STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO

Complainant,

v. **PELRB No. 107-15**

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTA FE,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") at a regular meeting on February 23, 2016, to consider the *Hearing Officer's Report and Recommended Decision* ("Report"), issued on December 2, 2015. On December 16, 2015, Complainant AFSCME filed exceptions to the Report and Respondent Santa Fe County filed a response brief on December 30, 2015. Complainant AFSCME Council 18's counsel, Shane Youtz, was present at the Board's meeting and presented a brief oral argument in support of its position. Respondent Santa Fe County's counsel, Rachel Brown, was present and also presented a brief oral argument.

Upon a vote of 3-0, the Board adopted the Hearing Officer's findings of fact and conclusions of law as they pertain to violations of NMSA, Sections 10-7E-19(A), (B), (C) and (H). The Board reversed the Hearing Officer's conclusion regarding NMSA 1978, Section 10-7E-19(F), and concluded that, by its own terms, the PIP constituted disciplinary action, and thus, Respondent had failed to bargain in good faith over the use of this discipline.

IT IS HEREBY ORDERED that AFSCME's prohibited practice complaint is **DISMISSED** as to alleged violations of NMSA, Sections 10-7E-19(A), (B), (C) and (H).

IT IS FURTHER ORDERED that the Board concludes that the Respondent's PIP which included the phrase –"failure to comply with the requirements listed above . . . shall lead to further disciplinary action" – constituted discipline, and was a violation of Section NMSA 1978, Section 10-7E-19(F).

IT IS FURTHER ORDERED that the County shall immediately amend the PIP to remove the above-cited language.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Date: 3-14-16

Duff Westbrook, Chair

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,
Complainant

v. PELRB No. 107-15

SANTA FE COUNTY,
Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on AFSCME's Prohibited Labor Practice Complaint alleging a unilateral implementation of a performance review system for members of two different bargaining units: The first, Local 1413 consists of all non-probationary Corrections Department employees in the positions of Detention Officer, Corporal, Sergeant, Teacher, Therapist, Case Manager, Booking Clerk, Senior Case Manager/Electronic Monitoring, Case Manager/Electronic Monitoring, Life Skills Worker I, Life Skills Worker II and YDP Assistant Shift Supervisor. (Accretion of Lieutenants into the bargaining unit is pending Board review.)

The second, Local 1413-M, consists of all non-probationary employees in the positions of Licensed Practical Nurse, Registered Nurse, Nurse Practitioner, Physician's Assistant, Pharmacy Technician and Dental Assistant.

On June 3, 2015 (the date the "hard copy" of the PPC was received) the Union filed its PPC alleging that within six months prior to the filing of the complaint, Santa Fe County unilaterally implemented a performance improvement plan (PIP) system and applied it as disciplinary action against bargaining unit members in both units, without first bargaining with the Union.

The County Answered the PPC on June 23, 2015 by general denial. It filed a Motion for Partial Dismissal on July 10, 2015, which was denied on July 23, 2015. In denying the Motion for Partial

Dismissal the Hearing Officer concluded that a Complainant who submits supplemental information in response to the Director's request pursuant to NMAC 11.21.3.12 is not required to "file" them with the same level of formality as is required under Rule NMAC 11.21.1.10. Therefore, e-mailed submissions in this case constituted a timely submission.

A hearing on the merits was held Thursday, October 29, 2015. At the conclusion of Complainant's case-in chief the County moved for a directed verdict, which motion was denied.

All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. The parties elected to submit closing briefs in lieu of oral closing argument, both of which were timely submitted on November 20, 2015. After duly considering the briefs, on the entire record, from my observation of the witnesses and their demeanor on the witness stand and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT:

1. The parties negotiated a collective bargaining agreement (Local 1413) which agreement is effective October 28, 2014, through June 30, 2018. (Stipulated in PHO).
2. This bargaining unit was previously represented by NMCPSO. (Stipulated in PHO).
3. Prior to October 28, 2014, this bargaining unit was governed by a CBA between NMCPSO and the County. (Stipulated in PHO).
4. The parties negotiated a collective bargaining agreement (Local 1413-M), which agreement is effective October 28, 2014 through December 31, 2016. (Stipulated in PHO).
5. On at least one occasion on or about January 13, 2015 the County inserted the following sentence (or a substantially similar sentence) as part of its Performance Improvement Plans (PIPs) addressed to bargaining unit employees:

> "failure to comply with the requirements listed above or further violations of County policy on your part shall lead to further disciplinary action, up to and including termination of your employment."

Exhibit C, page 2.

