressure
10 tactics may begin, is a reasonable interpretation of the statutory scheme and not clearly
11 erroneous.

12 "For the reasons set forth in *San Mateo County Community College District*, supra we
13 find that following a declaration of impasse, a unilateral change regarding a subject
14 within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a
15 valid affirmative defense, per se an unfair practice."

16

17 Since "impasse" under EERA's statutory scheme denotes a continuation of the labor
18 management dispute resolution process, while "impasse" under federal law indicates a
19 halt to that process, we think the Board reasonably determined that the considerations
20 warranting per se treatment of unilateral changes at the negotiation stage also warranted
21 per se treatment of such changes prior to the exhaustion of the statutory impasse
22 procedure.

23 142 Cal. App. 3d at 199-201.

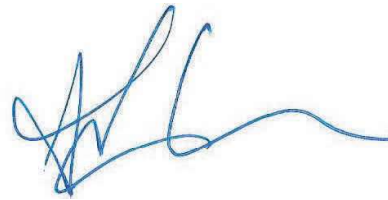
24 The impasse procedures under NRS 288.200 et seq. likewise constitute a continuation of the
labor management dispute resolution process. Accordingly, the Board should adopt the same rule
utilized by California's PERB which prohibits management from implementing any unilateral change
during the course of impact/effects bargaining until the statutory impasse procedures provided for
under Nevada law are completed.

1 **VIII. CONCLUSION**

2 For all of the reasons set forth above the Board should issue a Declaratory Order establishing
3 that (1) management must provide the union notice and an opportunity to impact bargain before it
4 assigns work performed by bargaining unit members to non-bargaining unit employees, and (2)
5 prohibit management from implementing the assignment of such work to non-bargaining unit
6 employees until the completion of any impact/effects bargaining, or in the event that such
7 impact/events bargaining results in impasse, the completion of the statutory impasse procedures under
8 NRS 288.200 et seq.

9 DATED this 21st day of May, 2024.

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5 **STATE OF NEVADA**

6 **GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD**

7
8 LAS VEGAS METRO POLICE MANAGERS
AND SUPERVISORS ASSOCIATION,

9 Complainant,

Case No.: 2024-018

10 vs.

11 LAS VEGAS METROPOLITAN POLICE
12 DEPARTMENT,

13 Respondent.

14 **RESPONDENT’S RESPONSE TO THE PETITION FOR DECLARATORY RELIEF**

15 Respondent Las Vegas Metropolitan Police Department (hereinafter “Department”), by
16 and through its attorneys of record, the law firm of Marquis Aurbach, hereby files its Response
17 to the Petition for Declaratory Relief. This Response is made and based upon the attached
18 Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral
19 argument allowed by counsel at a hearing on the Petition.

20 **I. PARTY IDENTIFICATION PURSUANT TO NAC 388.390(2)(A) – (B).**

21 1. Las Vegas Metropolitan Police Department: 400 S. Martin Luther King Blvd., Las
22 Vegas, Nevada 89106.

23 2. Las Vegas Police Managers & Supervisors Association: 801 S. Rancho Drive,
24 #A1, Las Vegas, Nevada 89106.
25
26
27
28

1 **II. STATEMENT OF FACTS PURSUANT TO NAC 288.390(2)(C)**

2 **A. THE PARTIES.**

3 The Las Vegas Police Managers' & Supervisors' Association ("PMSA" or
4 "Association") is an employee organization, as defined in Nevada Revised Statute 288.040.
5 PMSA is the bargaining agent for commissioned peace officers, police and corrections,
6 employed by the Las Vegas Metropolitan Police Department ("Department"), who are in the
7 rank of sergeant, lieutenant, captain and Computer Forensic Laboratory Supervisor. The
8 Department is a local government employer, as defined in Nevada Revised Statute 288.060.

9 **B. THE INITIAL COMPLAINT.**

10 On July 7, 2023, the Association filed an Amended Complainant alleging the Department
11 violated Nevada Revised Statute 288.270(1)(a) and (e). Specifically, the Association alleged that
12 the Department unilaterally removed work from the bargaining unit represented by the
13 Association and assigned that work to civilians without negotiating the same.

14 After the parties submitted their respective prehearing statements, the Board ordered the
15 parties to appear at a settlement conference. During the settlement conference, it was agreed by
16 the parties that the initial action would be held in abeyance to allow the Association the
17 opportunity to seek a declaratory order from the Board regarding whether the Department had an
18 obligation to bargaining over the alleged changes.

19 **C. THE PETITION.**

20 On May 21, 2024, the Association filed its Petition for Declaratory Order ("Petition") in
21 the instant matter. The Association posed the issues to the Board as follows:

22 1. When a specific job is being performed by a bargaining unit member, is the
23 employer required to provide advance notice and an opportunity for the union to impact bargain
24 before such work is assigned to a non-bargaining unit employee?

25 2. If "Yes" to question #1 then, is the employer prohibited from reassigning
26 bargaining unit work prior to the completion of impact bargaining, including if necessary,
27 statutory impasse proceedings under NRS 288.200 and/or NRS 288.215?
28

1 (Pet. at pp. 2:22-24; 3:1-3). The Association alleges that the Department is precluded from
2 assigning work performed by a member of the bargaining unit without first providing notice to
3 the Association and an opportunity to bargain over the impacts of the reassignment of work. (Id.
4 at p. 3:14-16). Further, the Association asserts that if the parties are unable to reach an
5 agreement on the alleged reassignment of work, then the Department is precluded from assigning
6 the work until the statutory impasse procedures are completed (e.g., fact-finding and/or interest
7 arbitration).

8 **III. LEGAL ARGUMENT**

9 **A. THE DEPARTMENT ENJOYS BOTH A STATUTORY AND**
10 **CONTRACTUAL RIGHT TO ASSIGN EMPLOYEES.**

11 At the outset, the Department underscores the well-recognized exclusive right
12 management possesses to direct and assign its employees, as well as the manner in which its
13 services are provided to the community. Nevada Revised Statute 288.150 provides, in relevant
14 part:

15 **NRS 288.150 Negotiations by employer with recognized employee**
16 **organization: Subjects of mandatory bargaining; matters reserved to**
17 **employer without negotiation; reopening of collective bargaining agreement**
18 **during period of fiscal emergency; termination or reassignment of employees**
19 **of certain schools.**

20 ...

21 3. Those subject matters which are not within the scope of mandatory
22 bargaining and which are reserved to the local government employer without
23 negotiation include:

24 (a) Except as otherwise provided in paragraph (u) of subsection 2, the right to
25 hire, direct, assign or transfer an employee, but excluding the right to assign or
26 transfer an employee as a form of discipline.

