STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY
and MUNICIPAL EMPLOYEES (AFSCME),
COUNCIL 18, AFL-CIO,

09-PELRB-201(

Petitioner,

vs.

PELRB Case No. 111-10

STATE OF NEW MEXICO
ADULT PROTECTIVE SERVICES DIVISION,

Respondent.

DECISION AND ORDER

THIS MATTER having come before the Public Employee Labor Relations Board upon appeal by State of New Mexico, Adult Protective Services Division of Hearing Officer Juan Montoya's decision dated June 9, 2010, and the Board, having reviewed the pleadings and briefs and having heard oral argument of counsel for the parties, hereby upholds the Recommended Decision of the Hearing Officer granting AFSCME's cross-motion for summary judgment and denying the Adult Protective Services Division's motion for summary judgment. Pursuant to Rule 11.21.3.19 NMAC, the Board adopts and incorporates herein, with one exception, Hearing Officer Montoya's Recommended Decision and its Findings of Fact, Discussion, Conclusions of Law and Order. The exception the Board makes is as follows: While the Board believes that a contractual violation was committed, the Board does not believe that the employee's Weingarten rights were violated.

MARTÍN V. DOMÍNGUEZ
Chairman,
Public Employee Labor Relations
Board

Date: 10/12/10

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June 9, 2010

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RE: AFSCME v. Adult Protective Services Division
PELRB Case # 111-10

Dear Ms. Jeffers and Mr. Youtz:

After re-reading the Adult Protective Services Division's (Division) Motion for Summary Judgment and the Cross Motion for Summary Judgment filed by the American Federation of State, County and Municipal Employees (AFSCME) and listening to the audio recording of the hearing I conclude that the Division did violate the Public Employee Bargaining Act (PEBA) by violating Ms. Madine Byram's Weingarten rights and by conducting an investigation of Ms. Byram without first informing her of her Collective Bargaining Agreement (CBA), Article 24, Section 2 (1)(a)rights. Therefore the Division's Motion for Summary Judgment is denied and the AFSCME's Cross Motion for Summary Judgment is granted.

FINDINGS OF FACT:

The following are undisputed facts provided by the parties in the Motion for Summary Judgment or the Cross Motion for Summary Judgment.

The parties have entered into a successor collective bargaining agreement effective December 23, 2009.

Pursuant to Article 14 of the CBA currently in effect, allegations of violation, misapplication, or misinterpretation of the CBA except for Article 1 and 2 are subject to the negotiated grievance procedure set forth in the CBA. Pursuant to Article 24 of the CBA currently in effect, any meeting where the Employer is investigating and employee for possible disciplinary actions, the Employer shall: a) notify the employee at the outset of the meeting that the employee is being investigated for possible disciplinary action; b) on request, allow the employee the opportunity for union representation; and c) if the Employer elects to proceed with the interview, provide the employee with a reasonable amount of time to confer with his/her representative.

The State Personnel Board Rules provide that any employee in a non-safety sensitive position who has a second positive drug or alcohol test between 30-180 days after failing the first, who fails to complete a rehabilitation program after referral, or who refuses to cooperate in drug or alcohol testing is subject to disciplinary action including dismissal.

Pursuant to the CBA at Article 14, grievances must be initiated by presenting a written grievance to the Employer promptly and no later than thirty (3)) calendar days after the grievant or the Union was aware, or reasonably could have become aware, of the incident(s) giving rise to the alleged grievance.

On January 28, 2010, Mr. Ed Fox, a regional manager for Adult Protective Services went into Ms. Nadine Byram's office and had a conversation with her because he had been told by another supervisor that she smelled of alcohol and he wanted to observe for himself whether she smelled of alcohol.

Mr. Fox went into Ms. Byram's office, sat down on a chair in her office, rested his arm on her desk, and asked her how she felt about APS possibly moving to the Human Services Department.

At no time during this conversation did Mr. Fox notify Ms. Byram that he was investigating her for a possible violation of a drug and alcohol policy nor that she might be subject to discipline.

Mr. Fox informed Ms. Kosmicki, Ms. Bryam's direct supervisor, that he had reason to believe she had been drinking and that there had been reports from other staff that it appeared she had been drinking.

Mr. Fox informed Ms. Byram that Ms. Kosmicki would drive her to a lab where she would be tested and then would drive her home.

Mr. Fox asked Ms. Bram if she would agree to be tested, she agreed.

Ms. Kosmicki took Ms. Byram to the lab, where a breath test for alcohol registered .000.

DISCUSSION:

The Division has raised several issues in its Motion for Summary Judgment. Whether this Board may hear as prohibited practices issues that could have been brought as a grievance, whether sitting close to a person and asking questions unrelated to the odor of alcohol to smell their breath for alcohol is an investigatory interview and finally whether the first alcohol positive test in a two step progression that could lead to discipline is an investigatory meeting.

The issue of whether this Board may hear as prohibited practices issues that could have been brought as a grievance has been addressed in the past in a variety of cases. Therefore I will reiterate and incorporate that discussion in this case.

