STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CWA LOCAL 7076,
Complainant,

v. **PELRB No. 122-14**

STATE OF NEW MEXICO,
Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on the State's Appeal from the Hearing Officer's Report and Recommended Decision issued January 26, 2015 dismissing the union claims under §§19(A), (discrimination with regard to terms and conditions of employment because of the employee's membership in a labor organization); 19(D) (discrimination against union members in regard to a term or condition of employment in order to discourage membership in a labor organization; and §19(G) (refusing or failing to comply with a provision of the PEBA or board rule); but sustaining the union's complaint as to violation of §19(B) (restraining and interfering with employees' rights under the PEBA by unilaterally altering a mandatory subject of bargaining and past practice) and §19(F) (by failing to bargain in good faith).

Upon a 2-0 vote at the Board's April 7, 2015 meeting (Chair Westbrook being absent) the Board adopts the Hearing Officer's Report and Recommendation, including its Findings of Fact, Conclusions of Law and Rationale with the exception of those relating to finding a violation of the PEBA §10-7E-19(F). With regard to that finding the Hearing Officer's Report and Recommended Decision that the State failed to bargain in good faith is reversed on the ground that the Union did not adequately explain why it took no action in a six-month period to request bargaining.

IT IS THEREFORE ORDERED:

(1) The State, through the State Personnel Office, shall post a Notice in a form substantially conforming with that appended to this Order in all agencies that received the March 5, 2014 letter or that were otherwise prevailed upon by the State to alter their practices with regard to coding time spent in grievances and work time, wherever notices to employees are generally posted, describing the conduct that violated PEBA;

(2) The State shall reinstate its prior practice of allowing a grievant's supervisor, in the proper exercise of his or her discretion, to authorize paid time for grievances without requiring use of accrued leave and shall make whole any employees who were required to use accrued leave or leave without pay to the extent the union can subsequently show that their supervisors' decisions not to code their time as union time or time worked was prompted by the policy change expressed in the March 5, 2014 letter.

(3) The State is ordered to cease and desist from similar conduct in the future unless and until it either successfully negotiates the policy change embodied in the March 5, 2014 letter in a successor agreement or Memorandum of Understanding.

(4) The union claims under §§19(A), (discrimination with regard to terms and conditions of employment because of the employee's membership in a labor organization); 19(D) (discrimination against union members in regard to a term or condition of employment in order to discourage membership in a labor organization; §19(F) (failing to bargain in good faith) and §19(G) (refusing or failing to comply with a provision of the PEBA or board rule) shall be and are hereby **DISMISSED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Date: 4/15/15

R.E. Bartosiewiscz, Presiding by Designation

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

CWA, LOCAL 7076,
Complainant

v. **PELRB No. 122-14**

STATE OF NEW MEXICO,
Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: On September 5, 2014, Complainant filed a Prohibited Practice Complaint alleging that the State unilaterally changed its practice with regard to how bargaining unit employees are compensated when they attend meetings in connection with grievances filed pursuant to the parties' Collective Bargaining Agreement (CBA), thereby violating several subsections of §10-7E-19 NMSA (2003). The State timely responded to the Complaint on September 26, 2014 denying any wrongdoing and alleging that its acts were in strict compliance with the Article 2, Section 3 of the CBA. At a status and scheduling conference held on October 30, 2014, the parties agreed to submit this dispute to PELRB Executive Director Thomas J. Griego, designated as the Hearing Officer, by affidavit and legal briefs for determination of the merits in lieu of a hearing. In accordance with the scheduling notice issued as a result of that agreement the parties submitted simultaneous briefs outlining their respective positions with supporting affidavits or declarations and documents on December 19, 2014 and simultaneous reply briefs with counter-affidavits/declarations on January 16, 2015. Upon review of the record and in consideration of the parties' timely filed arguments and affidavits or declarations, I make the following Findings, Conclusions and Recommendations:

FINDINGS OF FACT:

1. Prior to enactment of the first version of New Mexico's Public Employee Bargaining Act in 1993 (PEBA I), State employees who filed grievances did so under State Personnel Office grievance procedures and were paid for time spent in grievance meetings. (Declaration of Robin Gould Exhibit C) at ¶¶ 6 and 7).

2. After implementation of PEBA I, the New Mexico State Labor Coalition, entered into a contract with the State in December 1994, referred to as the "1994 Master Agreement" (Exhibit D; Declaration of Robin Gould, Exhibit C at ¶ 8).

3. Article 9 of the 1994 Master Agreement provided in part:

> "...The Employer shall allow Union officials and stewards who are employees [hereinafter referred to as 'employee officials' to attend, on paid status, meetings agreed to by the parties for the purposes of administration of this Agreement, including grievance hearings.
>
> Employee officials may investigate and process grievances on paid status for reasonable periods of time during their normal working hours. Where an employee official needs to consult with another employee concerning a grievance, both employees shall request permission to do so. As soon as practicable, the Employer shall relieve the employees from their respective assignments and allow them to consult...."

(Exhibit D at pp. 4-5).

4. During the time the 1994 Master Agreement was in effect the State paid not only the employee official who argued the grievance, but also the grievant for preparation and participation in grievance meetings. (Exhibit C at ¶¶ 9, 10, 11 and 12).

5. After PEBA I was repealed in 1999 by operation of a "sunset provision", employees continued to be paid for time spent preparing for and participating in grievance meetings under each agency's internal grievance procedure. Exhibit C at ¶¶ 13 and 14).

6. I take administrative notice of the fact that the New Mexico legislature passed a new version of the PEBA ("PEBA II") in 2003 as NMSA 1978, §§ 10-7E-1, *et seq.* (2003).