27 ...

28 (c) The right to determine:

(1) Appropriate staffing levels and work performance standards, except
for safety considerations;

(2) The content of the workday, including without limitation workload
factors, except for safety considerations;

(3) The quality and quantity of services to be offered to the public; and

1 (4) The means and methods of offering those services.

2 (d) Safety of the public.

3 Nev. Rev. Stat. 288.150(3)(a), (c)-(d). Further, the Collective Bargaining Agreement (“CBA”)
4 between the Department and the Las Vegas Police Managers & Supervisors Association
5 (“Complainant”) contains similar language which the Parties have negotiated:

6 **ARTICLE 7 – MANAGEMENT RIGHTS**

7 Except as expressly modified or restricted by a specific provision of this
8 Agreement, all statutory and inherent management rights, prerogatives, and
9 functions are retained and vested exclusively in the Department, including, but
10 not limited to:

11 Hire, direct, classify, assign or transfer employees; except when such assignment
12 or transfer is done as part of disciplinary purposes.

13 ...

14 Determine appropriate staffing levels and work performance standards and the
15 means and methods by which operations are conducted, except for safety
16 considerations.

17 Determine work schedules, tours of duty, daily assignments, standards of
18 performance, and or the services to be rendered.

19 Determine the quality and quantity of services to be offered to the public and the
20 means and methods of offering those services.

21 ...

22 Determine the content of the work day, including without limitation, workload
23 factors, except for employee safety.

24 ...

25 Manage its operations in the most efficient manner consistent with the best
26 interests of all its citizens, its taxpayers, and its employees.

27 Promote employees and determine promotional procedures as provided in NRS
28 280.310

...

The Department shall have such other exclusive rights as may be determined by
NRS 288.150.

The Department’s failure to exercise any right, prerogative, or function hereby
reserved to it shall not be considered a waiver of that right, prerogative, or
function.

(CBA, Art. 7, pp. 5-6).

1 Pursuant to Nevada Revised Statute 288.150(3), as well as Article 7 of the CBA, the
2 Department enjoys a management right to assign employees (provided the same is not for
3 discipline). The statute and the CBA are crystal clear on this right and the Petition is clearly and
4 attempt to strip the Department of this right. Moreover, the statute and the CBA provide a
5 management right to the Department to determine and the quality of services it provides to the
6 public, as well as the means and methods by which those services are performed. In some cases,
7 the positions challenged by the Association (and other positions, generally) require a skillset or
8 level of experience in order to meet the quality levels the Department determines appropriate,
9 which is precisely what both the statute and the CBA allow as a management right. The
10 Department is not reclassifying a position that is recognized by the CBA or taking a position
11 away from the bargaining unit, contrary to the arguments raised by the Association. It is, quite
12 simply, an exercise of the Department’s right to assign its employees in order to deliver services
13 to the public.

14 **B. THE DEPARTMENT HAS HISTORICALLY ASSIGNED NON-**
15 **BARGAINING UNIT PERSONNEL TO POSITIONS.**

16 As further evidence of the proper exercise of its management rights in this respect, the
17 Department has historically assigned positions to employees both in and out of the bargaining
18 unit. The CBA lists the following classifications: (1) Computer Forensics Laboratory
19 Supervisor; (2) Sergeant – Police and Corrections; (3) Lieutenant – Police and Corrections; and
20 (4) Captain – Police and Corrections. The Association suggests the Department is re-classifying
21 positions without bargaining the same under Nevada Revised Statute 288.150(2)(k) but there is
22 no reclassification of the recognized classification of bargaining unit positions. Again, it is
23 simply an exercise of a management right to assign employees.

24 Indeed, in FY2016, the Department made several operational changes to assign
25 employees to/from positions held by non-bargaining unit members and vice versa. Specifically,
26 the one position held the rank of captain was re-assigned to the rank of lieutenant; two positions
27 occupied by members in the Las Vegas Police Protective Association, Inc. (“PPA”), which is the
28

1 employee organization representing non-supervisory commissioned employees, were assigned to
2 captains; and one position occupied by an appointed employee was re-assigned to a captain.

3 In FY2017 a new police officer captain position was added for a new area command and
4 a position occupied by a bargaining unit member in the PPA was reassigned to a captain. In
5 FY2019, a position occupied by a captain was switched to an appointed position. In FY2021,
6 one position occupied by a captain was switched to an appointed position; one position occupied
7 by a captain was reassigned to a lieutenant and two positions occupied by captains were
8 reassigned to employees in the PPA bargaining unit. In FY 2023, two assignments originally
9 filled with non-PMSA employees (directors) were assigned to captains; three assignments
10 originally filled with PMSA bargaining unit members were assigned to appointed employees;
11 and one position originally filled by a PPA bargaining unit member was assigned to a captain.
12 Overall, Complainant *gained* a net one position from FY2013 through 2023.

13 The Association is seeking to stake claim on positions, which are not recognized
14 classifications in the CBA, because at some point in time, the Department assigned a PMSA
15 bargaining unit member to work in that position. This argument does not equate to a recognition
16 that an *assignment* to a position now becomes some new classification. The parties have already
17 bargained for the recognized classifications in the CBA and the Association cannot use the
18 instant Petition to achieve something it could not or failed to do in collective bargaining.
19 Further, under the Association's proposed issue and arguments advanced, if a bargaining unit
20 member does *any* work in a position, then the Department would have to give notice to the
21 Association when it wanted to have a non-bargaining unit employee perform that same work –
22 no matter the extent, scope or duration of the work. Thus, for example, if a bargaining unit
23 member covered a position that was not held by a bargaining unit employee for one week, under
24 the Association's proposed issue, the Department would have to give notice to the Association
25 before it could put the non-bargaining unit employee back in that position.

26 Furthermore, the fact that the challenged work has not been exclusive to the bargaining
27 unit is fatal to the Association's claim. Indeed, several courts have held that an employer does
28 not commit a unilateral change when it shifts work to non-bargaining unit employees when the

1 subject work was not *exclusively* performed by the bargaining unit. *See Amer. Federation of*
2 *State, Cnty. and Mun. Employees, Council 13, AFL-CIO v. Penn. Labor Relations Bd.*, 150 Pa.
3 CmwltH. 642, 647-48 616 A. 2d 135, 138-139 (1992); *see also Southfield Police Officers Ass’n v.*
4 *City of Southfield*, 433 Mich. 168, 179-188, 445 N.W.2d 98 (1989).

