

1. Call to Order

Co-Vice Chair Beigel called the meeting to order at approximately 11:00 am.

2. Public Comment

There was no public comment in the North or the South.

3. Committee introductions and meeting overview and/or update - For discussion only.

Co-Vice Chair Beigel opened the meeting with Committee introductions.

4. Adoption of the Agenda – Action Item

Co-Vice Chair Beigel requested a motion to adopt the agenda. Co-Vice Chair Beigel requested a motion to adopt the agenda removing item #7 of Jeremy Tye as his grievance was withdrawn prior to the hearing starting.

MOTION: Moved to approve the agenda.

BY: Member Laney

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

5. Adoption of the Meeting Minutes – Action Item

MOTION: Moved to approve the agenda.

BY: Member Laney

SECOND: Member Novotny

VOTE: The vote was unanimous in favor of the motion.

6. Discussion and possible action related to Grievance #6756 of Kathleen Vonk, Department of Public Safety – Action Item

This matter came on for hearing before the Employee-Management Committee¹ (“EMC”) on October 1, 2020 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance # 6756, filed by Sergeant Kathleen Vonk (“Grievant” or “Sergeant Vonk”). Sergeant Vonk was represented by Richard McCann (“Mr. McCann”) of the Nevada Association of Public Safety Officers. The agency-employer, the State of Nevada, Department of Public Safety (“DPS”), was represented by State of Nevada, Personnel Officer II Karen Ropp (“Ms. Ropp”).

¹ The EMC members present representing a quorum were: Pauline Beigel (NDOT), who chaired the meeting; Dana Novotny (GOED), Turessa Russell (UNLV) and Tonya Laney (DMV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Breece Flores, EMC Coordinator and Division of Human Resource Management Administrative Assistant II Ivory Wright Tolentino, were also present.

Ms. Ropp objected to an exhibit presented by Sergeant Vonk, Exhibit 11, the affidavit of [retired] DPS Captain Adam Page (“Captain Page”). Ms. Ropp stated that she could not cross-examine an affidavit, that it was not attested to before anyone, and that it was not signed by a notary. Mr. McCann responded on behalf of Sergeant Vonk, arguing that the exhibit was a declaration, so no notary was required, and that employee had asked for a continuance of the hearing because Captain Page was to be out of town for the hearing, so the declaration was provided instead of testimony. Mr. McCann also noted in substance that Captain Page was logged onto the meeting site as a witness for the hearing. Based on this information, Chair Beigel sustained Ms. Ropp’s objection. Ms. Ropp also stated that Colonel Solo, who was on her witness list, had retired and was unavailable, and asked to substitute as a witness Major Kevin Larsen (“Major Larsen”) in his place. Grievant, DPS Captain Page, Mr. McCann and Major Larsen (“Major Larsen”) were sworn in, and with the exception of Mr. McCann, testified at the hearing.

STATEMENT OF THE CASE

DPS issued a written reprimand to Sergeant Vonk on September 9, 2019 for bringing discredit to DPS. DPS alleged that Sergeant Vonk had while in uniform engaged in political activities while at the Nevada State Legislature on April 11, 2019 in violation of DPS policy, where she went after attending a funeral. According to DPS, the violation Sergeant Vonk had engaged in was a Class Two violation, so that the minimum discipline was a written reprimand. DPS also noted that Sergeant Vonk was present at the Nevada State Legislature for over 6 hours while in uniform, and that the impression created was that she was lobbying for a pay bill that [Nevada State Law Enforcement Officers Association] NSLEOA was supporting. DPS also stated in its written reprimand that Sergeant Vonk should have been aware that she was not authorized to be at the Legislative Building in full uniform during an open session of the Legislature. DPS noted that the alleged violation in question was a Class II violation of DPS policy, and that an investigation by its office of Professional Responsibility (“OPR”) had sustained the allegations.

Sergeant Vonk stated in substance that the original charges against her, neglect of duty, insubordination and misrepresentation of office were not sustained, and that DPS sustained the charge of bringing discredit to DPS for the very reasons the other charges originally brought against her were found unsubstantiated. It was also noted by Sergeant Vonk that Captain Page had counseled and coached her after the incident and that for a Class One Violation Captain Page gave Sergeant Vonk her discipline, and that Major Larsen was aware of the discipline provided, and that there was no reason for the grievance to be before the EMC, and that the EMC should reverse DPS’ decision.

Sergeant Vonk testified that she had been with the Highway Patrol Southern Command of DPS since December 2013 and had become a Sergeant in January 2017. Sergeant Vonk further testified that she had become the President of the Nevada Law Enforcement Nevada State Law Enforcement Officers Association in September 2018.

Sergeant Vonk further testified in substance that she went to Carson City on April 11, 2019 in order to attend a colleague's funeral which was scheduled on her day off, and that she had received permission to attend the funeral in uniform. Immediately after the funeral Sergeant Vonk, while still in uniform, went with Mr. McCann to the Legislature Building, and that this was not a pre-planned event. Sergeant Vonk stated in substance that she did not change out of her uniform due to convenience issues related to the location of the hotel she was staying at in relation to the Legislature Building, and that she did not believe it was any sort of issue or violation to remain in uniform while attending the event and being at the Legislative Building. Sergeant Vonk noted that she had asked Mr. McCann's advice about being in uniform while at the Legislative Building and that he had responded by stating that there were a lot of uniform at the Legislative Building in and out, so that it should not be a problem.

Sergeant Vonk testified that she did not engage in any form of lobbying or political activity while at the Legislative Building whatsoever. Sergeant Vonk stated that while at the Legislative Building she received a text and phone call from her lieutenant saying that she was not supposed to be testifying, and for her to leave the Legislative Building. Sergeant Vonk responded in substance by saying that she was not at the Legislative Building testifying and said to her lieutenant that she would immediately leave the Legislative Building.

Sergeant Vonk testified in substance that later Captain Page contacted her, and she explained what the issue was (as it was presented to her) to him. Sergeant Vonk indicated that Captain Page went over with her how her appearing in uniform at the Legislative Building might appear to other people at the Legislature. Sergeant Vonk stated in substance that Captain Page said that he felt Sergeant Vonk had made an unintentional error and that no discipline should result from the matter.

Sergeant Vonk stated in substance that she received a complaint from a representative of the union formerly known as the Nevada Highway Patrol Association (now NPU) about her being in uniform at the Legislative Building and the matter went from there. Sergeant Vonk testified that she was not lobbying while at the Legislative Building, and that she did not believe that she violated DPS's uniform policy on April 11, 2019, as she was not endorsing, supporting, opposing or contradicting a political campaign or initiative, and that when asked State Senator Nicole Cannizzaro had refuted these allegations. Sergeant Vonk also noted that she was not insubordinate on April 11, 2019, and that she did not bring discredit in any manner on her uniform. Sergeant Vonk also stated that she was not charged with insubordination.

Mr. McCann questioned Sergeant Vonk about Employee Exhibit 2, "Notification of Allegations of Misconduct" dated May 4, 2019. Mr. McCann noted in substance that there were two narratives of allegations in Exhibit 2, one that Sergeant Vonk was in her DPS uniform while present to support and endorse a political campaign or initiative, and that the second allegation said that Sergeant Vonk was present at the Legislative Building in uniform and that she had brought discredit to the Department because she was engaging in a political activity, campaign or initiative.

Mr. McCann also asked Sergeant Vonk about Employee's Exhibit 8, which was the concluding investigation of the administrative allegations against Sergeant Vonk. Mr. McCann noted that Allegation A was that Sergeant Vonk allegedly wore her DPS uniform while meeting with Senator Cannizzaro in order to support a political campaign or initiative, and that the finding of the investigation was that this allegation was unsustainable by OPR's investigation. It was also noted that Allegation B, that Sergeant Vonk's presence in uniform while engaging in political activities, campaigning or initiatives brought discredit to DPS, was sustained by the OPR investigation.

Sergeant Vonk stated in substance that she believed she had been coached and counseled by Captain Page as a result of the matter, and that Mr. Ableser (who had made the complaint) had assumed that she was on duty on April 11, 2019 and lobbying, while neither assumption was true, and that there were many inaccuracies in the email which Mr. Ableser had sent to DPS. Sergeant Vonk noted that no member of the Legislature had filed a complaint against her as a result of her conduct on April 11, 2019.

Upon cross examination by Ms. Ropp, Sergeant Vonk testified that she was unaware that April 11, 2019 was crossover day at the Legislature, which was a day in which bills passed from the different houses of the Nevada Legislature, but learned that April 11 was crossover day after the fact. Sergeant Vonk also stated that she never asked anyone in her chain of command whether it was acceptable to appear at the Legislature Building in uniform as she did not believe that it was an issue, although she asked Mr. McCann about doing so, and that he in substance stated that there were a number of uniformed officers in and out of the Legislative Building.

Sergeant Vonk was asked about Exhibit 3, page two, (Exhibit 6 in the Employee's packet) the second box down, DPS Policy Manual 1029.4, and asked to read the particular section, which Sergeant Vonk read. Sergeant Vonk was also asked about Mr. Ableser's response to questions by DPS Sergeant Peterson (who conducted part of the OPR investigation), who stated in substance that he had observed Sergeant Vonk twice on April 11, 2019, and that he thought she was working on legislation in uniform.