7. On September 8, 2004, CWA and the State entered into a collective bargaining agreement under PEBA II. (Exhibit E).

8. Under the 2004 Agreement, the parties continued the practice of paying grievants for time spent preparing for and participating in their own grievance meetings. (Exhibit C at ¶16).

9. Article 2, Section 3 of the 2004 Agreement provided in part:

> "The Employer shall allow Union officials and stewards who are employees [hereinafter referred to as 'employee officials' to attend, on paid status, meetings agreed to by the parties for the purposes of administration of this Agreement, including grievance meetings within the parameters set forth in succeeding paragraph.
>
> Each employee official shall be entitled to use union time to investigate and process grievances, which they are authorized to settle, within the agency to which they are assigned for reasonable periods of time without charge to pay or leave. Union time must be pre-approved and will not be disapproved except for operational reasons. However, the Employer retains the right to disapprove union time when the employee official is in an overtime status. If disapproval necessitates an extension of time for processing a grievance, the time shall be tolled for the duration of the denial until union time is afforded the employee official to investigate and process the grievance. Union time shall count as hours worked for the purpose of overtime computation but shall not qualify for payment of mileage or per diem unless an employee is other wise [sic] assigned to a per diem status by the Employer. An employee official shall use union time within assigned work hours to investigate and process grievances in the most efficient and effective manner possible so as to minimize the operational impairment. Time spent investigating and processing grievances outside of assigned work hours shall not be compensated. When an employee official desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so."
>
> (Exhibit E at p. 4).

10. The current CBA, which took effect on July 21, 2009 provides in Article 2, Section 3:

> "The Employers shall allow Union Officers and stewards to attend, on paid status (utilizing the union time code in the time and labor reporting system), meetings agreed to by the parties for purposes of administration of this Agreement including grievance meetings within the parameters set forth in this section's succeeding paragraphs.
>
> Each employee official shall be entitled to use union time to investigate and process grievances, which they are authorized to settle, within the agency to which they are assigned for reasonable periods of time without charge to pay or leave. Union time must be pre-approved and will not be disapproved except for operational reasons. However, the Employer retains the right to disapprove union time when the employee official is in an overtime status. If disapproval necessitates an extension of time for processing a grievance, the time shall be tolled for the duration of the denial until union time is afforded the employee official to investigate and process the grievance.
>
> Union time shall count as hours worked for the purpose of overtime computation but shall not qualify for payment of mileage or per diem unless an employee is otherwise assigned to a per diem status by the Employer.
>
> A union officer or steward shall use union time within assigned work hours to investigate and process grievances in the most efficient and effective manner possible so as to minimize the operational impairment.
>
> Time spent investigating and processing grievances outside of assigned work hours shall not be compensated. When a union officer or steward desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so."

(Union's Exhibit G; State's Exhibit A).

11. According to the Declaration of Robin Gould (Exhibit C at ¶20) since the effective date of the 2009 agreement until March of 2014 the State continued to pay bargaining unit employees for time preparing for and participating in grievance meetings. That declaration does not distinguish between bargaining unit employees

paid pursuant to the contract's union time provisions and those employees participating in the preparation for and participation in their own grievance meetings.

12. I take administrative notice of NMAC 7.7.13(B) regarding absence without leave that provides:

> "Employees shall not be paid for any periods of absence without leave and shall not accrue annual or sick leave."

13. Susan Edwards asserts in her Declaration, Exhibit H, that on March 17, 2013 she attended a grievance meeting in Santa Fe and was paid for time in attendance. The time card referenced in her Declaration shows two hours on the date in question coded as "Absent Without Leave". I cannot presume that this is travel time because the preceding e-mail string suggested that her travel time should be coded as "Annual, comp or LWOP", not "AWOL". She does not explain this discrepancy. Her Declaration does not state how long the grievance meeting lasted and so, I cannot make a reasonable inference from her Declaration that the remaining six hours in the scheduled work day or any portion thereof were paid while attending a grievance meeting.

14. In Exhibit I, bargaining unit employee Peter Herrera declares that he attended grievance meetings on paid status on April 18, 2013 and on June 20, 2013. The supporting documentation attached to his Declaration indicates that on April 18, 2013 he was paid 0.75 hour and on June 20, 2013 was paid 1.0 hour, both payments coded as "Union- union activities." He was the grievant in both those meetings, not a steward or employee-official.

15. Bargaining unit employee Sharon Johnston declared in Exhibit J that she met several times in January 2012 with "SoNM" concerning pay inequity for Nurse Practitioners.

Her Declaration does not inform me what "SoNM" is, nor does she indicate that these meetings were in connection with a grievance that she indicates was filed over that issue in January 21, 2012 or that she was meeting on behalf of her union. Her pay records indicate that she used four hours of Annual Leave for travel time and was paid for the approximately one hour that the meeting lasted as regular work time. With regard to the meeting taking place in March 2012, the supporting documents do indicate that it was in connection with a grievance over pay disparities and that she took four hours Annual Leave for travel only. The meeting itself, which was about one hour and 20 minutes in duration, was coded as regular work time. On May 15, 2012 Ms. Johnston worked with another Nurse Practitioner for two hours on the Level III grievance response during regular work hours on paid status as shown by an accompanying time sheet.

16. On May 15, 2014 Sharon Johnston attended another meeting regarding settlement of the same grievance. For that meeting her submitted time sheets support her Declaration that she took 3 hours Annual Leave for travel only and the one hour meeting was paid as regular work time. See also, 2nd Declaration of Robin Gould, Union's Exhibit 1.