6. Prior to the January 13, 2015 PIP referenced above, some PIPs executed in 2012 – 2014 also contained the same or similar language as that quoted, whereas others did not. (Exhibit 3).
7. The County has trained its managers on the use of performance evaluations, which includes the use of PIPs, since at least 2005. (Testimony of Bernadette Salazar Tr. 5:21-6:13, Disk 7; Exhibit E.)
8. Both of the relevant Collective Bargaining Agreements (Exhibits J-1A and J-1B) as well as the County's Human Resources Handbook (Exhibit B) are silent as to the use of letters of caution and PIPs.
9. The record establishes that the County has documented verbal warnings since at least 2012 and that there is no substantial difference between letters of caution and documenting a verbal warning. (Exhibits 4A and 4B).

ISSUES TO BE DETERMINED:

Whether the County has within six months preceding the filing of the PPC unilaterally implemented a performance review system or performance improvement plan and letters of caution without bargaining, thereby violating the PEBA §§ 10-7E- 19(A), (B), (C), (F) and (H).

REASONING AND CONCLUSIONS OF LAW: The PELRB has jurisdiction to hear and decide this matter. (Stipulated in PHO). As the Complainant, AFSCME 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). (Stipulated in PHO). In pursuit of meeting its

burden AFSCME 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. THE UNION HAS NOT MET ITS BURDEN OF PROOF WITH REGARD TO ITS CLAIM THAT THE COUNTY'S ACTIONS VIOLATED THE PEBA § 19(A).

Section 10-7E-19 (A) of the PEBA prohibits a public employer from discriminating against a public employee with regard to the terms and conditions of employment because of the employee's membership in a labor organization. For the claim under §19(A) in this case to be successful AFSCME must prove that as compared to non-bargaining unit employees, the County's implementation and/or use of PIPs and Notices of Caution discriminated against one or several bargaining unit members because of their union membership. The preponderance of the evidence established that the County uses PIPs and written documentation of oral reprimands for all employees in the same manner whether or not they are members of a bargaining unit. Complainant produced no evidence comparing bargaining unit members in AFSCME Local 1413 and Local 1413-M with non-bargaining unit employees. I can find no discrimination by the County with regard to terms and conditions of employment because of the employees' membership in a labor organization. Therefore, the Union's claims under § 19(A) should be denied.

II. THE UNION HAS NOT MET ITS BURDEN OF PROOF WITH REGARD TO ITS ALLEGATIONS THAT THE COUNTY VIOLATED §10-7E-19(B); UNLAWFULLY RESTRAINING AND INTERFERING WITH EMPLOYEES' RIGHTS UNDER PEBA.

AFSCME argues that by unilaterally implementing its use of PIPs and Letters of Caution the County has breached its obligation to bargain in good faith over mandatory subjects of bargaining in violation of NMSA 1978 §10-7E-17(A) (2003) and that their use breaches provisions in two collective bargaining agreements governing discipline procedures, presumably in violation of §10-7E-22 providing that collective bargaining agreements (CBAs) are valid and enforceable according to their terms when entered into in accordance with the provisions of the Public Employee Bargaining Act. To establish the former, AFSCME must prove that the County implemented new working conditions without bargaining. To establish the latter, it must prove their use breached a term in one or both of the two contracts at issue. The preponderance of the evidence does not support either assertion.

To adopt AFSCME's argument that use of the PIPs and Letters of Caution are barred because management's right to discipline employees is conditioned upon its being in accord with the parties' contracts and based on just cause requires the precedent conclusion that the PIPs and Letters of Caution constitute discipline. I conclude to the contrary that they are not discipline. They are not among the enumerated forms of discipline found in either of the CBAs at issue or in the County's Personnel Handbook. PIPs are intended as a corrective measure in the same sense that critiques found in a performance evaluation is intended to correct substandard conduct or to help a merely adequate employee reach optimal performance, as contrasted with a disciplinary measures such as a suspension, demotion, termination, etc. where corrective measure either have failed or are superfluous given the severity of a given offense. This conclusion is supported by the fact that as Exhibit E demonstrates, training on the proper use of the PIPs takes place in the context of a performance evaluation module; not a discipline module. Exhibit C also supports this

conclusion. In that PIP no reprimand, suspension, demotion or other enumerated was invoked on the exhibit. Although the facts recited on the PIP arguably would merit discipline, the employee is given directives for improving performance – not discipline. To the extent the employee was subsequently disciplined the County's HR Director testified that the employee was disciplined *after* the PIP was issued and after consideration of two prior written reprimands for similar conduct. (Testimony of Bernadette Salazar; TR 24:29-25:17, Disk 7). Two of the Union's witnesses, Solis and Trombley testified that the PIP was not mentioned during the employee's eventual disciplinary hearing and was not produced by the County in response to the Union's request for all documentation relied on to support the discipline. (Testimony of Rob Trombley TR 56:39 – 56:45.)