5 **C. THE DEPARTMENT’S PAST PRACTICE REVEALS THE**
6 **ASSOCIATION WAIVED ITS RIGHTS.**

7 Given the fact the Department has used bargaining unit and non-bargaining unit
8 employees to fill positions occupied, at some point in time by bargaining unit members, and the
9 Association only challenged the issue once prior to the instant matter, serves as evidence the
10 Association waived any right it had to challenge (assuming *arguendo* that the issue is even a
11 subject of mandatory bargaining). This Board has recognized that a past practice of a party can
12 constitute evidence that a party waived a statutory or contractual right, provided the waiver is
13 “clear and unmistakable.” Washoe County Teachers Assn. v. Washoe County Sch. Dist., Case
14 No. A1-045678, Item No. 470C, *3 (2001)(citing Ormsby Co. Educ. Assn. v. Carson City Sch.
15 Dist., Case No. A1-045527, Item No. 311 (1993); See El Dorado County Deputy Sheriff’s Assn.
16 v. County of El Dorado, 198 Cal.Rptr.3d 502, 507 (Cal. App. 2016)(“Failure by [employee
17 organization] to assert its bargaining rights after receiving notice of the proposed change in terms
18 of employment constitutes waiver of its rights.” (quoting Stockton Police Officers’ Assn v. City
19 of Stockton, 206 Cal.App.3d 62, 253 Cal.Rptr. 183 (1988)).

20 As set forth above, the Department has interchanged personnel in various positions
21 between various bargaining unit members and non-bargaining unit employees. With the
22 exception of the positions identified in the original complaint in this matter (2023-016) and Case
23 No. 2019-001, the Association did not raise an objection or request to bargain the other instances
24 when the Department exercised its management right to assign employees. The Association
25 surely was aware of the changes identified *supra* but chose not to challenge the actions of the
26 Department. Because the Department has an established past practice in this regard, and the
27 Association was aware and failed to assert its bargaining rights in prior instances (with the
28 exception of one), its silence should be construed as a waiver of rights.

1 **D. ASSOCIATION’S REQUEST TO IMPLEMENT CALIFORNIA PERB’S**
2 **HOLDING IN *MORENO VALLEY* SHOULD BE REJECTED.**

3 Finally, the Association’s request that the Board adopt California’s Public Employment
4 Relations Board (“PERB”) precedent *vis a vis* employer changes during impasse procedures
5 should be rejected. In the Petition, the Association argues the Board should adopt PERB’s
6 holding in *Moreno Valley Unified Sch. Dist. v. Pub. Employment Relations Bd.*, 142 Cal. App. 3d
7 191 (1983), which found that following the declaration of impasse, a unilateral change to a
8 subject within the scope of mandatory bargaining prior to exhausting the impasse procedures, is
9 a unilateral change. (Pet. at p. 8). The Association requests that the Department be prohibited
10 from reassigning bargaining unit work prior to the completion of impact bargaining, including
11 fact-finding and arbitration pursuant to Nevada Revised Statute 288.200 and 288.215. (Pet. at p.
12 3:1-3).

13 It should be noted that the facts of the *Moreno Valley* case are drastically different than
14 the issue presented here, in that in *Moreno Valley* the parties were negotiating a successor
15 agreement. 142 Cal. App. 3d at 194. Following 16 negotiations sessions over nearly 6 months,
16 impasse was declared by both parties and, four days later, the employer implemented the terms
17 of its “last best offer.” *Id.* Here, the parties are not in the throws of negotiating a successor
18 agreement, which would invoke the impasse procedures outlined in Nevada Revised Statute
19 288.200 and/or 288.215.

20 Moreover, under the Association’s request, the Department would not be able to put the
21 non-bargaining unit member back into the position until the parties negotiated the issue – all the
22 way through interest arbitration. (See Pet. at pp. 2:22-24; 3:1-3). Thus, in the hypothetical
23 above, the Department would have to keep that position open or filled with the temporary
24 bargaining unit employee for a minimum of six negotiations, then possibly a fact finding and,
25 finally, an arbitration. See Nev. Rev. Stat. 288.200 and 288.215. Such a requirement would
26 literally prevent the Department from exercising its management rights for an unreasonable
27 period of time, which would directly infringe on the Department’s management rights.
28

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IV. CONCLUSION

Given the foregoing, the Department respectfully requests the Board deny the Association's Petition in its entirety.

Dated this 14th day of August, 2024.

MARQUIS AURBACH

By s/Nick D. Crosby
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CERTIFICATE OF MAILING

I hereby certify that on the ___ day of July, 2024, I served a copy of the foregoing
ANSWER TO PETITION FOR DECLARATORY RELIEF upon each of the parties by
depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada,
First-Class Postage fully prepaid, and addressed to:

Dan Marks, Esq.
610 S. Ninth Street
Las Vegas, NV 89101
Attorney for Complainant

and that there is a regular communication by mail between the place of mailing and the place(s)
so addressed.

s/Sherri Mong
an employee of Marquis Aurbach

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FILED
October 11, 2024
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9 STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
10 RELATIONS BOARD

11 LAS VEGAS METRO POLICE MANAGERS
AND SUPERVISORS ASSOCIATION

Case No.: 2024-018

12 Complainant,

13 vs.

14 LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

15 Respondent.

16
17 **REPLY TO RESPONDENT'S RESPONSE**
18 **TO THE PETITION FOR DECLARATORY RELIEF**

19 Complainant LAS VEGAS METRO POLICE MANAGERS AND SUPERVISORS
20 ASSOCIATION ("LVPMSA"), by and through its counsel of record Adam Levine, Esq. of the Law
21 Office of Daniel Marks, hereby files this Reply to Las Vegas Metropolitan Police Department's
22 Response to Petition for Declaratory Relief.

23 ///

24 ///

1 **A. “Management Rights” Does Not Authorize Removing Work From The Bargaining**
2 **Unit Without Impact Bargaining.**

3 Respondent Las Vegas Metropolitan Police Department’s (hereafter “LVMPD”, “Metro” or
4 “the Department”) Response seeks to rely upon “management rights” to take work from the bargaining
5 unit and move it to be performed by persons outside of the bargaining unit. Specifically, LVMPD
6 asserts the right to “assign” authorizes it to take work out of the bargaining unit. However, LVMPD’s
7 Response cites no cases from this Board, from the National Relations Board, or from the Boards of
8 any other states in support of its position.

9 As set forth in the Petition filed by PMSA, precedent from this Board, the NLRB, and
10 California’s PERB all reject the management rights claim being made by LVMPD and hold even
11 where management has the right to remove work from the bargaining unit, they must impact bargain
12 with the union. LVMPD’s Response does not even address the cases cited in PMSA’s Petition with the
13 sole exception of the California PERB decision in *Moreno Valley School District v. PERB*, 142 Cal.
14 App. 3d 191 (1983).