17. Declarant Pearl Ortiz established that the CWA filed a grievance on her behalf and in connection with that grievance she attended meetings on August 15 and September 10, 2013. She was paid for the time spent in the meetings as regular work time. (Exhibit K; 2nd Declaration of Robin Gould, Union's Exhibit 1).

18. Declarant Jacqueline Quintana established that the Complainant filed a grievance on her behalf and in connection with that grievance she attended a meeting on July 18,

2012 and was paid on regular work time status for the time spent in the meetings. (Exhibit L; 2nd Declaration of Robin Gould, Union's Exhibit 1).

19. On or around October 18, 2013, the Complainant filed a grievance on behalf Daniel S. Secrist and his Declaration established that on January 14, 2014 he attended a meeting in connection with that grievance and was paid by his employing agency for one hour while attending that grievance meeting. Supporting documents attached to his Declaration establish that he was also paid for one hour on January 7, 2014. Both time entries were coded as "Union" time. (Exhibit M; 2nd Declaration of Robin Gould, Union's Exhibit 1).

20. Declarant Monica M. Weinreis established that on June 10, 2013, the Complainant filed a Step 2 grievance on her behalf and on June 27, 2013, a face-to-face meeting was held to discuss the grievance. Ms. Weinreis was paid for time spent in that meeting as regular work time. (Exhibit N; 2nd Declaration of Robin Gould, Union's Exhibit 1).

21. Sandy Martinez, the State's Labor Relations Director, acknowledges that some agencies and their supervisors allow employees who have requested to meet with Union officers and/or stewards regarding a grievance to do so during time paid by the State "depending on the circumstances". (State's Exhibit B). Her affidavit does not identify those circumstances under which permission to meet with Union officers and/or stewards regarding an employee's grievance might be denied or which, if any, agencies do not allow employees to meet with Union officers and/or stewards regarding a grievance during time paid by the State.

22. According to Donald Alire, the President of CWA Local 7076 since January 2011 and having held other executive positions with the Complainant prior to that time,

CWA's stewards and officers need to speak to individual grievants to investigate their claims and process their grievances. The grievants need to attend face-to-face grievance meetings with management concerning their grievances. In practice, the State has paid grievants for time spent with Union stewards or officers in investigations and in face-to-face grievance meetings provided they receive prior permission from their supervisor to attend the meeting. To his knowledge that practice has been in place since 2010. He does not state how the paid time was coded, whether as union time paid leave or regular work time. (Exhibit O).

23. The Declaration of Donald Alire (Exhibit O) comports with that of Robin Gould (Exhibit C) with respect to CWA's stewards and officers needing to meet face-to-face with grievants to investigate their claims and process their grievances. To schedule such a meeting, the steward, officer or the grievant contacts the employee's supervisor and explains the need for a finite amount of time. Prior to March 2014 requests for such meetings between grievants and their employee representatives were routinely granted and the grievant was paid by the State for time spent in grievance meetings as regular work time or as "Union Time". (Exhibit C at ¶8).

24. All of the bargaining unit employees submitting Declarations are members of the Complainant union. (Exhibits H, I, J, K, L, M and N).

25. On March 5, 2014, State Personnel Labor Relations Director Sandy Martinez sent a letter to CWA President Donald Alire stating:

> "As you are aware, Article 2, § 3 of the CBA with regard to Union Rights provides:
>
> 'The Employer shall allow employee **Union Officers** and **stewards** to attend, on **paid status** (utilizing the union time code in the time and labor reporting system), meetings agreed to by the parties for purposes of administering this Agreement including grievance

meetings within the parameters set forth in this section's succeeding paragraphs' (Emphasis added).

'Each **union officer or steward** shall be entitled to use **union time** to investigate and process grievances, which they are authorized to settle, within the agency to which they are employed, for reasonable periods of time without charge to pay or to leave' (Emphasis added).

'When a union officer or steward desires to consult with another employee concerning a grievance on work time, both employees shall request and obtain prior permission to do so.'

Please be advised that the State is taking action to ensure that state agencies comply with the above-referenced language. Accordingly, effective the pay period beginning March 29, 2014 paid union time will be applied appropriately for union stewards and officers only. Pursuant to Article 2, §3, bargaining unit employees are not entitled to paid-time or union time. Any past practices with regard to paid union time and paid state time that deviated from the above-referenced language of the CBA are ceased."

(Union's Exhibits C-4 and O-1; State's Exhibits B and C, emphasis in the original, hereinafter referred to as the "March 5, 2014 letter").

26. Since March 29, 2014, the State has ceased paying bargaining unit employees involved in meetings preparing or presenting grievances as it previously did, requiring them to use annual leave, compensatory time, or leave without pay for such meetings instead. (2nd Declaration of Robin Gould, Union's Exhibit 1.)

27. The parties did not engage in collective bargaining before the State ceased the practice of allowing grievants' supervisors, in the exercise of their discretion, to consider time spent by bargaining unit employees involved in preparing or presenting grievances to be time worked. (2nd Declaration of Robin Gould, Union's Exhibit 1.)

28. The terms of the parties' CBA at Article 2, § 3 is ambiguous and the meaning to be assigned that Article requires extrinsic evidence of the language and conduct of the

parties and the circumstances surrounding the agreement, as well as parol evidence of the parties' intent.

29. Article 2, § 3 of the parties' CBA does not limit the use of "union time" solely to union officers or stewards – its use is a matter of an employee's supervisor's discretion.

