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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

LAS VEGAS METRO POLICE MANAGERS AND SUPERVISORS ASSOCIATION,

Complainant,

and

LAS VEGAS METROPOLITAN POLICE DEPARTMENT,

Respondent.
_____/

Case No. 2024-018

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

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

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II. IDENTIFICATION OF PETITIONER

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

III. STATEMENT OF THE NATURE OF THE PETITIONER'S INTEREST

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

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

IV. SPECIFIC QUESTIONS PRESENTED TO THE BOARD

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

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

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

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

VI. STATEMENT OF THE PMSA'S POSITION

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

VII. MEMORANDUM OF POINTS AND AUTHORITIES

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

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

Association ("WCEA") because the WCEA insisted on negotiating to the point of impasse over the impact of subcontracting of work. The Board dismissed the County's complaint holding that:

> We agree with the position of the parties that a decision by an employer whether or not to subcontract is within the exclusive province and prerogative of the employer, and, as such, is not a mandatory subject of negotiation, within the provisions of NRS 288.150(2).
>
> However, once the decision to subcontract is made by the employer, the impact or that decision on employees is, in our view, a proper subject of mandatory negotiation under provisions of NRS 288.150(2).

Item No. 159 at p. 5.

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

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

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

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

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

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

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

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

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

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

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

> The Board has long held that an employer may violate its duty to negotiate in good faith by making unilateral changes of matters within the scope of representation. *Pajaro Valley Unified School District* (5/22/78) PERB Decision No. 51; *Grant Joint Union High School District* (2/26/82) PERB Decision No. 196; accord *NLRB v. Katz* (1962) 369 U.S. 736 [50 LRRM 2177].
> ….
>
> In *Alum Rock Union Elementary School District* (6/27/83) PERB Decision No. 322, the Board, applying the test for negotiability set forth in *Anaheim Union High School District* (10/28/81) PERB Decision No. 177, found that "where management seeks to create a new classification to perform a function not previously performed . . . by employees . . . it need not negotiate its decision." However, as the Board indicated in *Alum Rock*, supra, at p. 11, "those aspects of the creation . . . of a classification which merely transfer existing functions and duties from one classification to another involve no overriding managerial prerogative," and are, therefore, negotiable. Thus, where the assignment of duties to employees would transfer work previously performed by bargaining unit members out of the bargaining unit, the employer is obligated to negotiate. *Rialto Unified School District* (4/30/82) PERB Decision No. 209; *Solano County Community College District* (6/30/82) PERB Decision No. 219.

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

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

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

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

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

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

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

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

> The [PERB]s conclusion that impasse under the EERA is, unlike NLRA impasse, a continuation of mutual dispute resolution efforts and not a signal that economic pressure tactics may begin, is a reasonable interpretation of the statutory scheme and not clearly erroneous.
>
> "For the reasons set forth in *San Mateo County Community College District*, supra we find that following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a valid affirmative defense, per se an unfair practice."
>
> ….
>
> Since "impasse" under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process, while "impasse" under federal law indicates a halt to that process, we think the Board reasonably determined that the considerations warranting per se treatment of unilateral changes at the negotiation stage also warranted per se treatment of such changes prior to the exhaustion of the statutory impasse procedure.

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

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.

VIII. CONCLUSION

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

DATED this 21st day of May, 2024.

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STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

LAS VEGAS METRO POLICE MANAGERS AND SUPERVISORS ASSOCIATION, Complainant, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Case No.: 2024-018

RESPONDENT'S RESPONSE TO THE PETITION FOR DECLARATORY RELIEF

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

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

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

2. Las Vegas Police Managers & Supervisors Association: 801 S. Rancho Drive, #A1, Las Vegas, Nevada 89106.

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

A. THE PARTIES.

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

B. THE INITIAL COMPLAINT.

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

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

C. THE PETITION.

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

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

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

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

III. LEGAL ARGUMENT

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

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

> **NRS 288.150 Negotiations by employer with recognized employee organization: Subjects of mandatory bargaining; matters reserved to employer without negotiation; reopening of collective bargaining agreement during period of fiscal emergency; termination or reassignment of employees of certain schools**.
>
> …
>
> 3. Those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include:
>
> (a) Except as otherwise provided in paragraph (u) of subsection 2, the right to hire, direct, assign or transfer an employee, but excluding the right to assign or transfer an employee as a form of discipline.
>
> …
>
> (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

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

(d) Safety of the public.

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 functions are retained and vested exclusively in the Department, including, but not limited to:
>
> Hire, direct, classify, assign or transfer employees; except when such assignment or transfer is done as part of disciplinary purposes.
>
> …
>
> Determine appropriate staffing levels and work performance standards and the means and methods by which operations are conducted, except for safety considerations.
>
> Determine work schedules, tours of duty, daily assignments, standards of performance, and or the services to be rendered.
>
> Determine the quality and quantity of services to be offered to the public and the means and methods of offering those services.
>
> …
>
> Determine the content of the work day, including without limitation, workload factors, except for employee safety.
>
> …
>
> Manage its operations in the most efficient manner consistent with the best interests of all its citizens, its taxpayers, and its employees.
>
> Promote employees and determine promotional procedures as provided in NRS 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).

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

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

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

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

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

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

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

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

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

C. THE DEPARTMENT'S PAST PRACTICE REVEALS THE ASSOCIATION WAIVED ITS RIGHTS.

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

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

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

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

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

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

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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.

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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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STATE OF NEVADA
GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

LAS VEGAS METRO POLICE MANAGERS AND SUPERVISORS ASSOCIATION Complainant, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Case No.: 2024-018

REPLY TO RESPONDENT'S RESPONSE TO THE PETITION FOR DECLARATORY RELIEF

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

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A. "Management Rights" Does Not Authorize Removing Work From The Bargaining Unit Without Impact Bargaining.

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

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

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

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

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

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

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

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

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

> [W]here a governmental employer ceases responsibility for the provision of a public service and a successor provider performs the service as a result of statutorily imposed power or duty and not under the direction of a former provider, there is no obligation to bargain over the decision to cease providing the service. The record shows that the Commonwealth has essentially gone out of the business of providing certain inspection services in individual counties and that these services are now provided by the counties. 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.

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

> A finding of an unfair labor practice might . . . be justified if AFSCME had shown that . . . county employees are now performing a significantly greater proportion of the total inspections or are now inspecting devices that had traditionally been inspected solely by Commonwealth employees. Indeed, in a case where an employer had previously subcontracted bargaining unit work, the National Labor Relations Board nevertheless 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).

616 A.2d at 137.

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

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

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

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

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

445 N.W.2d at 106.[1] The holding of *Southfield Police Officers Association* is that an employer is not obligated to bargain when transferring work *between its different bargaining units* where such work has 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.

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

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

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

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

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

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

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

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

> Unlike the NLRA, a public employer under the state statute is not free to implement its final offer after bargaining parties reach an impasse. The public employer must first 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).

445 N.W.2d at 106.

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

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

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

DATED this 11th day of October 2024.

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

[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.

CERTIFICATE OF MAILING

CERTIFICATE OF ELECTRONIC SERVICE

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

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