15 LVMPD attempts to distinguish *Moreno Valley School District* by arguing the parties were
16 negotiating a successor bargaining agreement, and the employer only implemented the terms of its last
17 best offer after 16 negotiation sessions over 6 months. However, LVMPD does not explain how this is
18 a *meaningful* distinction. At least the Moreno Valley School District recognized its bargaining
19 obligation before it engaged in an unlawful unilateral change – something LVMPD refuses to do.

20 LVMPD’s Response argues it has “historically” assigned non-bargaining unit personnel to
21 certain positions. It claims on page 5 that in FY 2016 “one position held [by] the rank of captain was
22 reassigned to the rank of lieutenant”. However, this does not constitute the moving of work *out of the*
23 *bargaining unit* as the PMSA bargaining unit encompasses the positions of *both* lieutenants and
24 captains.

1 LVMPD's Response on pages 5 and 6 claim "two positions occupied by members in the Las
2 Vegas Police Protective Association, Inc. ("PPA"), which is the employee organization representing
3 non-supervisory commission employees, were assigned to Captains". No details are provided
4 regarding this change. However, presumably LVMPD negotiated with the PPA and the PPA consented
5 to this transfer. If it did not, that is a failure on the part of the PPA. However, PMSA cannot be
6 restricted in its rights under Chapter 288 by the PPA's failure to demand to bargain.

7 LVMPD's Response on page 6 discusses how in FY 2019 a position occupied by a Captain
8 was switched to an appointed position. This presumably was the Counter-Terrorism/Homeland
9 Security position which went to an appointed position following the retirement of LVMPD Captain
10 Christopher Tomaino. However, LVMPD's Response does not tell the Board this matter was discussed
11 and agreed to by PMSA. Likewise, the Response talks about changes of positions in FY 2021 and
12 2023. However, those position transfers were negotiated and memorialized in Memorandum of
13 Understandings ("MOUs"). Specifics regarding these negotiations culminated in agreements set forth
14 in the Amended Complaint filed in *PMSA v. LVMPD*, Case No. 2023-016 which are incorporated
15 herein by reference.

16 LVMPD's Response argues a unilateral change does not occur when a subject work was not
17 performed exclusively by the bargaining unit citing *AFSCME Council 13, AFL-CIO v. Pennsylvania*
18 *Labor Relations Board*, 150 Pa. Cmwlth. 642, 616 A.2d 135 (1992). However, *AFSCME Council 13*
19 reiterates the rule "Generally, a public employer commits an unfair labor practice if it unilaterally
20 shifts *any* bargaining unit work to non-members without first bargaining." 616 A.2d at 137 (*emphasis*
21 *in original*) citing *City of Harrisburg v. Pennsylvania Labor Relations Board*, 146 Pa. Cmwlth. Ct.
22 242, 605 A.2d 440 (1992).

23 However, the Pennsylvania Labor Relations Board in *AFSCME Council 13*, and the court
24 recognized an exception whereby there is no obligation to bargain when the employer ceased

1 performing the work altogether. In *AFSCME Council 13* personnel employed by the State Department
2 of Agriculture conducted vehicle tank meter inspections. However, the State stopped performing such
3 inspections and later entered into various Memoranda of Understanding with various counties to have
4 such inspections performed by counties. The Pennsylvania Labor Board held:

5 [W]here a governmental employer ceases responsibility for the provision of a public
6 service and a successor provider performs the service as a result of statutorily imposed
7 power or duty and not under the direction of a former provider, there is no obligation to
8 bargain over the decision to cease providing the service. The record shows that the
9 Commonwealth has essentially gone out of the business of providing certain inspection
10 services in individual counties and that these services are now provided by the counties.
11 There is no evidence that the counties perform these services at the direction of the
Commonwealth and therefore that the Commonwealth continues to be the ultimate
provider of these inspection services. Indeed . . . the Weights and Measure Act
expressly grants the counties the same authority to perform inspections as is granted to
the Commonwealth. Because there is no evidence that the Commonwealth remains the
ultimate provider of these inspection services, it had no duty to bargain over its decision
to cease providing these services.

12 Id. In noting there is no prohibited labor practice where the work was not performed “exclusively” by
13 bargaining unit members, the Pennsylvania Commonwealth Court was referring to a situation where
14 the work was performed by multiple employers, not a situation where the work was being taken out of
15 the bargaining unit. Moreover, the *AFSCME Council 13* court further noted the Pennsylvania Labor
16 Relations Board held:

17 A finding of an unfair labor practice might . . . be justified if AFSCME had shown that .
18 . . county employees are now performing a significantly greater proportion of the total
19 inspections or are now inspecting devices that had traditionally been inspected solely by
Commonwealth employees. Indeed, in a case where an employer had previously
20 subcontracted bargaining unit work, the National Labor Relations Board nevertheless
21 found that the employer committed an unfair labor practice by subcontracting bargaining
unit work "in a manner different in quantity and kind from that done previously."
Howmet Corporation, 197 NLRB No. 91, 80 LRRM 1555, 1558 (1972), enf'd, 257
LRRM 2572 (7th Cir.1974).

22 616 A.2d at 137.

23 Likewise, LVMPD’s citation to *Southfield Police Officers Association v. City of*
24 *Southfield*, 433 Mich. 168, 445 N.W.2d 98 (1989) does not support the Department’s position.

1 In *Southfield Police Officers Association*, the Michigan Supreme Court recognized “the duty to
2 bargain extends to a public employer's diversion of unit work to non-unit employees or to the
3 subcontracting of the unit work to independent contractors.” 445 N.W.2d at 103. At issue was
4 the City’s transfer of “bargaining unit work in crime prevention and the auto pound to civilian
5 employees who are members of a different bargaining unit and are represented by a different
6 union.” 445 N.W.2d at 100. Addressing the “exclusivity rule” developed by the Michigan
7 Employment Relations Commission (MERC), the Michigan Supreme Court specifically
8 recognized that this rule of MERC was contrary to the “adverse impact” test utilized by the
9 NLRB. 445 N.W.2d at 104-105. However, the Michigan Supreme Court distinguished the
10 NLRB approach by noting:

11 The instant case, by contrast, involves a more basic question. Here, the disputed work
12 had been interchangeably performed by more than one bargaining unit, thereby raising a
13 real question as to whether the transferred duties are in fact "bargaining unit work." This
14 factual difference is critical

15 445 N.W.2d at 105. The Michigan Court concluded where more than one *bargaining unit* has
16 performed such work, this would create “an insoluble Catch-22” situation where:

17 the public employer's transfer of nonexclusive work would always be subject to
18 challenge by whichever unit loses the work. In the present case, for example, public
19 safety technicians, police officers, and command officers all may have a claim to the
20 disputed work. It is not unrealistic to expect that the employer would become snared in
21 inter-union rivalries.