ISSUES:

1. Whether the March 5, 2015 letter, Exhibit R, affected a change in the parties' prior pay practices for bargaining unit employees preparing for and attending grievance meetings such that the State committed a Prohibited Labor Practice under one or more of the following sections of PEBA:
    a. §10-7E-19(A) by unilaterally ending the practice of paying employees for attending grievance meetings in a manner that discriminated against public employees with regard to terms and conditions of employment because of the employee's membership in a labor organization.
    b. §10-7E-19(B) by unilaterally ending a past practice of paying employees for attending grievance meetings on "union time" or regularly scheduled work time such that the State unlawfully restrained and interfered with those employees rights under PEBA.
    c. §10-7E-19(D) by discriminating against union members with regard to a term or condition of employment in order to discourage membership in CWA based on the argument that by prohibiting employees from using work time for grievance preparation and meetings, the State discourages employees from filing grievances or using the union contract's grievance procedure.

d. §10-7E-19(F) by refusing to bargain collectively in good faith with CWA concerning its desire to stop the practice of its employees meeting with union representatives or management during paid work time to prepare and present grievances.

e. Finally, the union alleges that because the State violated Sections 19(A), (B), (D) and (F), the State also committed a violation of §10-7E-19(G) by failing to comply with those provisions of PEBA.

2. In order to determine the foregoing issues I will also consider:

a. Whether bargaining unit employees have a right arising under Article 2, Section 3, paragraph 5 of the CBA to be paid for time spent investigating and filing grievances or for time spent consulting with their union representative concerning those grievances;

b. Whether a past practice exists whereby the State paid not only union officials who argue the grievances, but also the grievants themselves, for time spent investigating or consulting with their union representative concerning those grievances and attending their own grievance meetings, considering such time to be either "union time" or regularly scheduled work time and if so;

i. Whether the State acted contrary to that past practice. If the State did act contrary to that past practice, then I will consider:

1. Whether the State was privileged to do so, and;

2. Whether by acting contrary to that past practice the State committed a PPC under one or more of the subsections of §19 of the PEBA.

Because the Complainant has not briefed the question raised in its PPC whether the State's action in sending the March 5, 2014 letter abrogated a settlement agreement reached February 25, 2014 between Complainant and the Human Services Department, I am considering that claim to have been abandoned and it will not be addressed in this Report and Recommended Decision.

REASONING AND CONCLUSIONS OF LAW: The PELRB has jurisdiction to hear and decide this matter. As the Complainant, CWA has the burden of proof and the burden of going forward with the evidence in this case pursuant the PELRB Board rule NMAC 11.21.1.22(B). In its pursuit of meeting that burden CWA is obliged to present reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt. While the technical rules of evidence do not apply, the hearing examiner may exclude or disregard any proffered evidence that is irrelevant, immaterial, unreliable, unduly repetitious or cumulative, and shall exclude any evidence protected by the rules of privilege upon timely objection. See, NMAC 11.21.1.17. I construe the relevant provisions of the parties' CBA as a question of fact. The question of the meaning to be given the words of the contract is a question of fact where that meaning depends on reasonable but conflicting inferences to be drawn from events occurring or circumstances existing before, during, or after negotiation of the contract. See, 3 Corbin on Contracts Sec. 554, at 219. When, as here, contract interpretation turns upon whether the contract is ambiguous, extrinsic evidence will be admitted to aid in interpreting the parties' expressions. See, e.g., *Hill v. Hart,* 23 N.M. 226, 232, 167 P. 710, 711 (1917). ("The principle that parol evidence is not admissible to vary the terms of a written instrument is not infringed when the evidence is used for the purpose of ascertaining the meaning of doubtful expressions in the instrument."). As Professor Corbin observes, "No parol evidence that is offered can be said to vary or contradict a writing until

by process of interpretation the meaning of the writing is determined." Corbin, The Parol Evidence Rule, 53 Yale L.J. 603, 622 (1944). New Mexico rejected the "four corners" standard for contractual construction in *C.R. Anthony Company v. Loretto Mall Partners* and *J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad,* 179 P.3d 579, 2008 NMCA 37, 143 N.M. 574 (Ct. App. 2007) adopting instead the "contextual approach" to contract interpretation; a standard under which, even if the language of the contract appears to be clear and unambiguous, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance, in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear. The operative question then becomes whether the evidence is offered to contradict the writing or to aid in its interpretation.

With those standards in mind and with no objection to proffered evidence by either party having been raised, my conclusions and the reasoning behind them are as follows:

A. VIOLATION OF §10-7E-19(A); DISCRIMINATION AGAINST PUBLIC EMPLOYEES WITH REGARD TO TERMS AND CONDITIONS OF EMPLOYMENT BECAUSE OF THE EMPLOYEE'S MEMBERSHIP IN A LABOR ORGANIZATION.

In order to prove that the State's actions in this case discriminated against public employees because of their membership in a labor organization, the Complainant would need to provide me with some point of comparison, such as evidence of non-bargaining unit employees continuing to be paid as regular work time for their time spent advancing their grievances together with additional evidence that would allow me to conclude that any differences were the result of union membership. It has not done so.

While the Complainant has established that employees affected by the alleged change in the terms and conditions of employment at issue here are members of the Complainant

Union, there is an absence of evidence that the alleged change in pay status results in any difference between the union's members and non-members pursuing grievances. There being no evidence of any difference, there can be no finding that any difference was motivated by the employees' union membership.