Sergeant Vonk also testified in substance that she had never mentioned in her responses that she had been counseled by Captain Page, but had assumed that the individuals conducting the investigation and who were involved in the issuance of her reprimand were aware of it since the investigation involved management. Ms. Ropp questioned Sergeant Vonk, stating the Sergeant Vonk had never stated in her interview with OPR that she had been counseled by Captain Page, to which Sergeant Vonk responded that she did not believe that she had ever been asked about that matter, and that she did not provide this information in any follow up email to Sergeant Peterson.

Mr. McCann followed up and asked Sergeant Vonk if he (Mr. McCann) had ever been interviewed as part of the OPR investigation, to which she responded no, and Sergeant Vonk stated in substance that was not aware if Captain Page had been interviewed during the OPR investigation. Mr. McCann asked Sergeant

Vonk about Employee's Exhibit 6, page two of 17, who again affirmed that she was not endorsing, supporting, opposing or contradicting any campaign or initiative while in uniform. Sergeant Vonk was also asked about Exhibit 9, the original written reprimand she had received, indicating that she had originally been charged with insubordination, neglect of duty and conduct unbecoming misrepresentation of official capacity authority, and noted that she was never charged with misrepresenting her official capacity/authority in the matter.

Captain Page testified that he started working for DPS in 1998, in the Division of Parole and Probation, and then transferred to the Highway Patrol in 2015. Captain Page was promoted to Captain in July 2015 and retired in July 2019. Captain Page also testified that on April 11, 2019 he was in the office and Major Larsen contacted him and told him that Sergeant Vonk was in uniform in the Legislative Building and to contact her and let her know she needed to leave the Legislative Building while in uniform. Captain Page stated in substance that he contacted Sergeant Vonk to explain what the concerns were and Sergeant Vonk responded and let him know that she was in uniform because she had attended a funeral earlier that day while off duty, and that she would leave the Legislative Building. Sergeant Vonk had added that she had never been in the Legislative Building before and had wanted to tour that Building.

Captain Page stated that Sergeant Vonk apologized, and that he took that time to coach her about the perception of the event regardless of intent and told Sergeant Vonk that the situation would be handled as a training matter. Captain Page also stated that he let Major Larsen know that Sergeant Vonk had left the Legislative Building and that he had handled the matter at his level, and that Major Larsen had offered no further instructions in response.

Captain Page testified that it was his understanding that Sergeant Vonk was not in the Legislative Building in order to endorse, support oppose or contradict any political campaign or initiative, and that he believed the investigation surrounding these allegations was not sustained. Captain Page further stated that he did not feel that the matter was something that Sergeant Vonk needed an oral warning about, and he felt that the coaching/counseling he engaged in at the time of the incident would resolve the matter, and that the reprimand should be removed.

Mr. McCann asked Captain Page about DPS disciplinary policy, 340.3, Subsection R, Subsection 31, which said that when an officer did anything on or off duty which impact would reflect unfavorably upon the Department, if that action was a class one to five penalty, which Captain Page did not recall. Captain Page recalled that the minimum discipline imposed for a class one was an oral warning, and that what he provided on April 11, 2019 to Sergeant Vonk was not even an oral warning, but a training and coaching, and that he had done so with the apparent tacit acceptance of Major Larsen. Captain Page, upon being questioned by Ms. Ropp, stated that Major Larsen was in the office on April 11, 2019. In response to a question from Member Laney as to whether Sergeant Vonk was willful or intentional in her actions to violate DPS policy when she attended the Legislature on April 11, 2019, Captain Page stated, "Absolutely not. . . ."

Major Larsen testified in substance that he had been employed by DPS for 24 years and 9 months and had been a major for about a year and three quarters. Major Larsen testified that he the chance to review the written reprimand issued to Sergeant Vonk, and that he had signed approving it. Major Larsen briefly reviewed DPS' uniform policy, and with respect to DPS policy 1024.9, an officer did not have to be actively engaged in lobbying or political activity, but that he interpreted that policy as encompassing the appearance of such activity. Major Larsen also testified that Sergeant Vonk had not been given permission to appear in uniform at the Legislative Building, and that if she had asked for permission to wear her uniform to the Legislative Building she would not have been granted permission, as she had no reason to be at the Legislative Building in her uniform. Major Larson also stated that unless it was a specific bill which DPS sponsored or co-sponsored DPS remained neutral with respect to bills and that Sergeant Vonk' s mere presence in uniform with lobbyists gave the appearance that she was lobbying for a particular bill. Major Larsen further stated that he expected Sergeant Vonk as a sergeant and with all of her law enforcement experience to be aware of DPS' uniform policy as it pertained to on and off duty requirements. Major Larsen also stated in substance that it had been determined that Sergeant Vonk had been at the Legislature for about 6 hours and 33 minutes on April 11, 2019.

Major Larsen also stated that he called and left a message with Captain Page as initially he could not reach him, and that he contacted Lieutenant Ellithorpe to have him tell Sergeant Vonk to leave the Legislative Building immediately. Major Larsen also testified that he never advised Captain Page to counsel or coach Sergeant Vonk, nor did Captain Page receive his permission to do so, and that Sergeant Vonk had never brought up the fact that Captain Page had counseled her or coached her.

Upon questioning by Mr. McCann of DPS Policy No.1029.4, it was noted by Major Larsen that the policy did not expressly say anything about creating the appearance of endorsing, supporting, opposing or contradicting any political campaign or initiative, rather, that the policy stated that the act of endorsing, supporting, opposing or contradicting any political campaign or initiative while in uniform, or using a DPS badge, patch or other insignia, was a violation of DPS policy. Major Larsen also noted that it was Mr. Ableser's assumption that Sergeant Vonk was there for purposes other than what she had stated, and that allegations are identified after the specificity of charges were identified, and after that identification DPS policy is applied to the sustained allegations.

Mr. McCann argued in substance that Sergeant Vonk was not sustained for neglect of duty, was never charged with insubordination, and that the grievant documents themselves stated that Sergeant Vonk was not insubordinate, ant yet those violations as well as misrepresenting her official capacity, were in her written reprimand. Thus, Mr. McCann argued, the written reprimand needed to be removed from Sergeant Vonk' s file. Mr. McCann noted that Captain Page had decided to coach and counsel Sergeant Vonk, showing how limited he thought the concern was, and that he did not need anyone's authority to coach and counsel someone below him in his chain of command. Mr. McCann further argued that there was no rule Sergeant Vonk had broken, there was no lobbying

by Sergeant Vonk for any bill, and that an assumption that she was present in uniform at the Legislative Building on April 11, 2019, had been incorrectly made. Mr. McCann added that we do not live in a world of assumptions, and that all the evidence indicated that Sergeant Vonk was not present on April 11, 2019 to lobby for any bill.

Ms. Ropp argued in substance that it was important for the EMC to be aware that there was pending on April 11, 2019, a pay bill, and that it was reasonable for someone to assume that Sergeant Vonk was present at the Legislature in uniform for the purposes of advocating for that bill, and that the Sergeant had been seen talking to the co-author of that bill. Even though Sergeant Vonk may not have actively engaged in lobbying or supporting the bill, Ms. Ropp argued, it was the appearance which mattered, and that Sergeant Vonk's shadowing of Mr. McCann, a lobbyist, gave the appearance of not only her support of legislation, but also could have been construed as an endorsement of pending legislation by DPS.

Ms. Ropp noted that the OPR investigation had been initiated to investigate perceived violations of policy, and the findings were provided to DPS which then applied the disciplinary policies. In the class for bringing discredit, Ms. Ropp noted that the discipline ranged from one through five, but there were factors that could be considered for moving the discipline "up the chain" from a class one to a class two, such as experience, rank, knowledge and prior disciplinary issues, in which case a written reprimand would be appropriate. Ms. Ropp also noted that Major Larsen specifically called Lieutenant Ellithorpe to speak to Sergeant Vonk to have her leave the Legislative Building. Ms. Ropp pointed out that Sergeant Vonk had multiple opportunities to state that she had been coached or counseled by Captain Page but had not done so. Ms. Ropp also stated that appearance was very important in law enforcement, as there was a high level of scrutiny on law enforcement while in uniform. Ms. Ropp concluded by urging the EMC to uphold the reprimand, as it was properly investigated, rules were properly applied, and a class two violation resulted in a written reprimand, and the minimum discipline was sustained in this case.

Mr. McCann noted that there had been an admission that Sergeant Vonk's discipline had been admitted to be a one to five matter, but that one would think if there were aggravating circumstances to raise the discipline from an oral warning to a written reprimand that those factors would be brought out, but that they were not denoted in Sergeant Vonk's file. Mr. McCann argued that there was no proof that Sergeant Vonk was present on April 11, 2019, to lobby or support a particular bill, and that we were not in the "assumption world."

The EMC deliberated on Sergeant Vonk's grievance. Member Laney stated in substance that she agreed with DPS that the appearance of Sergeant Vonk at the Legislature in uniform could, and in fact did, cause a negative perception by at least one person. However, Member Laney continued, as a committee they had to review the facts, and that what they had was a written reprimand that did not match what the agency argued, which was perception and appearance. Member Laney noted that the written reprimand clearly outlined willful disobedience, and a knowing violation of the DPS Manual.