22 445 N.W.2d at 106.¹ The holding of *Southfield Police Officers Association* is that an employer is not
23 obligated to bargain when transferring work *between its different bargaining units* where such work has
24 historically been performed by these multiple bargaining units. However, nothing within the holding of

¹ The opinion of the Michigan Supreme Court was not unanimous, and a dissent was filed over the departure from NLRB precedent.

1 *Southfield Police Officers Association* authorizes the transfer of such work to management, or outside
2 contractors, without impact bargaining.

3 **B. PMSA Has Not Waived Its Rights To Impact Bargain By Past Practice.**

4 LVMPD cites this Court's prior holding in *Washoe County Teachers Association v. Washoe*
5 *County School District*, Case A1-045678, Item No. 470-C for the proposition that by past practice a
6 party can waive a statutory or constitutional right provided the waiver is "clear and unmistakable".
7 While undoubtedly true, a party asserting a past practice bears the burden of proving such by the "clear
8 and convincing" evidence standard that the practice is "(1) unequivocal; (2) clearly enunciated and
9 acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established
10 practice accepted by both Parties." *City of Reno v. Reno Fire Department Administrative Association*,
11 111 Nev. 1004, 1010, 889 P.2d 1115, 1119 (1995). Where, as here, the PMSA has insisted upon
12 bargaining over removal of work to be given to appointed personnel and have memorialized such
13 bargaining in Memorandum of Understanding as alleged in the Amended Complaint in Case No.
14 2024-016, LVMPD cannot meet such a burden of proof.

15 Likewise, LVMPD's citation to *El Dorado County Deputy Sheriff's Assn. v. County of El*
16 *Dorado*, 198 Cal. Rptr. 3d 502 (Cal. App. 2016) does not support its position. *El Dorado County*
17 *Deputy Sheriff's Assn.* makes clear "the public employer's duty to bargain arises under two
18 circumstances: (1) when the decision itself is subject to bargaining, and (2) when the effects of the
19 decision are subject to bargaining, even if the decision, itself, is nonnegotiable." 198 Cal. Rptr. 3d at
20 507. The case makes very clear that "the employer must give notice to the employee organization so
21 that it can make a demand to bargain.". It is only when such clear notice is given, and the employee
22 organization fails to assert its bargaining rights after receiving notice of the proposed change, will a
23 waiver be found. *Id.*

1 However, where an employee organization declines to demand impact/effects bargaining in a
2 given situation, either out of ignorance of its bargaining rights, or a determination that the particular
3 impact/effects of the decision do not warrant the assertion of the bargaining rights, this cannot
4 constitute waiver of the right to impact bargain over anything other than the immediate issue. Simply
5 put, even if PMSA did not bargain over a reassignment of bargaining unit work at some point in the
6 past, this would not constitute a surrender of its bargaining rights for the future.

7 **C. LVMPD May Not Implement Its Decision To Outsource Any Work Until**
8 **Exhaustion Of Impact Bargaining And The Statutory Impasse Process.**

9 As set forth in PMSA’s Petition, the California Court of Appeals in *Moreno Valley Unified*
10 *School District* held that the prohibition against unilateral change prohibits implementation of the
11 decision prior to exhaustion of the bargaining process, including impasse procedures. As set forth
12 above, LVMPD has failed to distinguish *Moreno Valley Unified School District* in any meaningful
13 manner.

14 Ironically, one of the cases cited by LVMPD in its Response, *Southfield Police Officers*
15 *Association*, supra, is directly on point in support of the PMSA’s position. The Michigan Supreme
16 Court in that case held:

17 Unlike the NLRA, a public employer under the state statute is not free to implement its
18 final offer after bargaining parties reach an impasse. The public employer must first
19 engage in, and exhaust, either arbitration or a fact-finding procedure established by 1969
PA 312, MCL 423.231 et seq.; MSA 17.455(31) et seq., MCL 423.25; MSA 17.454(27).

20 445 N.W.2d at 106.

21 LVMPD’s Response bemoans the fact that the Department would not be permitted to put a
22 non-bargaining unit employee into the position “until the parties negotiated the issue – all the way
23 through interest arbitration”, thus preventing “the Department from exercising its management right
24 for an unreasonable period of time”. (Response at p. 8 of 10). However, there is nothing that requires

1 such impact bargaining to take “an unreasonable period of time”. If LVMPD approaches its bargaining
2 obligation in good faith – i.e. with a *sincere* intent to reach an agreement – such impact bargaining
3 need not take long at all. Such proof exists in prior MOUs signed between the parties on this very
4 subject.

5 Moreover, even if the parties do reach impasse, there are steps which the parties can take to
6 expedite impasse procedures. These include, but are not necessarily limited to, agreeing to
7 alternative/expedited impasse procedures under NRS 288.180(3)², waiving mediation, agreeing to
8 binding fact-finding under NRS 288.200(6), agreeing to skip fact-finding and move directly to interest
9 arbitration under NRS 288.215, or to select both a fact finder and an interest arbitrator at the same time
10 and schedule both hearings, one immediately after the other, to avoid unnecessary delay.³

11 DATED this 11th day of October 2024.

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& Supervisors Association*

22 ² That statute states "As the first step, the parties shall discuss the procedures to be followed if they are unable to
23 agree on one or more issues".

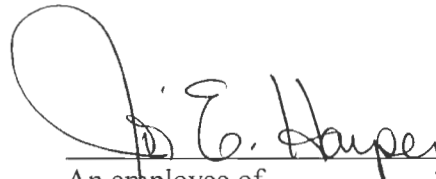
24 ³ The refusal of one particular government employer (Clark County) to engage in such commonsense efforts to
expedite impasse procedures is currently before the Board in Case Nos. 2024-014, 2024-016, and 2024-019.

1 CERTIFICATE OF MAILING

2 CERTIFICATE OF ELECTRONIC SERVICE

3 I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on
4 the 11th day of October 2024, I served a true and correct copy of the foregoing REPLY TO
5 RESPONDENT'S RESPONSE TO THE PETITION FOR DECLARATORY RELIEF by emailing the
6 same to the following recipients. Service of the foregoing document by email is in place of service via
7 the United State Postal Service.

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FILED
December 2, 2024
State of Nevada
E.M.R.B.
6:04 p.m.

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8
9 STATE OF NEVADA
10 GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

11 LAS VEGAS METRO POLICE MANAGERS
AND SUPERVISORS ASSOCIATION

Case No.: 2024-018

12 Complainant,

13 vs.