The State argues that because the CBA at issue in this case applies to all employees in the bargaining unit, regardless of the employee's membership or non-membership in the Union[1] and because its provisions regarding meeting with a union officer or steward on work time applies to all bargaining unit employees, not just union members, there cannot be any discrimination associated with the March 5, 2014 letter. I do not decide here whether an employer's action that discriminates against employees based on their inclusion in a bargaining unit as contrasted with union membership states a claim under §10-7E-19(A), but I do agree that under the facts plead and proven I can find no discrimination by the State with regard to terms and conditions of employment because of the employees' membership in a labor organization.

B. VIOLATION OF §10-7E-19(B); UNLAWFULLY RESTRAINING AND INTERFERING WITH EMPLOYEES' RIGHTS UNDER PEBA.

It perhaps goes without saying that at the outset of this claim the Complainant must identify the statutory right or rights with which the employer interfered. The State argues that there is a complete absence, not only of evidence, but of any allegation as to the protected right violated. I disagree. The PPC alleges that by the March 5, 2014 letter the

[1] NMSA (1978 10-7E-15(A) provides:

> "A labor organization that has been certified by the board or local board as representing the public employees in the appropriate bargaining unit shall be the exclusive representative of all public employees in the appropriate bargaining unit. The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The exclusive representative shall represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization."

employer announced its intent to unilaterally alter terms and conditions for bargaining unit members without bargaining over that change. In its Brief the Complainant pointed out that the March 5, 2014 set forth the State's position that "employees are not entitled to paid-time or union time." and that "All past practices with regard to paid union time and paid state time that deviated from the above-referenced language of the CBA are ceased". The letter clearly referred to the "past practice" of paying employees to prepare for and attend their own grievance meetings and announced that the State was changing a specific term or condition of employment "effective the pay period beginning March 29, 2014." PEBA requires an employer to negotiate over changes in terms and conditions of employment:

> "Except for retirement programs provided pursuant to the Public Employees Retirement Act [10-11-1 NMSA 1978] or the Educational Retirement Act [22-11-1 NMSA 1978], public employers and exclusive representatives:
>
> (1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession; and
>
> (2) shall enter into written collective bargaining agreements covering employment relations."

§10-7E-17(A) NMSA (2003).

Additionally, §10-7E-5 NMSA (2003) establishes the right of public employees (other than management employees and confidential employees) to form, join or assist a labor organization for the purpose of collective bargaining through their chosen representatives without restraint.

Reading §§ 5 and 17 together, leads to the conclusion that the Complainant has met both the first and second prongs of a three-pronged test necessary to establish a PPC under PEBA §10-7E-19(B), by establishing the right guaranteed under PEBA of public employees

who have elected a collective bargaining representative to have that representative bargain changes in existing working conditions on their behalf.

I turn my attention now to the third prong; whether there is evidence that the State interfered with, restrained, or coerced a public employee[s] with respect to the right identified.

The State defends the PPC in part by asserting that it did not revoke the bargaining unit members' ability to use "state-paid time" because requiring them to use annual leave satisfies any alleged requirement that the employee is on time paid by the State. Additionally, the State defends the PPC by reference to that portion of Article 2, Section 3 of the parties' CBA requiring that whenever a union officer or steward desires to consult with another employee concerning a grievance on work time, "both employees shall request and obtain prior permission to do so." As the State argues, requiring an employee to request permission to meet on work time is not a guarantee that such request will be granted. Rather, it is a "retained management right of the supervisor to decide whether the employees will be allowed to meet on work time."

Both of these defenses take too narrow a view of both what was accomplished by the letter of March 5, 2014 and of the guaranteed right affected thereby. To explain why this is so requires examination of the "past practice" doctrine. The Complainant alleges that a past practice exists whereby time spent in grievances was routinely considered time worked. That allegation is consistent with the notion advanced by the State in its brief that it is a "retained management right of the supervisor to decide whether the employees will be allowed to meet on work time". Under the "past practice" doctrine, prior conduct and representations may become or create binding terms and conditions of employment when the following conditions are met: (a) the practice has been consistently followed in the past;

(b) both parties to the contract are aware of the consistent practice; and (c) the past practice does not undermine, negate or amend provisions of the CBA. See, *AFSCME, Council 18 v. N.M. Dep't of Corrections*, PELRB Case No. 150-07 Hearing Officer Decision (February 6, 2008)[2] citing to *BP Amoco Chemical-Chocolate Bayou*, 2001 NLRB Lexis 8, at 36-40; *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998), enf'd 208 F.3d 214 (2000); *LaSalle Ambulance, d/b/a/ Rural/Metro Medical Services*, 327 NLRB 49 (1998) and Developing Labor Law (5th Ed.) at 836-837. Examples of the past practice doctrine being applied include an in instance where an employer with a past history of a merit increase program may not discontinue that program nor may he continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. To the extent that discretion has existed in determining the amounts or timing of the merit increases implementation of the program becomes a matter as to which the bargaining agent is entitled to be consulted. *Oneida Knitting Mills*, 205 NLRB 500, 500 n.1 (1973) (citation omitted); *see also NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981) (that the company could not discontinue annual reviews, but also "could not unilaterally determine the size of the increase that each employee would receive" and instead "it would be required to bargain over this discretionary element"). *See also, Metal Specialties Co.*, 39 Lab, Arb. Rep. (BNA) 1265, 1269 (1962) (For a "past practice" to be binding on both parties it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties); *Celanese Corp. of America*, 24 Lab. Arb. Rep. (BNA) 168, 172 (1954).

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[2] Because the case was not appealed to the Board, it cannot be cited as precedent but for historical information. *AFSCME, Council 18 v. N.M. Dep't of Corrections*, PELRB Case No. 150-07 involved a memorandum from the State mandating that there be a face-to-face meeting between management and union representatives at each stage of the grievance process. The hearing examiner concluded that the memorandum constituted binding past practice and was therefore incorporated into the CBA, because it was widely disseminated and known to the parties; spoke to an issue not directly covered by the contract and did not contradict the contract.