Member Laney noted that the burden of proof lay with the employee, and that the employee had done a good job in showing that the exact opposite occurred when Sergeant Vonk attended the Legislative Building in April 2019, and showed that her attendance in uniform was not a willful or knowing violation of DPS uniform policy. So, based on how the written reprimand had the charges listed, and based on the evidence presented, Member Laney stated she thought Sergeant Vonk had done a good job in stating her case.

Member Novotny stated in substance that as far as she could tell she could not understand why the discipline was upgraded to a class two and believed that the discipline in this case should only be a class one. Member Novotny also stated that she agreed with the employee.

Member Russell stated that she agreed with the other two EMC members who had spoken, and that she was in favor of the Grievant and granting the grievance. Co-Chair Beigel brought up a question she had about Exhibit No. 10, a proposed written reprimand that had changed and had included the unbecoming conduct only, and she never saw where it was stated why that reprimand was not issued, and if the written reprimand in question had been issued that might have made more sense. However, Co-Chair Beigel stated that she agreed with the other EMC members.

Member Laney motioned that relief be granted for the requested relief in Grievance No. 6756, and to remove the written reprimand from Sergeant Vonk's file because DPS did not provide sufficient evidence to sustain the charges of insubordination, neglect of duty or unbecoming conduct. Member Laney's motion was seconded by Member Russell and carried unanimously.

FINDINGS OF FACT

Based upon the testimony of the witnesses, the arguments made by the parties, the briefs, evidence, and documents on file in this matter, the EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

Grievant was a non-exempt State of Nevada employee. Grievant was employed by DPS on April 11, 2019. Grievant was in her DPS officer's uniform and present at the Legislative Building on April 11, 2019. Sergeant Vonk was originally in Carson City, NV on April 11, 2019 to attend a colleague's funeral while she was off duty, and she had received permission to attend the funeral while in uniform. Sergeant Vonk went to the Legislative Building after the funeral. Sergeant Vonk's attendance at the Legislative Building after the funeral was unplanned and was because Sergeant Vonk had never been in the Legislative Building before.

Grievant was with Mr. McCann, a lobbyist for Nevada Association of Public Safety Officers ("NAPSO") for much of the day on April 11, 2019. Sergeant Vonk did not change out of her uniform when at the Legislative Building due to convenience purposes connected to the location of the hotel at which she was staying.

Sergeant Vonk did not ask anyone in her chain of command at DPS if she could be at the Legislative Building in uniform, as she did not believe being in uniform at the Legislative Building was an issue.

Sergeant Vonk did ask Mr. McCann for his opinion on whether it was ok for her to be in uniform at the Legislative Building, and Mr. McCann stated in substance that there were a lot of uniform at the Legislative Building in and out, so that it should not be a problem.

DPS Policy No.1029.4 states that an officer may not, unless specifically authorized to do so, “wear any part of the uniform . . . to . . .endorse, support, oppose or contradict any political campaign or initiative.”

Grievant was not at the Legislative Building on April 11, 2019 to endorse, support, oppose or contradict any political campaign or initiative.

Mr. Ableser contacted DPS after seeing Sergeant Vonk in uniform twice in the Legislative Building on April 11, 2019 and assumed that she was present to lobby for/work on legislation.

After this contact Grievant was notified on April 11, 2019, by her lieutenant to not testify and to leave the Legislative Building immediately. Sergeant Vonk had been at the Legislative Building for over 6 hours before leaving.

Upon receiving notification from her lieutenant, Sergeant Vonk left the Legislative Building immediately and stated to Captain Page soon afterwards that she had not been at the Legislative Building to testify. Captain Page counseled and coached Sergeant Vonk on April 11, 2019, and it was his understanding that Sergeant Vonk was not at the Legislative Building to endorse, support, oppose or contradict any political campaign or initiative.

DPS’OPR conducted an investigation, the results of which sustained the finding that Grievant had engaged in conduct on April 11, 2019 that brought discredit to DPS and which had violated other DPS policies. DPS issued Grievant a written reprimand on September 9, 2019.

The written reprimand stated in substance that Grievant was found in violation of: DPS Discipline Policy 340.3 (j) insubordination (1) Willful disobedience or insubordination to constituted authorities, including refusal or deliberate failure to comply or carry out, or follow lawful regulations, policies directives orders and/or instructions properly issued by a supervisor, superior or other person in position of authority; (o)(4) Neglect of Duty, “Any knowing violation of the provisions of the Department Manual, operating procedures or other written directive and (r)(3)Unbecoming conduct, misrepresentation of official capacity or authority.

CONCLUSIONS OF LAW

For this grievance, it was Grievant’s burden to establish by a preponderance of the evidence that DPS did not exercise its discretion in a reasonable manner

when it issued her a written reprimand on September 9, 2019 as a result of her conduct on April 11, 2019. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6). Sergeant Vonk's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e). Sergeant Vonk was in uniform at the Legislative Building with a known lobbyist, Mr. McCann, which DPS stated created the impression that she was lobbying for a pay bill that NSLEOOA was supporting. DPS also alleged that these actions violated DPS Policy No. 1029.4. DPS Policy No.1029.4 states that an officer may not, unless specifically authorized to do so, "wear any part of the uniform . . . to . . . endorse, support, oppose or contradict any political campaign or initiative."

DPS Policy No.1029.4 says nothing about an officer violating DPS Policy No.1029.4 simply by creating the *perception* of endorsing, supporting, opposing or contradicting any political campaign or initiative. Thus, Grievant did not violate DPS Policy No.1029.4 when she wore her uniform at the Legislative Building on April 11, 2019; therefore, Grievant did not engage in neglect of duty by violating Policy No 1029.4. As Sergeant Vonk did not violate Policy No 1029.4 by endorsing, supporting, opposing or contradicting a political campaign or initiative she did not engage in unbecoming conduct, misrepresentation of her official capacity or authority.

As Sergeant Vonk left the Legislative Building immediately upon being told to do so by her lieutenant she was not insubordinate or willfully disobedient to a supervisor or other person in position of authority.

DECISION

Based upon the evidence in the record, and the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefor: Grievance No. 6756 is hereby GRANTED.

MOTION: Moved to grant grievance #6756. Based on the testimony and evidence, Grievant demonstrated that DPS did not exercise its discretion in a reasonable manner when it issue a reprimand to Grievant on September 9 2019, based on her conduct on April 11, 2019.

BY: Member Laney

SECOND: Member Russell

VOTE: The vote was unanimous in favor of the motion.

7. Discussion and possible action related to Grievance #6517 of Jeremy Tye, Department of Public Safety – Action Item

Co-Vice Chair Beigel noted this was stricken from the record as the grievance was withdrawn prior to the EMC Hearing had started.

8. Discussion and possible action related to Grievance #7023 of Jessica Moore, Department of Public Safety – Action Item

This matter came on for hearing before the Employee-Management Committee² (“EMC”) on October 1, 2020 pursuant to NAC 284.695 and NAC 284.6955, regarding Grievance #7023, filed by Jessica Moore (“Grievant”, “Ms. Moore” or “Office Moore”). Ms. Moore was represented by Alex R. Velto, Esq. (“Mr. Velto”).

The agency-employer, the State of Nevada, Department of Public Safety (“DPS”), was represented by State of Nevada, Office of the Attorney General Senior Deputy Attorney General Brandon Price (“Mr. Price”). As a preliminary matter, Mr. Price requested that Exhibit D of DPS’ packet be submitted under seal, as it was confidential pursuant to NAC 284.718(8), and as the exhibit had originally been submitted under seal. Mr. Price’s request was granted, as pursuant to NAC 284.718 Exhibit D was confidential. Exhibit D was also removed from the EMC website during the hearing. There were no objections to the exhibits. Mr. Price moved to exclude any testimony on any issue of *Garrity v. New Jersey*, as those issues were not raised in Ms. Moore’s actual grievance. Mr. Velto did not oppose Mr. Price’s motion and indicated that he did not plan to advance the argument that there had been a *Garrity* violation.

Ms. Moore, Lieutenant Allen Ashby (“Lieutenant Ashby”), Lieutenant Eric Estepa (“Lieutenant Estepa”) and Lieutenant John Gresock (“Lieutenant Gresock”) were sworn in and testified at the hearing.

STATEMENT OF THE CASE

Ms. Moore asked that the EMC uphold her grievance due to insufficient evidence. Ms. Moore argued that the key question was what was the duty of an off-duty officer, and what should they do when they witnessed someone violating the law? Ms. Moore was put in a difficult position. She had gone out to a bachelorette party, expecting not to encounter someone she had supervisory control over, and then contacted someone she deemed was breaking the law. No policy had been presented as to what an officer should do or what an officer’s duties were when off duty, which was important because that would answer the question of what Ms. Moore had to do in the situation she found herself in with respect to this grievance. Ms. Moore decided to step in and act in a manner that prevented someone that was breaking the law from also embarrassing the Department. Ms. Moore argued that the rationale for punishing her was unsupported, and the evidence did not support the allegations of discourteous conduct, conduct unbecoming, discredit to the agency, or

² The EMC members present representing a quorum were: Pauline Beigel (NDOT), who chaired the meeting; Dana Novotny (GOED), Turessa Russell (UNLV) and Tonya Laney (DMV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Breece Flores, EMC Coordinator and Division of Human Resource Management Administrative Assistant II Ivory Wright Tolentino, were also present.

the violation of DPS Policy 901. Additionally, Ms. Moore argued that she was not given access to the file of her OPR (Office of Professional Responsibility) investigation, and that NRS 289.080 said that the Department shall allow a representative of a peace officer to inspect the investigative file, and that Ms. Moore was not given that opportunity.