The Public Employee Bargaining Act (PEBA) and the Public Employee Labor Relations Board (PELRB) rules are the authority upon which this opinion is based.

The parties have made reference to well-established principles of federal labor law in their briefs. The New Mexico Supreme

Court has said that "we should interpret language of the PEBA in the manner that the same language of the National Labor Relations Act (NLRA) has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the National Labor Relations Board (NLRB) at the time the PEBA was enacted." see The Regents of UNM v. Federation of Teachers, 125 N.M. 401, at 408, 962 P.2d 1236 (1998). However NLRB has not directly addressed this issue under the NLRA because the NLRA, unlike PEBA, does not specifically make the non-compliance with a contract provision an unfair labor practice.

NMAC 11.21.3.21, Administrative Agency Deferral and NMAC 11.21.3.22, Arbitration Deferral of the PELRB rules allow for deferral at the director's discretion or by order of the Board. The provisions of the PEBA are mandatory as opposed to the discretionary nature of the rules. The applicable sections of the PEBA are:

10-7E-17. Scope of bargaining. (2003)

F. An agreement shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters. The grievance procedure shall provide for a final and binding determination. The final determination shall constitute an arbitration award within the meaning of the Uniform Arbitration Act [44-7A-1 to 44-7A-32 NMSA 1978]; such award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act. The costs of an arbitration proceeding conducted pursuant to this subsection shall be shared equally by the parties.

10-7E-19. Public employers; prohibited practices. (2003)

A public employer or his representative shall not:

H. refuse or fail to comply with a collective bargaining agreement.

The applicable sections of the PELRB rules are as follows:

11.21.3.22 ARBITRATION DEFERRAL:

A. If the subject matter of a prohibited practices complaint requires the interpretation of a collective bargaining agreement; and the parties waive in writing any objections to timeliness or other procedural impediments to the processing of a grievance, and the director determines that the resolution of the contractual dispute likely will resolve the issues raised in the prohibited practices complaint, then the director may, on the motion of any party, defer further processing of the complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

B. Upon its receipt of the arbitrator's award, the complaining party shall file a copy of the award with the director, and shall advise the director in writing that it wishes either to proceed with the prohibited practice complaint or to withdraw it. The complaining party shall simultaneously serve a copy of the request to proceed or withdraw upon all other parties.

C. If the complaining party advises the director that it wishes to proceed with the prohibited practices complaint, or if the board on its own motion so determines, then the director shall review the arbitrator's award. If in the opinion of the director, the issues raised by the prohibited practices complaint were fairly presented to and fairly considered by the arbitrator, and the award is both consistent with the act and sufficient to remedy any violation found, then the director shall dismiss the complaint. If the director finds that the prohibited practice issues were not fairly presented to, or were not fairly considered by, the arbitrator, or that the award is inconsistent with the act, or that the remedy is inadequate, then the director shall take such other action as he or she deems appropriate. Among such other actions, the director may accept the arbitrator's factual findings

while substituting his or her own legal conclusions and/or remedial requirements.

D. In the event that no arbitrator's award has been issued within one year following deferral under this rule, then the director may, after notice and in the absence of good cause shown to the contrary, dismiss the complaint.

E. The director's decision either to dismiss or further process a complaint pursuant to this rule may be appealed to the board under the procedure set forth in 11.21.3.13 NMAC. Interim decisions of the director under this rule, including the initial decision to defer or not to defer further processing of a complaint pending arbitration, shall not be appealable to the board.

In view of the fact that the rules are discretionary and the PEBA is not, the PEBA will be the focus of this discussion. On the one hand, we have a mandatory requirement, 10-7E-17 (F) NMSA 1978, that a grievance procedure be negotiated culminating in final and binding arbitration. On the other hand, refusal or failure to comply with a collective bargaining agreement is an enumerated prohibited practice, 10-7E-19 (H) NMSA 1978.

Our task, then, is to balance the requirements of PEBA, while implementing the purpose of the statute:

10-7E-2. Purpose of act. (2003)

The purpose of the Public Employee Bargaining Act [10-7E-1 to 10-7E-26 NMSA 1978] is to guarantee public employees the right to organize and bargain collectively with their employers, to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions.

As evident in 10-7E-2 NMSA 1978, the PEBA guarantees public employees the right to organize and bargain collectively with their employers, while promoting harmonious and cooperative labor-management relations and efficiency in government. This

purpose is similar to that of the NLRA. *See* NLRA Section 1, 29 USC § 141. Historically, collective bargaining contracts under the NLRA have included a process by which contract disputes between employees and employers can be resolved, in addition to the dispute mechanism embodied in the NLRA itself. (The National Labor Relations Act calls these disputes "unfair labor practices," while the PEBA calls them "prohibited practices.") Contract violations under the NLRA are normally resolved through grievance and arbitration provisions. Unfair labor charges are adjudicated before administrative law judges with the National Labor Relations Board.