The question in this case is whether the letter of March 5, 2014 removed discretion to consider time spent in grievances as time worked that previously resided in a grievant's supervisor in favor of a centralized mandate from the State Personnel Office that it shall not be so. The plain answer to that question is "yes". In the March 5, 2014 letter the State announced that as far as attending to grievances is concerned "employees are not entitled to paid-time or union time", which is true enough if one considers only what the express language Article 2, Section 3 of the parties' CBA requires. However, the letter goes on to state that "All past practices with regard to paid union time and paid state time that deviated from the above-referenced language of the CBA are ceased." A plain reading of the March 5, 2014 letter leads to the conclusion that the State unilaterally eliminated what it acknowledges in the letter and its brief as the past practice of allowing a grievant's supervisor to exercise a "retained management right" to decide whether the employees will be allowed to meet on work time to address grievances.

It is evident that a past practice exists in this case, but I would not phrase it, as the Union does, as a practice of paying employees for preparing and attending their own grievance meetings. Rather, it is a past practice whereby a grievant's immediate supervisor has discretion to consider time spent by the grievant addressing his or her grievances to be time worked or "union time" and that those supervisors routinely granted requested leave for that purpose without requiring the grievant to take annual leave or compensatory time. That past practice was interfered with by the March 5, 2014 letter for reasons discussed more fully below. The State defends its abrogation of the past practice, in part, by arguing that the Complainant failed to timely request bargaining after receiving notice of the change via the March 5, 2014 letter. See, Respondent's Brief in Chief, p. 9; Respondent's Reply Brief, pp. 6-7. A Complainant is excused from demanding bargaining when the unilateral

change is presented as a "*fait accompli*" as discussed more fully under point D below. Therefore, the State's defenses are insufficient to overcome Complainant's proof that the State violated §10-7E-19(B).

Here, the past practice of paying employees for preparing and attending their own grievance meetings as either union time or regular work time is clearly established. First, the March 5, 2014 letter itself acknowledges the past practice described as I have described it. Second, CWA Staff Representative Robin Gould, with twenty-four years of experience as a bargaining unit member, local union president and international union representative, declared that the State has paid employees for such time going back more than twenty-five years. (Exhibit C at 17). Similarly, CWA Local 7076 President Donald Alire declared that the practice has been in place during his approximately ten-year period of leadership with the Union. (Exhibit O at ¶¶ 8-9). Third, at least six bargaining unit employees, from different departments and agencies, attest that they have been paid as union time or regular work time for their attendance at their own grievance meetings, either as union time or regular work time. (See Exhibits I, J, K, L, M and N). [3]

Fourth, the practice has been clearly enunciated and acted upon. The evidence shows that the experience of Union leaders and bargaining unit grievants themselves has been that grievants have been consistently paid for preparation and attendance at their grievance meetings. (Exhibits C, H, I, J. K, L, M, N and O).

Based on the foregoing I conclude that the practice as I have described it has been readily ascertainable over more than twenty-five years as a fixed, established practice accepted by both the Union and the State. As Gould declared, the practice was in effect even

[3] I give little weight to the Declaration of Susan Edwards Exhibit H because of the deficiencies in the supporting documentation noted in the Findings of Fact.

before CWA bargained its first contract with the State in 1994. (Exhibit C at ¶¶ 6-7). The practice continued during the interim period between PEBA I and PEBA II. (*Id.* at ¶ 14). After PEBA II reinstituted collective bargaining in 2003, the practice continued throughout the period during which the 2004 and 2009 CBA's between CWA and the State were in effect. (*Id.* at ¶16, 18, 20). As an established practice the State may not unilaterally end it without bargaining with the Union. The PEBA calls for mandatory bargaining over wages, hours, and terms and conditions of employment by all public employers. See, *AFSCME & Los Alamos County Firefighters v. County of Los Alamos,* 1 PELRB No. 3 (Dec. 20, 1994) at 14.

The State's practice of allowing grievants' supervisors, in the proper exercise of their discretion, to authorize time spent by their employees in grievance meetings to be coded as time worked without requiring use of accrued leave, is not directly covered by the contract and is not contrary to the CBA. None of the CBA's in evidence define the term "union time". Consequently, there is no express limitation on its use other than the reasonable exercise of a supervisor's discretion. As appears from the March 5, 2014 letter the State takes the position that union time is the exclusive prerogative of union stewards and other employee officials. While that is a reasonable reading of Article 2 Section 3 I am not compelled to conclude that it is the only reasonable reading of the contract, particularly in light of the parties' past practice with regard to paying its employees for attending to grievances. All that can be said with certainty from the express terms of the contract itself is that there is a time code called union time and that code is available to union stewards and other employee officials when they represent employees in grievances other than their own. The contract does not say that union time may only be used by employee officials and is not available to others who, in a supervisor's discretion, it is appropriate to extend such leave. In any event, use of paid "State time", no matter how it is coded, is subject to the discretion of

the employee's supervisor, which discretion must not be abused in light of §10-7E-2, which includes among the stated purposes of the PEBA "...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..." See also the Preamble to the parties' CBA, Section 1, wherein one of the stated purposes of the CBA is to provide "... a means of amicable and equitable adjustment of all grievances..." Black's Law Dictionary defines "equitable" as "just; conformable to the principles of natural justice and right. Just, fair, and right, in consideration of the facts and circumstances of the individual case." Finally, Article 5 Section 3 (Management Rights) of the parties' CBA permits agencies to maintain their own policies that may be more generous to employees that the agreement is. Concluding that there exists a binding past practice as I have defined it here is consistent with all of the foregoing guiding principles.