Because of these facts, Ms. Moore argued, her grievance should be affirmed, and the letter of reprimand removed from her file.

DPS argued that the grievance was about a law enforcement officer who was rude and discourteous to a member of the public while she was at a bar with her friends. It was quite evident, DPS argued, that Ms. Moore did not want to take responsibility for her own actions and wanted to blame everyone else. DPS stated that Ms. Moore and her friends went out to dinner and then went to a show on August 22, 2019. While attending the show Ms. Moore and a probationer under supervision by DPS noticed each other, and during the show Ms. Moore's friend was called up on stage to perform an act, and at that point Ms. Moore noticed that the probationer was recording the performance with her cell phone.

DPS stated that Ms. Moore decided that she would confront the probationer about recording what was occurring because she did not like the fact that her friend was being recorded. DPS stated that Ms. Moore went up to the probationer, announced that the probationer was on probation, and said that she was not supposed to be in the bar, which DPS stated was an error by Ms. Moore, as the probationer had no such restrictions. DPS further stated that Ms. Moore snatched the cell phone out of the probationer's hands and proceeded to tell the probationer she needed to leave the bar. According to DPS the probationer became so embarrassed by the incident that she in fact left the bar. DPS also noted that Ms. Moore never reported the incident until about a month after it occurred, and not until after she found out that a formal complaint had been filed with the Department regarding her conduct at the bar that night. DPS argued that it investigated the complaint, interviewed Ms. Moore, and that the allegation that her rights under NRS 289.080 were violated were simply untrue, as that statute said that when an employee was under investigation the Department must allow the employee an opportunity to inspect materials, and that there was no affirmative duty for DPS to provide all materials it obtains during an investigation, and that the employee must request the material.

DPS stated that at no point was Ms. Moore precluded from reviewing any materials. DPS stated that the evidence would show that Ms. Moore's attorney at the time simple never requested the materials.

DPS stated that Ms. Moore was charged with rude and discourteous treatment of a member of the public, engaging in unbecoming conduct which caused discredit to the agency and violating Policy 901, which was DPS' policy as to when a chronological entry must be entered into the offender tracking and information system. DPS also noted that the range of punishment given to Ms. Moore was the lowest possible punishment under DPS' disciplinary policy. DPS closed by asking that the EMC deny the grievance.

Ms. Moore testified that she started her career in criminal justice by working at the juvenile detention center in Reno, NV, and later started her career with DPS as a probation officer and had been a probation officer with DPS for a little over three years. Ms. Moore further testified that she had never been disciplined while with DPS, and that she went through multiple trainings while with DPS.

Ms. Moore stated that at the beginning of her career with the Department she went through a training which outlined what her duties were as a probation officer. With respect to her duties and obligations while off duty, Ms. Moore stated she had no training with regards to what she was supposed to do while off duty with respect to her responsibilities if she came into contact with a person that she supervised, or an individual on probation period.

With respect to the night in question, Ms. Moore, stated that Taylor Bailey, another officer at the Division, and three court staff surprised her with a bachelorette party. Ms. Moore testified that she went to dinner with the group and then went across the street to a bar (the Saint) where they had surprised her with tickets to the event that was occurring at the bar that night. Ms. Moore stated that the group was there for about 30 minutes before the probationer came in. Ms. Moore stated that her group did not interact with the probationer, and that she did not see the probationer again until Officer Bailey was called on stage to participate in the act.

According to Ms. Moore, at that time she realized the probationer was recording, she made contact with the probationer and told her she should not be recording what was going on, and that she took the phone from her hands, but gave it back immediately. Ms. Moore told the probationer that she was on probation and should not be there, which was when Sarah Thompson, who worked for the court, came up, grabbed the probationer by the arm and removed her from the bar and that Ms. Moore did not tell her to leave. Later Ms. Moore clarified her statement and said that she told the probationer that she should leave but did not have to leave. Ms. Moore stated that while on probation there was an intoxicants condition that stated a probationer could not be in access, control or possession of any alcohol or be in an environment with controlled substances.

Ms. Moore testified that she never saw probationer physically possession alcohol, but that there was access and control because it was strictly a bar which did not serve food, and the main purpose of the establishment was to sell alcohol, and the probationer was standing near a bar. Ms. Moore stated that she had a margarita that night with dinner but was not drinking at the bar.

When asked at what point Ms. Moore realized that the probationer was not lawfully allowed to be present, she stated at the point the probationer walked into the bar establishment, and that she approached the probationer in the belief that she was in violation of her probation by

being at the establishment and by her recording the incident on stage she was going to bring embarrassment on the Division and the specialty court program.

When asked if she was familiar with DPS Policy 901 Ms. Moore stated that she was, and that it was required that officer enter a chronological entry into the OTIS [Offender Tracking and Information System] system when there was an offender contact, and that the contact had to be entered if it would go against the probationer's probation.

Ms. Moore stated that while on duty any contact had to be entered, and that it was her impression that she did not need to enter the encounter in question with the probationer because she was off duty, and that there was nothing in the policy about entering "chronos" while off duty, so she did not believe that she needed to do so, and she was not planning on violating the probationer or revoking her probation, or using the alleged violation against the probationer.

Ms. Moore stated in substance that she knew multiple officers who had not entered chronos who had not be disciplined when those officers had been off duty and had seen offenders but had not "chronosed" it, and that in some instances supervisors were aware of the incidents, as a supervisor had had such an interaction and had failed to chrono it.

Ms. Moore further testified that she did not believe that she acted in a rude or discourteous manner towards the probationer because she did not degrade the probationer, or speak rudely to her, but just advised her that she was in violation of her probation, that she should not be there, and that she did not appreciate her recording her group. Ms. Moore further felt that she did not act in a manner unbecoming of an officer because she did not identify herself as or announce that she was a probation officer or an officer for the Department.

Ms. Moore stated that after she was aware that a complaint had been filed, she and Officer Bailey contacted Lieutenant Estepa to advise him of what they had been told and of the incident. According to Ms. Moore, Lieutenant Estepa responded that he was unaware of a complaint being filed against the two officers, and so told them in substance not to worry about it, which Ms. Moore interpreted as that there was no wrongdoing, and to just move on with her duties. Ms. Moore testified in substance that since receiving the written reprimand she had not received training or counseling on how to act if she encountered an offender while off duty.

Officer Moore testified that she was not given access to the investigation file, and that she was not told that she had the right to view the file, nor was she aware that she could view it. Ms. Moore also stated that her purpose behind her actions with the probationer on August 22, 2019 was to make sure that no bad image or bad review came upon the Division or the specialty courts.

Upon cross examination, Ms. Moore testified that she was a training officer with Parole and Probation, and that it was her job to train new probation officers on how to do their job, and so it was incumbent on her to know the policies of her division.

Ms. Moore was asked about Exhibit A (Employee Exhibit 2), which was Ms. Moore's grievance, to which was attached a narrative that describe the incident. Ms. Moore stated that she was at the Saint with her group for several hours on the night of the incident, and that she drank more alcohol after the probationer left the bar, and that at the time of the incident she was not the probationer's supervising officer, but had been previously. However, Ms. Moore stated that she knew the probationer had the intoxicants condition because many probationers have that condition, and that as she had previously supervised the probationer, she was aware of her conditions.

Ms. Moore stated that she believed the probationer had a restriction that she was not allowed to access, control or possess alcohol, and so should not be allowed to be at the bar. Ms. Moore also stated that she did not advise her fellow officer not to go on stage if it was going to embarrass the Department, as she did not intend for the incident to be recorded, and that she took the phone out of the probationer's hand. Ms. Moore also stated that she told the probationer she should leave, and that the probationer was escorted out of the bar by a member of her party.

Ms. Moore also stated that it was her opinion that she was not taking any enforcement action towards the probationer during the incident, and that it was not her routine practice to take cell phones out of person's hands when she felt that the person should not be recording something, and that it was not her common practice while off duty to tell someone they should not be somewhere when she felt the person should not be there. Ms. Moore also indicated that she did not make an entry into OTIS of her contact with the probationer as a result of the August 22, 2019 incident, although she had stated in substance to her friends when she first saw the probationer that she could deal with the probationer being at the bar at work the following day, which she did not do.

In looking at the Employer's Exhibit C (Policy 901), Ms. Moore agreed that the Policy did not state that an officer had to enter a chrono only when the chrono would have a negative impact on the offender, but any impact, or that a chronological entry was required only when an officer was on duty. Ms. Moore also testified that her understanding of the policy was different than what the policy stated.

Ms. Moore further testified that she thought it was discourteous to take a phone from someone's hands, and that it was public record as to whether someone was on probation.

In looking at Policy 901(3)(A), Ms. Moore stated that chronos should be entered within one working day of receipt of the information, but that she had not done so, and that she never told anyone about the incident when she returned to work from leave.

Ms. Moore testified that at the time of the investigation of the incident by DPS she was represented by counsel, and that she did not ask for copies of any of the evidence that DPS had obtained during the investigation of the August 22, 2019 incident, nor did her attorney to her knowledge, although Ms. Moore stated that she did not realize she had to ask for the material.