**LAS VEGAS METRO POLICE MANAGERS
AND SUPERVISORS ASSOCIATION
PREHEARING STATEMENT**

14 LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,

15 Respondent.
16
17

18
19 COMES NOW Complainant/Counter-Respondent Las Vegas Metro Police Managers and
20 Supervisors Association (“PMSA”) by and through undersigned counsel Adam Levine, Esq. of the Law
21 Office of Daniel Marks and hereby submits pursuant to NAC 288.250 its Pre-Hearing Statement.
22
23
24

1 **I. STATEMENT OF THE ISSUES OF FACT AND LAWS TO BE DETERMINED BY THE**
2 **BOARD.**

3 The issue of law to be determined by the Board is whether LVMPD was obligated to bargain
4 with PMSA before transferring work performed by Captains, who are covered as part of the bargaining
5 unit, to non-bargaining unit/nonunion civilian Directors.

6 **II. POINTS AND AUTHORITIES**

7 As this matter was filed as a Petition for Declaratory Order, all of the Points and Authorities are
8 contained within the Petition, and Reply in support of the Petition, which are already on file with the
9 Board and which are incorporated herein by reference.

10 **III. LIST OF WITNESSES**

- 11 1. Sergeant Troyce Krumme is the Chairman of PMSA and is knowledgeable regarding the
12 parties past history of bargaining, and creation of Memorandums of Understanding,
13 when LVMPD desires to move job/responsibilities performed by Captains to nonunion
14 civilian Directors, and the facts and circumstances surrounding Sheriff Kevin
15 McMahill's negotiations and then repudiation of such negotiations.
- 16 2. Daniel Coe, Esq. is the General Counsel for PMSA and is knowledgeable regarding the
17 parties past history of bargaining, and creation of Memorandums of Understanding,
18 when LVMPD desires to move job/responsibilities performed by Captains to nonunion
19 civilian Directors, and the facts and circumstances surrounding Sheriff Kevin
20 McMahill's negotiations, and then repudiation of such negotiations.
- 21 3. Jamie Frost is the Labor Relations Counsel for LVMPD and is knowledgeable regarding
22 the parties past history of bargaining, and creation of Memorandums of Understanding,
23 when LVMPD desires to move job/responsibilities performed by Captains to nonunion
24

1 civilian Directors, and the facts and circumstances surrounding Sheriff Kevin
2 McMahill's negotiations, and then repudiation of such negotiations.

- 3 4. Kevin McMahill is the elected Sheriff and head of LVMPD and is knowledgeable
4 regarding the negotiations between his administration and PMSA regarding moving
5 work performed by Captains to nonunion civilian Directors, and his decision to cut off
6 such negotiations and refused to sign the MOU(s) which were negotiated in connection
7 there with.

8 PMSA reserves the right to supplement this witness list.

9 **IV. ESTIMATION OF TIME**

10 Complainant estimates that one (1) full day (8 hours) will be needed to present
11 Complainant/Counter-Respondent's case in chief.

12 **V. STATEMENT PURSUANT TO NAC 288.250(c).**

13 There are no administrative or other proceedings in connection with this matter.

14 DATED this 2nd day of December 2024.

15 LAW OFFICE OF DANIEL MARKS

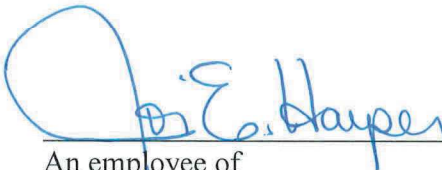
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24 & Supervisors Association

1 CERTIFICATE OF ELECTRONIC SERVICE

2 I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on
3 the 2nd day of December 2024, I served a true and correct copy of the foregoing LAS VEGAS METRO
4 POLICE MANAGERS AND SUPERVISORS ASSOCIATION's PREHEARING STATEMENT by
5 emailing the same to the following recipients. Service of the foregoing document by email is in place
6 of service via the United State Postal Service.

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FILED
December 2, 2024
State of Nevada
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1:39 p.m.

9 **STATE OF NEVADA**
10 **GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD**

11 LAS VEGAS METROPOLITAN POLICE
12 MANAGERS AND SUPERVISORS
13 ASSOCIATION,

Case No.: 2024-018

Complainant,

vs.

14 LAS VEGAS METROPOLITAN POLICE
15 DEPARTMENT,

Respondent.

16 **RESPONDENT'S PREHEARING STATEMENT**

17 Respondent Las Vegas Metropolitan Police Department (hereinafter "Department"), by
18 and through its attorneys of record, the law firm of Marquis Aurbach, hereby files its Prehearing
19 Statement in the above-referenced matter.

20 **I. ISSUES TO BE DECIDED BY THE BOARD**

21 1. Whether the Department must engage in impact bargaining with the Association
22 when the Department intends to assign a non-bargaining unit employee to a position that, at some
23 point in time, was assigned to a bargaining unit member, but was not exclusively staffed by a
24 bargaining unit member.

25 2. Did the Association waive its right to challenge the contested actions of the
26 Department in this case, based upon an established past practice?
27
28

1 **II. LEGAL ARGUMENT**

2 **A. THE DEPARTMENT ENJOYS BOTH A STATUTORY AND**
3 **CONTRACTUAL RIGHT TO ASSIGN EMPLOYEES.**

4 At the outset, the Department underscores the well-recognized exclusive right management
5 possesses to direct and assign its employees, as well as the manner in which its services are
6 provided to the community. Nevada Revised Statute 288.150 provides, in relevant part:

7 **NRS 288.150 Negotiations by employer with recognized employee**
8 **organization: Subjects of mandatory bargaining; matters reserved to**
9 **employer without negotiation; reopening of collective bargaining agreement**
10 **during period of fiscal emergency; termination or reassignment of employees**
11 **of certain schools.**

12 ...

13 3. Those subject matters which are not within the scope of mandatory bargaining
14 and which are reserved to the local government employer without negotiation
15 include:

16 (a) Except as otherwise provided in paragraph (u) of subsection 2, the right to
17 hire, direct, assign or transfer an employee, but excluding the right to assign or
18 transfer an employee as a form of discipline.

19 ...

20 (c) The right to determine:

21 (1) Appropriate staffing levels and work performance standards, except for
22 safety considerations;

23 (2) The content of the workday, including without limitation workload
24 factors, except for safety considerations;

25 (3) The quality and quantity of services to be offered to the public; and

26 (4) The means and methods of offering those services.

27 (d) Safety of the public.