The State minimizes the importance of the March 5, 2014 letter by claiming it has not taken any action to eliminate the practice of allowing employees to meet on paid work time, if the supervisor grants permission to do so; that all it has done is explain to agencies the language in the collective bargaining agreement regarding "union time" for union officers and stewards versus time for employees to meet with union officers or stewards. (Affidavit of Sandy Martinez, attached hereto as Exhibit B). This is evidently not true based the plain language of the March 5, 2014 letter and the declaration of Robin Gould that the prior pay practice has ceased. (Neither party provided any evidence that the practice continued after March 29, 2014, the effective date in the March 5, 2014 letter from SPO.)

I therefore conclude that that the union established the existence of a binding past practice whereby grievants' supervisors, in the proper exercise of their discretion, routinely authorized time spent in grievance meetings to be coded as time worked or union time

without requiring use of accrued leave. That practice is incorporated into the CBA, because it was widely disseminated and known to the parties; spoke to an issue not directly covered by the contract and did not contradict the contract. Accordingly, the State violated PEBA §10-7E-19(B) when it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA.

C. VIOLATION OF §10-7E-19(D); DISCRIMINATING AGAINST UNION MEMBERS IN REGARD TO A TERM OR CONDITION OF EMPLOYMENT IN ORDER TO DISCOURAGE MEMBERSHIP IN CWA.

The complainant asserts that by unilaterally ending the past practice of allowing a grievant's supervisor, in the proper exercise of his or her discretion, to authorize paid time for grievances without requiring use of accrued leave, the State discourages employees from filing grievances or using the union contract's grievance procedure. In order to establish a prohibited practice for violation of §10-7E-19(D), two elements must be established: First, the alleged discriminatory act must be in regard to hiring, tenure, or a term or condition of employment; and second, the motive of the Employer in committing the discriminatory act must be to discourage membership in a labor organization. The Complainant provides no evidence to support its assertion that the State's purpose here was to discourage membership in a labor organization generally or in CWA specifically. The stated purpose of the March 5, 2014 letter is "...to ensure state agencies comply with the [CBA] language." As discussed above, by ignoring or overlooking the impact of the past practices doctrine the effect of that strict compliance with Article 2 Section 3 of the CBA adversely effects employee rights in a variety of ways that may arguably be related to the State's desire to give it an advantage over the union when it comes to processing grievances but there is an absence of any evidence

that doing so either has, or tends to, discourage union membership. All I have before me is the opinions of union officials that it will do so. Accordingly, the Complainant has not met its burden of proof with regard to the alleged violation of PEBA §10-7E-19(D).

D. VIOLATION OF §10-7E-19(F); REFUSING TO BARGAIN COLLECTIVELY WITH CWA CONCERNING THE STATE'S DESIRE TO STOP THE PAST PRACTICE AS DESCRIBED HEREIN.

As already discussed above, PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." See §17(A). Violations of the duty to bargain in good faith involve two standard types of violations: 1) a *per se* violation where the conduct is clear and unambiguous; or 2) a pattern of bad faith where the employer's intent to frustrate bargaining or not reach agreement is derived from the conduct, *NLRB v. Advanced Business Forms*, 474 F.2d 457, 465 (2d. Cir. 1973). For *per se* violations, intent is not relevant. *See NLRB v. Katz*, 369 U.S. 736 (1962). As the Developing Labor Law treatise describes it, *per se* violations of the duty to bargain typically constitute a "failure to negotiate" as to a particular issue, or under certain conditions, "rather than an absence of good faith." It is a *per se* breach of the duty to bargain imposed by PEBA §17 to unilaterally alter a mandatory subject of bargaining without first providing notice and opportunity to bargain to impasse, unless the requirement to bargain has been waived. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 892-905.

The State has correctly pointed out in its brief that a unilateral action by the employer will not amount to a refusal to bargain if the employer provides notice of the proposed change and an opportunity for the Union to request bargaining over the proposed change,

citing to *Pinkston-Hollar Constr. Svcs.*, 312 NLRB No. 148. 144 LRRM 1211 (1993); *NLRB v. Oklahoma Fixtures Co.*, 151 LRRM 2919 (10th Cir.1996); *Haddon Craftsmen*, 300 NLRB No. 100, 136 LRRM 1190 (1990); *Gratiot Community Hospital v. NLRB*, 149 I.RRM 2072. (6th Cir. 1995). However, there exists in the law an exception to the usual requirement that a party is obligated to request bargaining before a claim for breach of the duty to bargain may be sustained. The union is relieved of its duty to request bargaining if the change is presented as a "*fait accompli*". See, *CWA Local 7076 v. New Mexico Public Education Department*, 76-PELRB-2012 in which the *"fait accompli"* doctrine was discussed and applied. In that case the Board found the union to have waived bargaining by failing to make a timely demand. The District Court reversed the Board and remanded the matter for further findings.

NLRB case decisions on the topic are instructive. As stated in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982):

> "The [NLRB] has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a *fait accompli.*"

A union cannot be held to have waived bargaining over a change that is presented to it as a "*fait accompli*". See, *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981). An employer must inform the union of its proposed actions under circumstances that afford a reasonable opportunity for counter arguments or proposals. Where notice of a change in working conditions is given shortly prior to implementation, the notice is merely informational about a *fait accompli* and fails to satisfy the requirements of the Act. See, *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964); *Ladies Garment Workers v. NLRB*, 463

F.2d 907, 919 (D.C. Cir. 1972); *In re: Gannett Co.*, 333 NLRB 355 (2001) (citing *Ciba-Geigy Pharmaceutical Division, supra*).