Ms. Moore testified that Employee Exhibit 1 was the written reprimand that had been issued to her. Upon redirect, in looking at Policy 901.3 (Employer's Exhibit C), Ms. Moore stated that chronos should be entered under normal circumstances within one working day of receipt of the information, and that if the information was received on the last day of the month it should be entered by the end of that business day, and that the use of the language "business day" made her think that she had to be on duty for the Policy to apply, as to her typically "business day" meant that she was on duty and working. Ms. Moore further stated that Policy 901 was explained to her before the August 22 incident as being concerned with on duty contact, and that it did not also relate to off duty contact. However, upon cross examination Ms. Moore stated that it would make no sense for DPS to not require that officers make chronos on their days or time off from work.

Ms. Moore also stated in substance she would have responded differently if she saw someone breaking the law who was on probation, and thus supervision, than she would have responded if the individual was not supervised by DPS, and that she would not have interacted with the individual not on supervision the way she acted with the probationer. Ms. Moore further stated that she would not have confronted someone at a bar who she did not know if that person had been recording her friend on stage, and that she only confronted the probationer because the probationer was breaking the law and would have used the recording against the Division.

Upon being asked as to why Ms. Moore did not arrest the probationer if she believed that she was violating the law, Ms. Moore responded because she was not on duty, and that she would not take action to enforce the law while off duty because to do so is dangerous. Ms. Moore also testified that she was trained to be professional and courteous towards probationers, and that she was not trained to embarrass probationers.

Member Russell asked Grievant when she told the probationer that she should not be at the bar because of restrictions if she specifically said that the probationer was on probation, or just that she said that she should not be there because of restrictions, to which Ms. Moore responded that

she could not recall. Member Novotny asked what the probationer's response was, to which Ms. Moore responded in substance that the probationer responded with profanity and swung her arms at her. In turning to Exhibit 2, the narrative provided with Ms. Moore's grievance, in the second paragraph, Ms. Moore acknowledged that she advised the probationer that she was on probation and should leave.

Lieutenant Estepa testified that his duties at Parole and Probation included being personnel commander, that he was stationed in Carson City, NV, and prior to this he was assigned to the Reno Parole and Probation Office, where he was assigned a supervision unit, of which Ms. Moore was part of. Lieutenant testified that at some point he became aware of an incident involving Ms. Moore that occurred in August 2019 through a letter from the Washoe County Alternate Public Defender's Office. This letter notified Lieutenant Estepa of some concerns regarding Ms. Moore during an incident where Ms. Moore was with other court employees while off duty. The author of the letter stated that Ms. Moore (at that time Ms. Weaver) was involved in an incident at show in Reno, NV along with two court employees where Ms. Moore publicly announced that the probationer was on probation and that she could take possession of the probationer's phone because she was a probation officer.

Lieutenant Estepa stated that after receiving this letter he generated the Department complaint form referencing the letter and he sent it to OPR, which he did because the matter involved possible misconduct. Lieutenant Estepa also stated that he was never interviewed as part of OPR's subsequent investigation.

When testifying about Policy 901 (Employer's Exhibit C), Lieutenant Estepa stated that a chronological entry was supposed to be entered by a probation officer when an incident had an impact on an offender's supervision, and that officers were not trained to only enter chronos when they had a tendency to reflect negatively on a probationer, and reiterated that whether it was positive, negative or neutral, an officer would enter a chrono if it would have an impact or bearing on a probationer's supervision. Lieutenant Estepa also testified that the policy did not state that chronos were only required when an officer was on duty and had contact with an offender, and that it could be common for officers to make chrono entries from having contact with offenders when officers were off duty, and that he had made such entries several times over his time of being an officer.

Lieutenant Estepa stated in substance that if someone was a training officer he would expect they would know that an officer would make a chrono whether on duty or off duty if the officer had contact with a probationer and the contact could impact the offender's supervision. Lieutenant Estepa also explained to the EMC the training that probation officers received upon becoming a probation officer, which involved the officers going through a 15-19 week basic academy where they learn

how to be peace officers, and once they graduate they go to their respective divisions where they would receive specific training of about four weeks, mostly classroom presentations on the specific functions of being a Parole and Probation Officer. After this the officers went through training known as PST where they worked with an officer for about 12-15 weeks on how to work independently on their own.

Lieutenant Estepa stated that the officers are taught during the training to make chrono entries if they have a contact with an offender whether on or off duty, and Lieutenant Estepa also stated in the courses he taught in chrono any contact that an officer had with an offender should be recorded in the system. Lieutenant Estepa also stated that he would expect a training officer to teach this information to new officers.

Lieutenant Estepa noted that he did not discipline Ms. Moore when she came to him after he received the letter from the Alternate Public Defender's Office. Lieutenant Estepa further testified that probation officers were taught how to act towards probationers, and were taught, whether on or off duty, to be professional toward probationers and treat them with respect and courtesy.

Lieutenant Estepa stated that he never interviewed the probationer or spoke with her. Lieutenant Estepa was asked if the probationer would be restricted from accessing or controlling alcohol, to which Lieutenant Estepa stated that it depended on the probation agreement ordered at sentencing, but that it was common in probation agreements that either there was a flat out prohibition on a probationer being in possession and control of alcohol or the probationer could not possess more than the legal limit of alcohol.

Lieutenant Estepa was asked about Policy 901, and he stated that officers were trained on Policy 901 when they first "come on board." Lieutenant Estepa noted that the scope of the training was to teach officers to be familiar with the offender tracking and information system and how to do chrono, and the course was one day, and the rest of the training was a continuation of practical learning. Lieutenant Estepa acknowledged that he did not personally know whether it was part of Officer Moore's training as to whether or not to chrono contacts with offenders while the officer was off duty, but that he had never encountered a probationer and not chronoed that encounter. Lieutenant Estepa also stated that DPS had no specific policy on how officers were to treat probationers while the officer was off duty.

Lieutenant Estepa was asked about Employer Exhibit G, DPS' Disciplinary Policy, Section 340.2, and it was noted that an officer's off-duty conduct could be grounds for discipline, and in looking at Subsection (c) of that policy, titled "Discourtesy," noted it was a violation of DPS policy to treat a member of the public discourteously, whether on or off duty. Lieutenant Estepa reiterated that a probation officer will undergo a significant amount of training with an experienced

probation officer in order for the new probation officer to learn his or her job, and then the new officers are taught when and how to make entries into OTIS, and that proficiency in applying DPS policy must be shown by the trained probation officer. Lieutenant Estepa also stated that there were policies that applied to officers while only on duty dealing with how to operate as a probation officer.

Lieutenant Ashby testified that he was currently assigned to the Reno Office and oversaw the Specialty Court Unit, the low risk supervision unit and the interstate compact unit, but at the time of the incident in August 2019 he did not oversee the Specialty Court Unit, but did at the time the reprimand was issued to Ms. Moore, and supervised her at the time the written reprimand was issued.

Lieutenant Ashby stated that the duties of probation officers in the specialty court unit included checking and verifying conditions of probation, and that officers conduct home contacts, field contacts, and work with the Specialty Court team to discuss probationers' cases and attend court hearings and make sure that probationers are following through with their obligations.

Lieutenant Ashby also noted that it was common practice for probation officers in the Specialty Court Unit to enforce restrictions of probation on probationers even if the probationer was not on an officer's direct caseload. Lieutenant Ashby also felt that he had a professional and good working relationship with Ms. Moore. Lieutenant Ashby stated that he issued the written reprimand, and in looking at DPS' Exhibit B, he identified the written reprimand issued to Ms. Moore. Lieutenant Ashby testified that prior to issuing the written reprimand he reviewed the findings of the OPR investigation and OPR file. Lieutenant Ashby stated that the allegations against Ms. Moore were found to be sustained, and that he found Ms. Moore had violated DPS regulation and policy during the August 22, 2019 incident. It was noted that Ms. Moore was charged with several charges, including violating DPS Policy 340.3.1(c)(2), which was bullying, discourteous or disrespectful treatment of any member of the public.

Lieutenant Ashby explained that the policy meant that DPS employees must act professionally with any member of the public and co-workers. Lieutenant Ashby stated that from the very beginning of an officer's training professionalism was taught, and to be courteous and professional to the public, including probationers. It was determined Ms. Moore violated Policy 340.3.1(c)(2) because she confronted the probationer, removed her cell phone, identified her as being a probationer in front of the general public, which might not be general knowledge to people with the probationer, and which stigmatized the probationer, and by telling her she was not allowed to be in the bar, which was ultimately erroneous, and which caused the probationer embarrassment, and ultimately for the probationer to leave the bar.

Lieutenant Ashby stated that the reason it was erroneous to tell the probationer to leave the bar was because the probationer had no specific condition saying she was not allowed to be in a bar or lounge, which was often a specific condition of probation, and the probationer did not have this restriction as a condition of her probation. Lieutenant Ashby further stated that to the best of his knowledge all probation officers receive a copy of the DPS disciplinary policy when hired and are required to sign and acknowledge that they have read and understand the disciplinary policy. Lieutenant Ashby also stated that in his experience field training officers train new probation officers to be courteous to probationers, although there was no specific training at that point in time.

Lieutenant Ashby further testified that peace officers were held to a higher standard of conduct than normal members of the public whether on or off duty, and that the policy of courteous treatment applied when an officer was also off duty.