Contracts entered into pursuant to the PEBA also include a grievance and arbitration clause, but the inclusion of such a clause is expressly required under 10-7E-17 (F) NMSA 1978. This bargained for grievance procedure applies to all contract violations, while the enumerated prohibited practices of PEBA are typically included in the contract. Thus, all prohibited practices under PEBA, such as discrimination, retaliation and interference with the right to form join or assist a union, are arguably subject to the mandatory grievance procedure.

However, PEBA authorizes and in fact mandates the PELRB to hear 10-7E-19 NMSA 1978, 10-7E-20 NMSA 1978 and 10-7E-21 NMSA 1978 violations of PEBA. Accordingly, the question becomes whether the parties may enter into a contract that as a practical matter has the effect of making some statutory provision ineffective. Namely, have the parties, by the provisions of the contract, excluded the PELRB from hearing what the statute has enumerated as prohibited practices that the PELRB is required to adjudicate. Because it is the PEBA that enables the parties to enter into collective bargaining agreements in the first instance, the contract is obviously subordinate to PEBA. Therefore, the contract provisions cannot be interpreted to divest the PELRB of jurisdiction to hear alleged prohibited practice violations.

Having excluded the aspects of well-established principles of federal labor law as non-applicable, PELRB rules, which are permissive on this issue, and the contract, which cannot dictate

to the PELRB as to its statutory duty, the only aspect left to consider is the apparent contradiction or inconsistency between provisions of the statute. Namely, 10-7E-17 (F) NMSA 1978 requires final and binding arbitration, while 10-7E-19 (H) NMSA 1978 makes the non-compliance with a collective bargaining agreement a prohibited practice.

This agency will apply all provisions of the PEBA to the best of its ability. Therefore, the resolution to the question addressed herein is that the PELRB will continue to accept prohibited practice complaints that allege a violation of the contract as the basis for the complaint.

On a case-by-case basis, this Board, will evaluate alleged contract violations brought as prohibited practices. Matters that allege violations of Sections 10-7E-19 (A) through 10-7E-19 (G), Sections 10-7E-20 (A) through 10-7E-20 (C) or 10-7E-20 (E) through 10-7E-20 (F), or Section 10-7E-21 of PEBA will continue to be heard by the PELRB. Matters that allege a violation of PEBA solely under Sections 10-7E-19(H) or 10-7E-20(D), refusal or failure to comply with a collective bargaining agreement, will be deferred to the grievance and arbitration process pursuant to NMAC 11.12.3.22.

As a practical procedural matter the PELRB anticipates that the parties will comply with the negotiated grievance procedure and timely file grievances pursuant to the contract, as well as filing prohibited practice complaints as warranted. Upon motion by either party the hearing officer shall determine whether a particular case will be deferred or not.

By use of this procedure this agency puts into effect both tracks provided in the PEBA for resolution of prohibited practice complaints and alleged contract violations. Use of this procedure will also balance the purposes of PEBA by enforcing both PEBA rights and the contracts that result from collective bargaining, while promoting harmonious labor-management relations and efficiency.

Wiengarten requires that the employee reasonably believe that discipline could result from the investigatory meeting and ask for union representation. In the instant case the employee was

never told the investigation was being conducted, in fact the meeting was conducted under false pretences, whereby the employee could not have known of the investigation and therefore not have known to ask for union representation.

A first alcohol positive test of a state employee is subject to referral for treatment. A second alcohol positive test of a state employee is subject to discipline. There cannot be a second alcohol positive test without the first alcohol positive test. Therefore the prerequisite first alcohol positive test is a part of the discipline process and qualifies for Weingarten protection and triggers the CBA, Article 24, Section 2 (1) (a) rights.

CONCLUSIONS OF LAW:

The Public Employee Labor Relations Board has the right and responsibility to hear violations of collective bargaining contracts as prohibited practices pursuant to 10-7E-19 and 20 NMSA 1978 Comp.

The PEBA rights enumerated in 10-7E-5 NMSA 1978 Comp. consisting of the right to form, join or assist a labor organization for the purpose of collective bargaining without interference, restraint or coercion is substantially the equivalent of the NLRA language, "to engage in concerted activities for mutual aid and protection".

Investigation of an act that is not subject to discipline in and of itself, but is a prerequisite for a subsequent act to become a disciplinary act is subject to Wiengarten and CBA Article 24, Section 2 (1) (a) rights.

ORDER:

Therefore I order the Division of Adult Protective Services to cease and desist from committing prohibited practices as prohibited by NMSA 10-7E-19. The Division is further ordered to post this letter order.

The posting of this letter order is to occur fifteen (15) days after the date of this order unless one or both of the parties properly appeals this matter to the Public Employee Labor Relation Board (PELRB). This document is to remain posted for an uninterrupted period of forty-five (45) days.

APPEAL:

Either party may appeal this hearing officer's decision by filing a notice of appeal with the PELRB staff at:

Public Employee Labor Relations Board
2929 Coors Blvd. NW Suite 303
Albuquerque New Mexico 87120.

Provisions for appeal are found at NMAC 11.21.3.19. An appeal must be filed within 10 work days of this opinion and otherwise comply with NMAC 11.21.3.19.

Sincerely yours,

Juan B. Montoya