There is nothing in the parties' contracts or in common sense that would prevent the County from both disciplining an employee under appropriate circumstance while simultaneously placing the employee on a PIP with the object of correcting the employee's conduct. Correlation is not cause and such a simultaneous use of a PIP would not thereby convert its use from correction to discipline.

The occasional inappropriate use of language in a PIP that sounds like that used in discipline does not, by itself, transform a corrective tool into a disciplinary tool. PIPs and Letters of Caution are maintained in employees' files at the Detention Center rather than forwarded to the Human Resources Department for inclusion in the Official Human Resources files the way a disciplinary action (other than an oral reprimand) would be. (Testimony of Stephanie Martinez; Tr. 15:36-16:12, Disk 5). Accordingly, they are not reviewed by Human Resources Staff so that the artless use of phrases in PIPs such as "failure to comply with the requirements listed above or further violations of County policy on your part shall lead to

further disciplinary action, up to and including termination of your employment" are not subject to correction by those who might know better than to use them.

Taking the foregoing into consideration, it makes sense that PIPs and Letters of Caution are not specifically referenced in the parties' CBAs and Personnel Policies because they are not discipline. As they are, instead, a performance evaluation tool they are properly regarded as being within the reserved management rights section; Article 4 Section 2 in the two CBAs (Exhibits J-2A and J-2B):

> "The County retains and reserves all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitutions of the State of New Mexico and the United States, the Public Employee Bargaining Act, and local Ordinances. The Union recognizes that except as specifically limited, abridged or relinquished by the terms and provisions of this Agreement, all rights to manage, direct, or supervise the operations of the County and employees are vested solely in the County. The County shall also have the management rights outlined below:
>
> ...C. To direct employees of the County and evaluate and judge employee's skill, ability, efficiency, and general performance in accordance with adopted County policies;"

Article 1 Section 2 of the Local 1413 CBA (Exhibit J-2A) and Article 1 Section 3 of the Local 1413-M CBA (Exhibit J-2B) provide that all issues not specifically addressed in the parties' CBAs shall be governed by the Santa Fe County Human Resources Handbook in effect at the time. In this case, the use of PIPs and Letters of Caution are not addressed specifically in either the CBAs or the County's Human Resources Handbook (Exhibit J-1). However, the preponderance of the evidence demonstrates that a past practice of using PIPs and Letters of Caution as part of the employee evaluation process has been established. The record contains examples of both documents from at least as early as 2012 and perhaps as early as 2005 if that is when the training module Exhibit E was created. The County's HR Director testified that the tools have been used without objection from at least that time.

Had the evidence shown that the County was altering its past practice by now using an evaluation tool as a disciplinary tool, the Complainant might have prevailed. Under the facts of this case it appears to be the Union that is seeking to change the County's past practice regarding the use of PIPs and Letters of Caution without bargaining. Without having established that the County's use of PIPs and/or Letters of Caution is contrary to either a contract right or a binding past practice the Union cannot prevail on its claim that the County unlawfully restrained or interfered with employees' rights under PEBA in violation of §19(B).

III. THE UNION HAS NOT MET ITS BURDEN OF PROOF AS TO ITS ALLEGED VIOLATION OF §19(C), INTERFERING WITH THE EXISTENCE OR ADMINISTRATION OF A LABOR ORGANIZATION.

Under the NLRA a provision essentially identical to §19(C) of the PEBA addresses a very narrow type of activity such as establishment of a "company union", infiltration of unions by lower-level supervisors or failing to maintain neutrality between competing unions. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 448-449. I found no evidence that the County took any action that interfered with the existence or administration of the Union within the narrow scope contemplated by §19(C). If it exists it has not been called to my attention by the Union in its brief. Therefore, this claim must be denied for lack of evidence.

IV. THE UNION HAS NOT MET ITS BURDEN OF PROOF AS TO ITS ALLEGED VIOLATION OF §19(F).

Section 19(F) of PEBA prohibits a public employer from refusing to bargain collectively in good faith with the Union. This PPC alleges that the County unilaterally imposed a "new" PIP system and instituted new disciplinary Letters of Caution without bargaining. (PPC ¶ 3). The premise of the claim has not been proven. As discussed above, the preponderance of

the evidence establishes that the County's use of PIPs and Letters of Caution is a retained management right. Any changes in the form of the PIPs or the letters of caution are not substantial or material. The County's use of both documents as a non-disciplinary, corrective management tool is consistent with its retained right to direct its employees, evaluate them and judge their skill, ability, efficiency, and general performance.

In reaching the conclusion that the County's use of these documents does not constitute a breach of its duty to bargain in good faith I am mindful that part of the stated purpose of the PEBA includes the protection "...of the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions." NMSA 1978 § 10-7E-2 (2003). Public interest is furthered by fostering the kind of immediate "feedback" exhibited by the proper use of these documents before undergoing the more stringent Performance Evaluation process contained in the County's Personnel Handbook. The Union itself potentially benefits from their use because its members would not be "caught off guard" once discipline is commenced due to deficiencies in performance or conduct and, in the context of the progressive discipline the Union espouses, to have some kind of written record of management's counselling and correcting of bargaining unit employees before resorting to discipline whenever possible.