Lieutenant Ashby felt that what Ms. Moore did on August 22, 2019 had a nexus with her job because Ms. Moore had previously supervised the probationer, Ms. Moore was known to probationers as being a probation officer, so the probationer knew Ms. Moore was a probation officer, and then Ms. Moore tried to take enforcement action on the probationer's conditions of probation (instructing probationer to leave the bar, taking the cell phone from probationer and identifying probationer as being on probation), and so placed herself with a direct nexus of being in a position of authority being a probation officer.

In looking at Exhibit G, the DPS Disciplinary Policy, Subsection (c), Lieutenant Ashby stated that the class of offense Ms. Moore committed was a Class Two, and the range of punishment required for a first offense was a written reprimand, while the maximum was a suspension. In this case, Lieutenant Ashby stated Ms. Moore was given the minimum discipline, as it was her first offense. Lieutenant Ashby noted that issuing a letter of instruction would have been inconsistent with DPS' disciplinary policy.

It was noted that Ms. Moore was also charged with engaging in unbecoming conduct of an officer that reflects unfavorably upon the Department, which was set forth in 340.3.1(R31). In explaining what this policy prohibits, Lieutenant Ashby stated that any on or off duty conduct that an employee knows or reasonably should know was unbecoming of a member of the Department, or which was contrary to good order, efficiency or moral or which tended to reflect unfavorably upon the Department or its members was prohibited, and that Ms. Moore violated this policy because a complaint had been filed by the Alternate Public Defender's Office due to Officer Moore's actions, which were ultimately sustained, thereby causing the Department discredit. The particular actions Lieutenant Ashby cited were removal of the probationer's cell phone, the way Ms. Moore identified the probationer in front of the public as being on probation, ordering the probationer to stop recording and then ordering the probationer to leave based on a non-

existent condition. Lieutenant Ashby stated that it surprised him that a probation officer would act this way towards a member of the public.

Lieutenant Ashby testified that violating the unbecoming conduct of an officer policy had a range of discipline ranging from a one to five, and that the appropriate level of punishment was an oral warning to dismissal. Lieutenant Ashby also testified about DPS Policy 901, stating probation officers are trained on when to make an entry in the offender tracking system, and that any contact with an offender should be chronoed, and that this policy did not apply only when an officer was on duty.

Lieutenant Ashby stated that making chronos when encountering probationers was important because it was a record that officers could stand on, it protected the officers in the event of encountering probationers, and officers were taught that if an event was not chronoed it did not happen. Lieutenant Ashby stated in substance that how and when to chrono was taught in one of the first classes officers were taught in training. Lieutenant Ashby stated that it would surprise him if a field training officer stated that he or she was unaware he or she was required to chrono an encounter with a probationer while off duty, or when the contact only has a possible negative impact on a probationer/offender.

Lieutenant Ashby determined that Ms. Moore violated DPS Policy 901 as a result of the August 22, 2019 incident because she had not made a chronological entry within one working day of the encounter with the probationer. Lieutenant Ashby also stated that he felt that a written reprimand was appropriate in this case because, with all of the allegations, there were two ranges of class one to five violations, and the discourteous treatment allegation was a class two, so that was the allegation that went to the forefront, and then according to the DPS disciplinary chart policy for a class two first offense the minimum level was a written reprimand. Lieutenant Ashby also stated that in his experience (he had been with the Department since 2007) officers could go on to have successful careers in the Department with written reprimands in their file.

Lieutenant Ashby indicated that it was a probation officer's duty to check for the status of violations, which entailed checking probation agreements and verifying conditions by conducting contacts and by attending staffing. Lieutenant Ashby also agreed that the Department encouraged officers to prevent violations of a probationer's probation. With respect to the probationer's probation, Lieutenant Ashby testified that he believed that the probation had a no-intoxicants clause, but had no specific restrictions barring her from entering a bar or lounge based off her probation agreement. Lieutenant Ashby was asked why the probationer did not have access to alcohol while at the bar, and he responded because the alcohol was behind the bar, although he acknowledged that the probationer could have walked up and purchased

alcohol. Lieutenant Ashby also noted that he never interviewed the probationer in connection with the August 22, 2019 incident.

Member Laney asked Lieutenant Ashby if he thought it was consistent with prior discipline to issue a written reprimand in this case considering it was Ms. Moore's first offense, to which he responds that the discipline was consistent with DPS policy.

The EMC deliberated on Ms. Moore's grievance. Member Laney stated that it was blurry to her as to whether the employee felt she was on or off duty, depending on how the situation benefitted or did not benefit her. Member Laney stated that if the incident was important enough to take the probationer's cell phone from her and tell her that she should not be present at the bar, but then she did not feel it was important enough to report the incident, one could not play both sides of the matter when it benefitted Ms. Moore. Member Laney also felt that the employee had not convinced her that the discipline was inappropriate.

Member Russell stated that she was not so convinced on discourteous treatment, unbecoming conduct or discrediting the Department, but that allegation D (Failure to document contact) was substantiated. As far as the alcohol access was concerned, Member Russell made a distinction between the ability to purchase closed containers and access to alcohol in a bar, where glasses of alcohol could easily be accessed. In going back to the allegation about discourteous treatment of a member of the public, Member Russell had concerns with how the investigation was handled, and so was leaning towards partially granting and partially denying Ms. Moore's grievance.

Member Laney added she was not as concerned that there were no more interviews performed during the investigation, as the employee never denied the fact that she removed the cell phone from the probationer's hands, did not deny that she used some form of wording to tell the probationer she should not be in the establishment, and that Member Laney never believed that it was in question whether or not the incident occurred as the employee stated in her own words. In knowing that the situation occurred, Member Laney did not see how courtesy could be applied to snatching someone's cell phone from their hand and telling that person they should not be somewhere, so to Member Laney the number of people interviewed made no difference.

Member Novotny asked what would have happened had the probationer not been recording, and if Ms. Moore would have gone back and said anything or recorded the incident, and would there have been disciplinary action for not recording the incident? Member Novotny stated in substance that she felt that it was wrong for Ms. Moore not to have documented the August 22, 2019 incident, and grabbing the cell phone but the not documenting the incident and failing to follow DPS Policy 901 was critical for Member Novotny.

Co-Chair Beigel stated that she believed that grabbing someone's cell phone was rude, so Allegation A sounded discourteous to her, and that the conduct was unbecoming of a DPS member. Co-Vice Chair Beigel also noted that although she did not believe it had been brought out in testimony, Ms. Moore's own statement in the documentation said that the probationer had saw Ms. Moore enter the bar, and that the probationer had mouthed: "That's my probation officer," so that Ms. Moore was aware that the probationer knew that Ms. Moore was a DPS employee. With respect to Allegation D, Member Beigel stated that Ms. Moore never documented the incident in the chronos regardless, and that had the probationer not complained they would not have known about the August 22 incident and no one would have been able to say she had not done her job, so she was satisfied with the written reprimand as it stood, as the class two was the lowest for one of the allegations in the written reprimand.

Member Laney made a motion to deny Grievance No.7023 for Jessica Moore, as the Grievant failed to prove that the agency violated NAC 284.638(3) or NAC 284.650 in issuing a written reprimand. The motion was seconded by Co-Chair Beigel and carried unanimously.

FINDINGS OF FACT

Based upon the testimony of the witnesses, the arguments made by the parties, the briefs, evidence, and documents on file in this matter, the EMC makes the following findings of fact. All findings made are based upon a preponderance of the evidence.

1. Grievant was a non-exempt State of Nevada employee.
2. Grievant worked as a probation officer for DPS on August 22, 2019.
3. On August 22, 2019, Grievant, after having dinner, went to a bar, the Saint, in Reno, NV with a small party of friends for a bachelorette party given for Grievant and in order to watch a show at the Saint.
4. Approximately 30 minutes after entering the bar Grievant encountered a member of the public who was on probation.
5. Grievant, although she did not directly supervise the probationer, was aware that the probationer was on probation.
6. Grievant was unaware of the exact terms of the probationer's probation agreement.
7. Sometime during the night of August 22, 2019, a friend of Grievant who worked for DPS was called on stage to participate in an act.
8. Grievant then noticed the probationer was, with her cell phone, recording her friend onstage participating in the act.
9. Grievant went to probationer, took the probationer's cell phone from her, and stated in substance that the probationer was on probation and should not be at the bar.
10. The probationer was then escorted out of the bar by a member of Grievant's group.
11. DPS Policy 901 concerns entering chronos, or chronological notations, which includes entering contacts with offenders (including the probationer in this grievance) into DPS' OTIS where the contact has the possibility of impact upon an offender's supervision.
12. DPS also has policies concerning treating members of the public, including the probationer, which apply whether a DPS probation officer was on or off duty.
13. DPS Policy 340, Disciplinary Policy, states:
 - (a) Any act of commission and/or omission that constitutes misconduct.