Here, the March 5, 2014 letter presented the Union with a *fait accompli* that did not necessitate a demand to bargain. It announced a change to a past practice of many years' duration to take effect within a few weeks. The letter clearly communicated that the State had made up its mind to end that past practice. Any request to bargain would have been fruitless and therefore, was not required.

It is not disputed that no bargaining over this issue took place. Therefore, I conclude that under the facts of this case the Union was not required to demand bargaining and as a result, the Union has established a violation of §10-7E-19(F).

E. VIOLATION OF §10-7E-19(G); REFUSAL OR FAILURE TO COMPLY WITH A PROVISION OF THE PUBLIC EMPLOYEE BARGAINING ACT OR BOARD RULE.

Finally, the union alleges that because the State violated Sections 19(A), (B), (D) and (F), the State also committed a violation of §10-7E-19(G) by failing to comply with those provisions of PEBA. This Board has previously taken the position that §19(G) of PEBA is directed against claims arising under sections of PEBA other than §19. To interpret §19(G) otherwise would result in the finding of repetitive and duplicative liability. There is no reason to believe the New Mexico Legislature intended every violation of a subsection of §19 to result in two separate counts of liability. Accordingly, the Complainant has not established a violation of §10-7E-19(G) since it alleges no violation of PEBA except other subparts of §19.

DECISION:

Based on the foregoing it is my recommended decision that the union has not established a violation of §10-7E-19(A), (discrimination with regard to terms and conditions

of employment because of the employee's membership in a labor organization). Neither has the union established a violation of §10-7E-19(D) (discrimination against union members in regard to a term or condition of employment in order to discourage membership in a labor organization. Because Section 19(G) of PEBA is directed against claims arising under sections of PEBA other than §19, the union has not established a violation of §10-7E-19(G). Those claims should therefore be **DISMISSED.**

The State's conduct in issuing the March 5, 2014 letter with its announcement that the State was unilaterally ending its past practice of allowing supervisors, in the exercise of their discretion, to pay employees preparing for and attending their own grievance meetings as time worked or as union time constitutes violation violated PEBA §10-7E-19(B) because it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA. The same conduct also violated §10-7E-19(F) by failing to bargain in good faith with regard to its change in employees' working conditions. As to those claims the PPC is **SUSTAINED.**

Consistent with the foregoing, I recommend that the PELRB declare the State to have violated §19(B) and §19(F) of the PEBA and order the State to post a Notice in a form substantially conforming with that appended to this decision in all agencies that received the March 5, 2014 letter or that were otherwise prevailed upon by the State to alter their practices with regard to coding time spent in grievances and work time, wherever notices to employees are generally posted, describing the conduct that violated PEBA,

I FURTHER RECOMMEND that the Board order the State to reinstate the prior practice of supervisory discretion as described herein and make whole any employees who were required to use accrued leave or leave without pay to the extent the union can subsequently show that their supervisors' decisions not to code their time as union time or

time worked was prompted by the policy change expressed in the March 5, 2014 letter. Finally, the State should be ORDERED to cease and desist from similar conduct in the future unless and until it either successfully negotiates the policy change embodied in the March 5, 2014 letter in a successor agreement, or Memorandum of Understanding.

REQUEST FOR REVIEW

Pursuant to PELRB Rule 11.21.3.19, any party may file a request for Board review within 10 business days after service of this Report. The request for review shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such exception. The request may not rely on any arguments not previously raised before the undersigned. The request must be served on all other parties. Within ten business days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

Issued, Monday, January 26, 2015.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

State of New Mexico

Public Employee Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

An Agency of the State of New Mexico the Public Employee Labor Relations Board (PELRB) has found that we violated the Public Employee Bargaining Act (PEBA) and has ordered us to post and abide by this notice.

On March 5, 2014, State Personnel Labor Relations Director Sandy Martinez sent a letter to CWA President Donald Alire stating that the State was unilaterally ending its past practice of allowing supervisors, in the exercise of their discretion, to pay employees preparing for and attending their own grievance meetings as time worked or as union time. The PELRB has determined that the change in pay practices constitutes a violation of the PEBA §10-7E-19(B) because it unilaterally altered a mandatory subject of bargaining and a longstanding past practice thereby unlawfully restraining and interfering with employees' rights under PEBA. The same conduct also violated §10-7E-19(F) by failing to bargain in good faith with regard to its change in employees' working conditions.

YOU HAVE THE RIGHT to form, join or assist a labor organization for the purpose of collective bargaining through your chosen representatives or to refrain from such activities without restraint. We are required to bargain with your chosen representative in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

THEREFORE, WE WILL rescind our letter of March 5, 2014 and any directives that resulted from it and reinstate the prior practice of allowing a grievant's supervisor to exercise discretion as to whether employees may attend grievance meetings on union time, as regular time work or on some other form of paid leave and we will make whole any employees who were required to use accrued leave or leave without pay to the extent the union can show that supervisors' decisions not to code a grievant's time as union time or time worked was prompted by the policy change expressed in the March 5, 2014 letter.

WE WILL NOT engage in similar conduct in the future unless we successfully negotiate the policy change embodied in the March 5, 2014 letter in a successor agreement, or Memorandum of Understanding.

NEW MEXICO STATE PERSONNEL OFFICE

_____

Justin Najaka, Director