Because the use of PIPs and Letters of Caution do not change the *status quo ante* I conclude that there was no obligation to bargain about them mid-term. According to Mr. Trombley's testimony concerning the union's demand to bargain the issue, the County responded "We will talk". This is not a refusal to bargain; it is an agreement to bargain albeit leaving open when that bargaining will take place. For reasons that are explained below I conclude that the County did not have an obligation to bargain mid-term.

As the Union pointed out in its brief the parties' CBAs contain the following "zipper clause":

> "A. This Agreement is the complete and only agreement between the parties and replaces any and all previous agreements. ***There shall be no additional negotiations on any item, whether contained herein or not and whether contemplated by either party at the time of negotiations or not, except by written mutual agreement of the parties.***
>
> B. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining and that all such subjects have been discussed and negotiated upon and agreements contained in this Agreement were arrived at after the free exercise of such rights and opportunities. Therefore, ***the County and the Union, for the life of this Agreement, each voluntarily and without qualification waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.*** All items in this financial package are contingent upon sufficient budget appropriations."

Exhibit J-2A, Article 28; Exhibit J-2B, Article 26 (Emphasis added).

While I can definitely acknowledge the Union's desire to bargain the use of PIPs and Letters of Caution, especially in light of the mess the County has made of their use through unfortunate language and title choices and inconsistent, ambiguous application of them, I do not conclude that the County is obliged to bargain them mid-term. The zipper clause does not apply to bar past practices with regard to their use because their use is consistent with reserved managements right that have been bargained. For these reasons the Union's claims for failure to bargain in good faith must be denied.

Notwithstanding the foregoing, I do not agree with the County's argument that the Union should be deemed to have waived the right to bargain the PIPs and the Letters of Caution because individual bargaining unit members' awareness of PIP's and Letters of Caution issued prior to January 2015 should be imputed to the Union and it did not object to them.

As the party asserting the affirmative defense of waiver, it is the County that bears the burden of proving that the alleged waiver was knowingly and voluntarily made. To impute knowledge held by individuals in the bargaining unit (who may or may not be members of the Union) to the Union is to effectively relieve the County of part of its burden of proof. That PIPs issued to individual bargaining unit members throughout 2012 – 2014 contained the contested disciplinary language is not evidence that the Union had knowledge of such language prior to January 13, 2015 when it learned of the PIP that prompted this complaint. For that reason and in light of the County's assertion that such PIPs are not discipline and are therefore not to be included in the employees' Human Resources central file, the Union cannot be deemed to have made a knowing waiver of its right to demand bargaining over the PIPs.

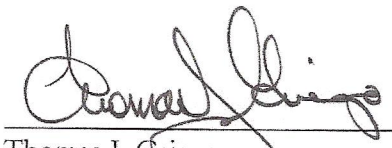
V. THE UNION HAS NOT MET ITS BURDEN OF PROOF AS TO ITS ALLEGED VIOLATION OF §19(H).

The PEBA §19(H) prohibits an employer's refusal or failure to comply with a collective bargaining agreement. As previously stated the parties' CBAs are silent with regard to the use of PIPs and Letters of Caution. I have concluded elsewhere in this Recommended Decision that the proper use of those documents in pursuit of performance evaluation goals is within the management rights clauses in those CBAs. Accordingly, the preponderance of the evidence does not support a conclusion that Santa Fe County has failed or refused to comply with either of the two collective bargaining agreements at issue here. For that reason the Union's claims under §19(H) are denied.

DECISION: The preponderance of the evidence in this case is insufficient to establish that the County of Santa Fe committed a prohibited practice by using PIPs and letters of caution. Although management has introduced ambiguity into the system by needlessly introducing ambiguous disciplinary language into what are intended to be performance evaluation tools,

those errors are occasional and do not change the essential nature of the documents. Any misuse of the PIPs or the Letters of Caution as a means of disciplining employees is best remedied on an *ad hoc* basis, possibly through the grievance process, though I do not decide now that grievance is the exclusive remedy. If it was in my power to do so, I would direct the County to correct the errors brought to my attention through this PPC including reviewing the central personnel files of the employees receiving a PIP or a letter of caution to ensure they are not present there. However, because I have not substantiated any of the Union's alleged violations of the Act I do not believe it is proper to direct the County to make such corrections. Based on the foregoing it is my report and recommended decision that the Union's claims should be **DENIED**, the PPC **DISMISSED** and that the Union take nothing thereby.

Issued, Wednesday, December 02, 2015.



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