- (b) Any activity that is incompatible with an employee's conditions of employment established by law, regulation, standard or which violates a provision of the Nevada Administrative Code (NAC), including NAC 284.650, NAC 284.653 and NAC 284.738 through NAC 284.771, inclusive.
 - (c) Any violations of any Department policy, rule, regulation, procedure or other directive, including any activity outlined in the Prohibitions/Class of Offense Guide below.
 - (d) Failure to abide by the standards of ethical conduct.
- 14. Grievant failed to chrono the August 22, 2019 incident involving contact with the probationer, into OTIS.
 - 15. Grievant did not report the incident to anyone in her chain of command at DPS until she heard a complaint about the incident had been made.
 - 16. The August 22, 2019 incident was brought to the attention of Lieutenant Estepa through a letter from the Washoe County Alternate Public Defender's Office.
 - 17. Lieutenant Estepa, due to the circumstances alleged in the letter from the Washoe County Alternate Public Defender's Office, initiated actions that led to DPS' OPR investigating the August 22, 2019 incident.
 - 18. As a result of the August 22, 2019 incident and the OPR investigation, a written reprimand was issued to Grievant on December 13, 2019.
 - 19. The written reprimand stated that the following allegations had been sustained against Grievant:
 - a. That Grievant acted in a discourteous manner to the probationer.
 - b. That Grievant's actions on August 22, 2019 were unbecoming of a member of DPS.
 - c. That Grievant's conduct on August 22, 2019 brought discredit to DPS;
 - d. That Grievant failed to document her contact with the probationer.

CONCLUSIONS OF LAW

- 1. For this grievance, it was Grievant's burden to establish by a preponderance of the evidence that DPS abused its discretion by issuing her the written reprimand on December 13, 2019, for the above noted actions which took place on August 22, 2019.
- 2. A grievance is any act, omission or occurrence which an employee who has attained permanent status feels constitutes an injustice relating to any condition arising out of the relationship between an employer and an employee. NRS 284.384(6).
- 3. Ms. Moore's grievance falls within the jurisdiction of the EMC under NRS 284.073(1)(e).
- 4. Grievant violated DPS Policy 340.3.1, as she acted in a discourteous manner towards a member of the public, the probationer, on August 22, 2019 by grabbing the probationer's cell phone from her hand, stating in public that the probationer was on probation, and telling the probationer that she should leave the bar.
- 5. DPS Policy 340.3.1 applied to DPS probation officers whether the officer was on duty at the time the alleged conduct occurred.
- 6. Grievant, by her actions on August 22, 2019 of grabbing the probationer's cell phone from the probationer's hands, stating in public that the probationer was on probation and then telling her she should leave the bar, acted in a manner that was unbecoming of a member of DPS, and which brought discredit to DPS.
- 7. Grievant violated DPS Policy 901, in that Grievant failed to enter (chrono) into DPS' OTIS the encounter with the probationer when the encounter/contact had the possibility of impact upon an offender's supervision.

8. DPS Policy 901 concerning entering incidents into DPS' OTIS that could possibly impact an offender's supervision applied whether or not a probation officer was on duty at the time of the offender contact.

DECISION

Based upon the evidence in the record, and the foregoing Findings of Fact and Conclusions of Law, and good cause appearing therefor: Grievance No. 7023 is hereby DENIED.

MOTION: Moved to deny grievance #7023 Based on the testimony and evidence, Grievant failed to prove that DPS abused its discretion in issuing Grievant a written reprimand on December 13, 2019, as a result of Grievant's conduct on August 22, 2019.

BY: Member Laney

SECOND: Co-Vice Chair Beigel

VOTE: The vote was unanimous in favor of the motion.

9. **Discussion and possible action related to Motion to Dismiss Grievance #6668 of Robert Stepien, submitted by the Department of Public Safety, supporting documentation, and related oral argument if any. Possible action may include denying the Motion to Dismiss, granting the Motion to Dismiss and consequently dismissing the grievance, or any combination of those possible actions – Action Item**

The above entitled grievance and the Motion to Dismiss submitted to the Employee Management Committee ("Committee") by the State of Nevada, Department of Public Safety ("DPS").

The Committee is authorized to consider motions to dismiss and corresponding documents pursuant to NAC 284.695(1), which allows the Committee to answer a request to consider a grievance without a hearing if the matter is based on a previous Committee decision or if the matter does not fall within the Committee's jurisdiction.

The above-referenced motion to dismiss was heard by the Committee³ on October 1, 2020. Senior Deputy Attorney General Brandon Price ("Mr. Price") represented DPS. You represented Major Robert Stepien ("Major Stepien").

DPS argued that Grievant Mr. Stepien was a major at DPS and that he had filed a grievance challenging decisions by DPS that were completely discretionary and within the DPS

³ The Committee members present representing a quorum were: Pauline Beigel (NDOT), who chaired the meeting; Dana Novotny (GOED), Turessa Russell (UNLV) and Tonya Laney (DMV). Counsel for the EMC, Deputy Attorney General Robert A. Whitney, Breece Flores, EMC Coordinator and Division of Human Resource Management Administrative Assistant II Ivory Wright Tolentino, were also present.

Director's authority to make. DPS also filed its motion on the grounds that the EMC did not have jurisdiction on the matters set forth in the grievance.

DPS stated that Major Stepien was assigned to the Nevada Highway Patrol ("NHP") Division Northern Command from May 1, 2017 through August 12, 2019. At that time the NHP Division was made up of a Northern Command and a Southern Command, with the Northern Command encompassing operations for the Northern part of the State. Major Stepien was responsible for staff management, including peace officers and civilian staff, and was responsible for ensuring that operations of NHP were properly carried out. Major Stepien was also responsible for development of NHP goals, reviewing budget requests, developing and enforcing policies and procedures, disciplining employees, as well as other law enforcement activities.

In January 2019 George Togliatti was appointed as the new Director of DPS, and right after the appointment he began to assess the state of the Department to determine what, if anything, needed to be done to ensure that the Department was operating properly and to ensure a successful environment.

Director Togliatti decided to conduct a full review or analysis of NHP to better understand how employees engaged with management, how policies and procedures were affecting staff and operations, and he wanted to get an assessment of workplace efficiency and the overall culture at the NHP.

The review pertained to NHP as a whole and did not focus on one area or target any employee in particular, and the review was headed by a DPS captain who did not work for NHP at the time. Additionally, there was a committee created to conduct the review. The committee conducted interviews of approximately 10% of NHP staff who were randomly selected. All of the employees interviewed were asked the same set of questions, and the committee then prepared a report of what they found during the review process. The final report was finished July 25, 2019, and it revealed significant issues with respect to employee engagement at NHP and the overall culture and environment at NHP, in particular at Northern Command. The report also confirmed many of the complaints received by the new Director. Accordingly, the Director made a discretionary decision to assign Major Stepien to the Investigations Division on a temporary duty assignment, after which the pandemic hit, which impacted some of the operations and projects DPS had going on, and Major Stepien was still working the Investigative Divisions.

It was argued by DPS that Major Stepien was still a major, his salary was the same as it was when he was with Northern Command, he still had a patrol vehicle, and that he filed his grievance to contest the Director's discretionary decision to assign him to the Investigations Division. DPS

also noted that Major Stepien claimed that the review by DPS was arbitrary and capricious, was unlawful, and that he claimed he was reassigned due to his gender. Additionally, DPS stated that it filed its motion to dismiss arguing the EMC did not have jurisdiction of the matters raised in Major Stepien's grievance, and that he sought two forms of relief, that he be immediately reassigned to NHP Northern Command, and that DPS not be allowed to assign him to any other position without due process.

DPS argued that the grievance should be dismissed for three reasons: the EMC lacked jurisdiction to hear the grievance, Major Stepien could not demonstrate that he suffered any sort of injustice that was grievable, even if it was assumed what he said in his grievance was true, and the third reason was that the EMC could not grant the relief requested by Major Stepien. It was also noted that throughout the grievance process Major Stepien was placed on a temporary duty assignment and claimed that this was an involuntary transfer. It was also noted that the EMC's authority was limited by statute and regulation, and NAC 284.658(2) defined what a grievance was and was not, and that the term did not include a grievance for which a hearing was provided by NRS 284.376, and under that statute, Subsection 1, appeals of involuntary transfers must be filed and heard by the personnel hearing officer. DPS argued that because hearing officers with the Personnel Commission had exclusive jurisdiction to hear allegations of involuntary transfers, the EMC did not have the authority to review whether or not DPS' actions in fact constituted an involuntary transfer.

It was also argued by DPS that the EMC's frequently asked questions website recognized that involuntary transfers were not matters for which the EMC was charged with reviewing. Furthermore, it was argued, discretionary decisions like the one made in this case by the DPS Director rested solely with the appointing authority, and no one had the authority to second guess those decisions, and that under NRS 284.020(2) agency heads had the authority to manage their own affairs as they saw fit, so if the EMC were to review the decision to assign Major Stepien to the Investigations Unit then it would be violating that statute. It was also noted that the EMC had previously held that it will generally not put itself into the shoes of the appointing authority, and that the appointing authority had a great deal of latitude in managing the affairs of its employees.

DPS stated that the EMC did not have jurisdiction to review DPS' employee engagement study, which was DPS own internal review of its operations. The notion that a state agency did not have the authority to conduct a review of itself and conduct its own analysis was absurd, according to DPS. DPS also argued that it did not conduct an organizational climate study, rather DPS conducted an employee engagement diagnosis to analyze the extent to which NHP employees were engaged in their work and whether employees were engaged in achieving the overall strategic goals of the organization. It was noted

that some of the topics assessed during the review involved matters like the overall climate of the organization, but that there was nothing in NRS/NAC Chapter 284 that prohibited a state agency from conducting its own review or climate study. It was also submitted to the EMC that when a new director came in it was incumbent upon the director to get “a lay of the land” and assess its office environment, and that failure to do so would have resulted in a disservice to Nevada citizens.