28 Nev. Rev. Stat. 288.150(3)(a), (c)-(d). Further, the Collective Bargaining Agreement (“CBA”) between the Department and the Las Vegas Police Managers & Supervisors Association (“Complainant”) contains similar language which the Parties have negotiated:

ARTICLE 7 – MANAGEMENT RIGHTS

Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent management rights, prerogatives, and

- 1 functions are retained and vested exclusively in the Department, including, but
2 not limited to:
- 3 Hire, direct, classify, assign or transfer employees; except when such assignment
4 or transfer is done as part of disciplinary purposes.
- 5 ...
- 6 Determine appropriate staffing levels and work performance standards and the
7 means and methods by which operations are conducted, except for safety
8 considerations.
- 9 Determine work schedules, tours of duty, daily assignments, standards of
10 performance, and or the services to be rendered.
- 11 Determine the quality and quantity of services to be offered to the public and the
12 means and methods of offering those services.
- 13 ...
- 14 Determine the content of the work day, including without limitation, workload
15 factors, except for employee safety.
- 16 ...
- 17 Manage its operations in the most efficient manner consistent with the best
18 interests of all its citizens, its taxpayers, and its employees.
- 19 Promote employees and determine promotional procedures as provided in NRS
20 280.310
- 21 ...
- 22 The Department shall have such other exclusive rights as may be determined by
23 NRS 288.150.
- 24 The Department's failure to exercise any right, prerogative, or function hereby
25 reserved to it shall not be considered a waiver of that right, prerogative, or
26 function.

27 (CBA, Art. 7, pp. 5-6).

28 Pursuant to Nevada Revised Statute 288.150(3), as well as Article 7 of the CBA, the
Department enjoys a management right to assign employees (provided the same is not for
discipline). The statute and the CBA are crystal clear on this right and the Petition is clearly an
attempt to strip the Department of this right. Moreover, the statute and the CBA provide a
management right to the Department to determine and the quality of services it provides to the
public, as well as the means and methods by which those services are performed. In some cases,

1 the positions challenged by the Association (and other positions, generally) require a skillset or
2 level of experience in order to meet the quality levels the Department determines appropriate,
3 which is precisely what both the statute and the CBA allow as a management right. The
4 Department is not reclassifying a position that is recognized by the CBA or taking a position away
5 from the bargaining unit, contrary to the arguments raised by the Association. It is, quite simply,
6 an exercise of the Department's right to assign its employees in order to deliver services to the
7 public.

8 **B. THE DEPARTMENT HAS HISTORICALLY ASSIGNED NON-**
9 **BARGAINING UNIT PERSONNEL TO POSITIONS.**

10 As further evidence of the proper exercise of its management rights in this respect, the
11 Department has historically assigned positions to employees both in and out of the bargaining unit.
12 The CBA lists the following classifications: (1) Computer Forensics Laboratory Supervisor; (2)
13 Sergeant – Police and Corrections; (3) Lieutenant – Police and Corrections; and (4) Captain –
14 Police and Corrections. The Association suggests the Department is re-classifying positions
15 without bargaining the same under Nevada Revised Statute 288.150(2)(k) but there is no
16 reclassification of the recognized classification of bargaining unit positions. Again, it is simply an
17 exercise of a management right to assign employees.

18 Indeed, in FY2016, the Department made several operational changes to assign employees
19 to/from positions held by non-bargaining unit members and vice versa. Specifically, the one
20 position held the rank of captain was re-assigned to the rank of lieutenant; two positions occupied
21 by members in the Las Vegas Police Protective Association, Inc. ("PPA"), which is the employee
22 organization representing non-supervisory commissioned employees, were assigned to captains;
23 and one position occupied by an appointed employee was re-assigned to a captain.

24 In FY2017 a new police officer captain position was added for a new area command and a
25 position occupied by a bargaining unit member in the PPA was reassigned to a captain. In FY2019,
26 a position occupied by a captain was switched to an appointed position. In FY2021, one position
27 occupied by a captain was switched to an appointed position; one position occupied by a captain
28 was reassigned to a lieutenant and two positions occupied by captains were reassigned to

1 employees in the PPA bargaining unit. In FY 2023, two assignments originally filled with non-
2 PMSA employees (directors) were assigned to captains; three assignments originally filled with
3 PMSA bargaining unit members were assigned to appointed employees; and one position
4 originally filled by a PPA bargaining unit member was assigned to a captain. Overall, Complainant
5 *gained* a net one position from FY2013 through 2023.

6 The Association is seeking to stake claim on positions, which are not recognized
7 classifications in the CBA, because at some point in time, the Department assigned a PMSA
8 bargaining unit member to work in that position. This argument does not equate to a recognition
9 that an *assignment* to a position now becomes some new classification. The parties have already
10 bargained for the recognized classifications in the CBA and the Association cannot use the instant
11 Petition to achieve something it could not or failed to do in collective bargaining. Further, under
12 the Association’s proposed issue and arguments advanced, if a bargaining unit member does *any*
13 work in a position, then the Department would have to give notice to the Association when it
14 wanted to have a non-bargaining unit employee perform that same work – no matter the extent,
15 scope or duration of the work. Thus, for example, if a bargaining unit member covered a position
16 that was not held by a bargaining unit employee for one week, under the Association’s proposed
17 issue, the Department would have to give notice to the Association before it could put the non-
18 bargaining unit employee back in that position. This is an absurd protocol and ignores both the
19 statutory and contractual rights of the Department.

20 Furthermore, the fact that the challenged work has not been exclusive to the bargaining
21 unit is fatal to the Association’s claim. Indeed, several courts have held that an employer does not
22 commit a unilateral change when it shifts work to non-bargaining unit employees when the subject
23 work was not *exclusively* performed by the bargaining unit. *See Amer. Federation of State, Cnty.*
24 *and Mun. Employees, Council 13, AFL-CIO v. Penn. Labor Relations Bd.*, 150 Pa. Cmwlth. 642,
25 647-48 616 A. 2d 135, 138-139 (1992); *see also Southfield Police Officers Ass’n. v. City of*
26 *Southfield*, 433 Mich. 168, 179-188, 445 N.W.2d 98 (1989).

27
28

1 **C. THE DEPARTMENT’S PAST PRACTICE REVEALS THE**
2 **ASSOCIATION WAIVED ITS RIGHTS.**

3 Given the fact the Department has used bargaining unit and non-bargaining unit employees
4 to fill positions occupied, at some point in time by bargaining unit members, and the Association
5 only challenged the issue once prior to the instant matter, serves as evidence the Association
6 waived any right it had to challenge (assuming *arguendo* that the issue is even a subject of
7 mandatory bargaining). This Board has recognized that a past practice of a party can constitute
8 evidence that a party waived a statutory or contractual right, provided the waiver is “clear and
9 unmistakable.” Washoe County Teachers Assn. v. Washoe County Sch. Dist., Case No. A1-
10 045678, Item No. 470C, *3 (2001)(citing Ormsby Co. Educ. Assn. v. Carson City Sch. Dist., Case
11 No. A1-045527, Item No. 311 (1993); See El Dorado County Deputy Sheriff’s Assn. v. County of
12 El Dorado, 198 Cal.Rptr.3d 502, 507 (Cal. App. 2016)(“Failure by [employee organization] to
13 assert its bargaining rights after receiving notice of the proposed change in terms of employment
14 constitutes waiver of its rights.” (quoting Stockton Police Officers’ Assn v. City of Stockton, 206
15 Cal.App.3d 62, 253 Cal.Rptr. 183 (1988)).