It was argued that the EMC had no jurisdiction to review whether Major Stepien’s due process rights were violated, as the definition of grievance stated that a grievance was not an action where a hearing was provided by Federal law, and that due process violations could be taken up with the U.S. EEOC, and therefore it would not be appropriate for the EMC to hear that issue. Additionally, in order to establish a due process violation Major Stepien would have to prove that a property or liberty interest was violated in his situation, and essentially he would be asking the EMC to determine if his reassignment was an involuntary transfer, and that the EMC did not have the jurisdiction to make that kind of determination. It was also argued that under the facts alleged in the grievance Major Stepien could not demonstrate that he suffered any sort of injustice, as he had the same position, same rank and same patrol vehicle as he had when with the Northern Command, so he suffered no injustice.

It was also noted that EMC had no jurisdiction over the gender discrimination claims, which Grievant had conceded. Finally, it was argued that the EMC did not have the authority in statute or regulation to direct the DPS Director to assign an employee to a specific area in their agency; rather, that discretion rested solely with the agency. DPS also argued that the EMC had no authority to make a monetary award. Thus, DPS requested that the grievance be dismissed without a hearing.

Mr. Anthony Hall Esq. Simons Hall & Johnston argued that the standard of review was that the EMC had to assume everything you said was true, and that everything that Mr. Price said was wrong. Mr. Anthony Hall Esq. Simons Hall & Johnston further argued that every argument Mr. Price made was based on the EMC making a factual determination that what he said was true and correct, but that the law said exactly the opposite must be done, and that the law required that the EMC take what you said as accurate.

Mr. Anthony Hall Esq. Simons Hall & Johnston referenced *Stacy Linder v. State of Nevada*, (Nevada State Personnel Commission Administrative Case No. 2002575-CC) arguing that it was instructive to Major Stepien’s grievance, and that in *Linder* NDOC specifically made the argument that DPS was making in the instant grievance, that the hearing officer had no jurisdiction because the event in that case was just a reassignment and not an involuntary transfer, and that the hearing officer in *Linder* said that NDOC was wrong, just like DPS was wrong in this case. The hearing officer in *Linder* stated that she needed to hear the facts so she

could determine what the matter was, and that in the hearing, while NDOC tried to falsely claim the action as a reassignment, it was a matter of fact that the elements of what happened established that the action was an involuntary transfer, so she found the matter was in fact an involuntary transfer, so that in fact the hearing officer had authority to make a determination on whether the issue was an involuntary transfer or a reassignment, and went on to determine that the transfer was done improperly. Mr. Anthony Hall Esq. Simons Hall & Johnston argued that such a situation was exactly what occurred in Major Stepien' s case, as DPS changed its story, calling the action something that it was not, but that DPS also engaged in a pattern of false conduct in order to target Major Stepien.

Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that Major Stepien was flat out targeted by DPS. Mr. Anthony Hall stated that DPS began by going to a woman to try and get her to take Major Stepien' s position, but she refused to go along with that course of action. When this person did not go along with that course of action, you argued that DPS came up with a new scheme, which was a climate survey, and that in fact DPS initially called the action a climate survey until someone realized that it was illegal. Mr. Anthony Hall Esq. Simons Hall & Johnston stated that DPS used this climate survey to punish and transfer Major Stepien, and that these facts must be assumed to be true. Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that if those facts happened the EMC absolutely had jurisdiction over the grievance.

Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that once Major Stepien' s transfer was completed documentation was generated that stated Major Stepien was permanently and official transferred, which would have normally given him rights to appeal the transfer, but Major Stepien did not receive a 5 days-notice, as DPS changed the documentation so that the documentation said that DPS' action was not really a transfer, it was a TDY, a temporary transfer. Thus, the EMC needed to hear the facts and see what DPS' action really was in this situation. Mr. Anthony Hall Esq. Simons Hall & Johnston also stated that the reality was when DPS made this new game that the transfer was a temporary assignment Major Stepien' s right to appeal the action was taken away, and the change was fake and could be proven.

Mr. Anthony Hall Esq. Simons Hall & Johnston further stated in substance that witnesses would testify to this fact. Mr. Anthony Hall Esq. Simons Hall & Johnston also stated that if one looked at where DPS said its action was a temporary assignment DPS had assigned specific tasks to Major Stepien, but that in reality he has done nothing for 14 months, and that this was a way to deprive Major Stepien of his rank, reputation and overtime. Mr. Anthony Hall Esq. Simons Hall & Johnston again argued that the EMC had to assume this information you presented was true.

Mr. Anthony Hall Esq. Simons Hall & Johnston argued that based on the facts Major Stepien's grievance was a legitimate and appropriate grievance over which the EMC had jurisdiction. Mr. Anthony Hall Esq. Simons Hall & Johnston noted that in the definition of grievance, the EMC had jurisdiction over working conditions and hours, and that clearly working conditions was an issue in this case. Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that a violation of due process was an interpretation of the law and was also within the EMC's jurisdiction, and that Mr. Price was wrong about the EEOC having jurisdiction of due process violations, and that the EEOC only had jurisdiction of Title VII issues, and that in fact the two previous grievance hearings held earlier in the day before the EMC dealt with due process rights, and that following procedure was just another word for due process. Mr. Anthony Hall Esq. Simons Hall & Johnston further argued that the EMC had jurisdiction over the climate study that took place and the contested performance report, and that the fake, illegal climate study was used as a performance report, and you reiterated that the evidence would show Major Stepien was targeted. Mr. Anthony Hall Esq. Simons Hall & Johnston also noted that whether the transfer was temporary or permanent was also another matter the EMC had jurisdiction over. Additionally, you also stated that the EMC had remedies to fix the situation, and that in any event the remedies available did not deprive the EMC of jurisdiction.

Mr. Anthony Hall Esq. Simons Hall & Johnston argued that Mr. Price was also wrong on there being no monetary harm to Major Stepien, as overtime could be awarded by the EMC, and that if Major Stepien was deprived of overtime by the actions taken by DPS this would be considered compensatory damages.

Mr. Price argued that he was not asking the EMC to make a factual determination at this stage of events, but that if the EMC took as true that Major Stepien's assignment to the Investigations Division was in fact a transfer then the EMC would not have jurisdiction to review whether the action was an unlawful transfer. Mr. Price also noted that you cited to *Linder*, which he felt helped his position because in that case it was determined that a hearing officer did have jurisdiction to review an involuntary transfer, and that the EMC was not a hearing officer, and so required that the grievance be dismissed by the EMC.

Mr. Price also again noted that Major Stepien was still a major at DPS, and that he could not be reimbursed for overtime never worked. Mr. Price also argued that no climate survey took place in this grievance, and that if a climate survey did take place there was nothing precluding DPS from performing its own climate survey, and that you never provided any law disputing this.

Mr. Anthony Hall Esq. Simons Hall & Johnston argued in response that the argument made about the hearing officer making the determination was exactly your point, and that what DPS did when it said their action

was a transfer, there would have been jurisdiction to go to a hearing officer, but when DPS changed what it was calling its action it deprived Major Stepien of the ability to go before a hearing officer, and that DPS had created a transfer in fact, and that the end result would be that DPS was creating a situation where its conduct was unreviewable. Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that the EMC had the ability to look at DPS' actions and determine whether or not the actions constituted an involuntary transfer. Mr. Anthony Hall further argued that climate surveys could be performed, but that HR must perform them, and that HR had specific rules connected to climate surveys, and that those rules were not complied with in this case and that made the survey illegal. Mr. Anthony Hall Esq. Simons Hall & Johnston also argued that the climate study was illegally used as a performance review.

Mr. Price concluded that the EMC simply had no jurisdiction to review an involuntary transfer, and that there was nothing stopping Major Stepien from filing an appeal with the hearing office, and he did not do so. Mr. Price further argued that there was no performance review conducted in this case, and that Major Stepien was not disciplined.

The Committee deliberated on the Motion. Member Russell stated that she was leaning towards moving the grievance forward, as the facts were unclear. Member Laney disagreed, saying that it was clear the EMC had no jurisdiction over the matter, even assuming that the harassment and discrimination allegations were removed. Member Laney also stated in substance that when looking at the other facts of the case they were all residual of the main claim, so that if the main claim was granted a hearing in another jurisdiction the EMC would have to wait until that matter was concluded until being able to take action on the other allegations. Member Novotny stated she believed the grievance was not within the EMC's jurisdiction. Co-Chair Beigel felt that there were a lot more facts presented than when the EMC only had Major Stepien's grievance.

Member Laney also stated that she agreed with the fact that there was a separate hearing process for determining if the Grievant was involuntarily transferred which was not within the EMC's jurisdiction, and that they had heard previous cases where there was confusion and where employees thought that the EMC were the hearing officers for those matters.

Member Laney moved to grant the motion to dismiss Grievance No. 6668 for Robert Stepien based on a lack of jurisdiction as outlined in NAC 284.695(1). The motion was seconded by Co-Chair Beigel, and carried by a majority of three to one, with Member Russell voting against the Motion.

MOTION: Moved to grant the motion to dismiss grievance #6668 due to lack of jurisdiction.

BY: Member Laney

SECOND: Co-Vice Beigel

VOTE: The vote was 3/1 with Member Russell voting nay of the motion.

10. Public Comment

There was no public comment in the North or the South.

11. Adjournment

Co-Vice Chair Beigel adjourned the meeting at approximately 4:19 pm.