16 As set forth above, the Department has interchanged personnel in various positions
17 between various bargaining unit members and non-bargaining unit employees. With the exception
18 of the positions identified in the original complaint in this matter (2023-016) and Case No. 2019-
19 001, the Association did not raise an objection or request to bargain the other instances when the
20 Department exercised its management right to assign employees. The Association surely was
21 aware of the changes identified *supra* but chose not to challenge the actions of the Department.
22 Because the Department has an established past practice in this regard, and the Association was
23 aware and failed to assert its bargaining rights in prior instances (with the exception of one), its
24 silence should be construed as a waiver of rights.

25 **D. ASSOCIATION’S REQUEST TO IMPLEMENT CALIFORNIA PERB’S**
26 **HOLDING IN MORENO VALLEY SHOULD BE REJECTED.**

27 Finally, the Association’s request that the Board adopt California’s Public Employment
28 Relations Board (“PERB”) precedent *vis a vis* employer changes during impasse procedures

1 should be rejected. In the Petition, the Association argues the Board should adopt PERB’s holding
2 in *Moreno Valley Unified Sch. Dist. v. Pub. Employment Relations Bd.*, 142 Cal. App. 3d 191
3 (1983), which found that following the declaration of impasse, a unilateral change to a subject
4 within the scope of mandatory bargaining prior to exhausting the impasse procedures, is a
5 unilateral change. (Pet. at p. 8). The Association requests that the Department be prohibited from
6 reassigning bargaining unit work prior to the completion of impact bargaining, including fact-
7 finding and arbitration pursuant to Nevada Revised Statute 288.200 and 288.215. (Pet. at p. 3:1-
8 3).

9 It should be noted that the facts of the *Moreno Valley* case are drastically different than the
10 issue presented here, in that in *Moreno Valley* the parties were negotiating a successor agreement.
11 142 Cal. App. 3d at 194. Following 16 negotiations sessions over nearly 6 months, impasse was
12 declared by both parties and, four days later, the employer implemented the terms of its “last best
13 offer.” *Id.* Here, the parties are not in the throes of negotiating a successor agreement, which
14 would invoke the impasse procedures outlined in Nevada Revised Statute 288.200 and/or 288.215.

15 Moreover, under the Association’s request, the Department would not be able to put the
16 non-bargaining unit member back into the position until the parties negotiated the issue – all the
17 way through interest arbitration. (See Pet. at pp. 2:22-24; 3:1-3). Thus, in the hypothetical above,
18 the Department would have to keep that position open or filled with the temporary bargaining unit
19 employee for a minimum of six negotiations, then possibly a fact finding and, finally, an
20 arbitration. See Nev. Rev. Stat. 288.200 and 288.215. Such a requirement would literally prevent
21 the Department from exercising its management rights for an unreasonable period of time, which
22 would directly infringe on the Department’s management rights.

23 **III. PENDING ADMINISTRATIVE, JUDICIAL OR OTHER PROCEEDINGS**

24 Related to this case is a prior unfair labor practices complaint lodged by Complainant. See
25 Case No. 2023-016. That case involves an allegation of a prohibited practice by the Department
26 concerning the assignment of civilian Directors to certain positions which, at some point in time,
27 was staffed by a Captain. At a settlement conference in that case, the parties agreed to continue
28

1 the hearing on the prohibited practices complaint to allow the Complainant to lodge the instant
2 declaratory order complaint.

3 **IV. WITNESSES**

- 4 1. Jamie Frost, Labor Relations Counsel
5 Las Vegas Metropolitan Police Department
6 c/o Marquis Aurbach Chtd.
7 10001 Park Run Drive
8 Las Vegas, NV 89145

9 This witness is expected to testify as to the facts and circumstances giving rise to the
10 allegations contained in the Petition, as well as the Department's defenses raised and asserted
11 herein.

- 12 2. Sheriff Kevin McMahill
13 Las Vegas Metropolitan Police Department
14 c/o Marquis Aurbach Chtd.
15 10001 Park Run Drive
16 Las Vegas, NV 89145

17 This witness is expected to testify as to the facts and circumstances giving rise to the
18 allegations contained in the Petition, as well as the Department's defenses raised and asserted
19 herein.

- 20 3. Rich Hoggan
21 Chief Financial Officer, LVMPD
22 c/o Marquis Aurbach Chtd.
23 10001 Park Run Drive
24 Las Vegas, NV 89145

25 This witness is expected to testify as to the facts and circumstances giving rise to the
26 allegations contained in the Petition, as well as the Department's defenses raised and asserted
27 herein.

- 28 4. NRCP 30(b)(6) Witness(es), LVMPD
c/o Marquis Aurbach Chtd.
10001 Park Run Drive
Las Vegas, NV 89145

1 This witness(es) is/are expected to testify regarding the Department's assignment of
2 employees to positions within the Department, the Collective Bargaining Agreement and related
3 rules, policies, procedures and regulations.

4 Respondent reserves the right to call any witness identified by the Complainant and the
5 right to supplement this list.

6 **V. ESTIMATED TIME NEEDED FOR PRESENTATION OF CASE**

7 The Respondent estimates it will need one day to present its case.

8 Dated this 2nd day of December, 2024.

9
10 MARQUIS AURBACH

11
12 By s/Nick D. Crosby
13 Nick D. Crosby, Esq.
14 Nevada Bar No. 8996
15 10001 Park Run Drive
16 Las Vegas, Nevada 89145
17 Attorney(s) for LVMPD

18 **CERTIFICATE OF MAILING**

19 I hereby certify that on the 2nd day of December, 2024, I served a copy of the foregoing
20 **RESPONDENT'S PREHEARING STATEMENT** upon each of the parties by depositing a copy
21 of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage
22 fully prepaid, and addressed to:

23 Adam Levine, Esq.
24 Law Offices of Daniel Marks
25 610 S. Ninth Street
26 Las Vegas, NV 89101
27 *Attorney for Complainant*

28 and that there is a regular communication by mail between the place of mailing and the place(s)
so addressed.

s/Sherri Mong
an employee of Marquis Aurbach
Page 9 of 10

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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