STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,

Petitioner,

v.

PELRB 122-12

NEW MEXICO CHILDREN, YOUTH and FAMILIES DEPARTMENT,

Respondent

ORDER

THIS MATTER comes before the Board on Interlocutory Appeal of the Hearing Officer's Recommended Decision issued February 11, 2013 answering in the affirmative the question whether the right to union representation during investigatory interviews guaranteed private sector employees under federal labor law is also afforded public employees covered under New Mexico's Public Employee Bargaining Act.

Although the Hearing Officer's Recommended Decision concluded that the decision did not resolve the merits of the PPC because the union still must establish the elements of a proper invocation *Weingarten* protections on behalf of the individual employee or that the elements of one or more of its other alleged violations were met, the parties subsequently agreed to dismiss any remaining claims and to consider the February 11, 2013 Recommended Decision to have resolved all issues in the case.

Upon a roll call vote of 2-1 (Vice-Chair Bingham dissenting) the Board adopts the Hearing Officer's Findings, Conclusions and Rationale as its own and incorporates them into this Order.

IT IS HEREBY ORDERED that the Hearing Officer's Recommended Decision be, and hereby is, adopted by the Board as its Order on the basis that that PEBA's language is sufficiently broad to confer rights similar to those conferred by the NLRA as construed in the *Weingarten* decision, that PEBA does not exclude *Weingarten*-type rights and because the CYFD's case authority was distinguishable.

Vice-Chair Bingham writes separately to dissent from the majority which dissenting opinion is appended to this Order.

Date: 5/15/13

Duff Westbrook, Chair

DISSENT

To the extent this Board has previously held that New Mexico's PEBA confers so-called ***Weingarten*** rights [***NLRB v. Weingarten, Inc.***, 420 U.S. 251 (1975)] to public employees in New Mexico as set forth in the historical narrative in our Executive Director's recommended decision in the instant case, I would reverse those previous decisions by this Board and would consequently not adopt the recommended decision of Executive Director in the instant case for three reasons.

First, nowhere does PEBA expressly grant ***Weingarten*** rights to public employees. If New Mexico's Legislature intended to confer ***Weingarten*** rights to public employees, the Legislature should have so stated in PEBA. ***Weingarten*** was decided in 1975. PEBA was passed in 2003. The Legislature did not so state. Consequently, the Legislature did not confer ***Weingarten*** rights to public employees, and this Board should not confer them by decision.[1] In this regard, based on the statutory allowance of judicial review of administrative action, courts have authority to review the decisions of this Board, if appealed, and to determine whether those decisions are in accord with law.

Second, language in PEBA is different in a number of respects from language in the NLRA. Based on the reasoning and analysis in ***Johnson v. Express One International, Inc.***, 944 F.2d 247, 251 (5th Cir. 1991) (the Railway Labor Act is not the National Labor Relations Act), PEBA is sufficiently different from the NLRA so as not to grant ***Weingarten*** rights to public employees even if those employees have an exclusive collective bargaining representative. Like the RLA, PEBA is silent as to a right to engage in "concerted activities".

Third, the NLRA applies only to private sector employees. The U.S. Supreme Court in 1975 in ***Weingarten***, *supra*, construed rights under the NLRA to private sector employees, not public sector employees. Non-exempt public employees have a property interest in their job. Private sector employees do not have a property interest in their jobs. Thus, public employees, as a result of their property interest, have due process protections which private sector employees do not have. The due process protections held by public employees were expressly recognized by the U.S. Supreme Court 10 years after ***Weingarten***, *supra*, in ***Cleveland Bd. of Education v. Loudermill***, 470 U.S. 532 (1985). Consequently, if ***Weingarten*** has been interpreted to extend

[1] Private sector ***Weingarten*** rights apply only when a labor organization is the exclusive collective bargaining representative for the employees of an employer. ***Weingarten*** rights do not apply in non-union settings. See ***Johnson v. Express One International***, *supra*.

certain rights given to private sector employees to public sector employees, which rights are in effect due process rights, those arguing for such an extension must confront ***Loudermill***, wherein the Supreme Court clarified that public sector employees have due process protections with respect to their job. Because public sector employees have ***Loudermill*** rights, public employees do not need ***Weingarten*** rights. Public employees are sufficiently protected by their property interest. See ***Lovato v. City of Albuquerque***, 106 N.M. 287 (1987) and ***Zamora v. Village of Ruidoso Downs***, 120 N.M. 778 (1995).

Nevertheless, as has been demonstrated, some public employers have, despite ***Loudermill***, given their public employees ***Weingarten*** rights as a result of collective bargaining or by agency directive. This being the case, those public employees have both ***Loudermill*** rights and ***Weingarten*** rights until ***Weingarten*** rights are withdrawn through negotiation or retracted by agency directive. Retraction of ***Weingarten*** rights by means of agency directive may require compliance with New Mexico's Administrative Procedures Act or other agency-specific rulemaking procedures. That question is not before this Board. Additionally, the question of collateral estoppel, as raised by the petitioner, is a question appropriate for a court rather than this Board in light of this opinion.

Date: May 7, 2013

Wayne E. Bigbee

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

2929 Coors Blvd. N.W., Suite 303
Albuquerque, NM 87120
(505) 831-5422
(505) 831-8820 (Fax)

February 11, 2013

Shane Youtz, Attorney at Law
Youtz & Valdez, PC
900 Gold Ave.
Albuquerque, NM 87102-3043

Dina Holcomb, Attorney at Law
3301-R Coors Blvd. NW #301
Albuquerque, NM 87120

Re: ***AFSCME Council 18 v. NM Children, Youth and Families, Dept.; PELRB No. 122-12***

Dear counsel:

This letter constitutes my Findings of Fact, Conclusions of Law and Recommended Decision regarding the preliminary question at issue in this case. The threshold issue may be stated as follows:

Is the right to union representation at investigatory interviews which an employee reasonably believes may result in disciplinary action guaranteed private sector employees under federal labor law, also afforded covered public employees in New Mexico under the Public Employee Bargaining Act (PEBA)? The federal decisional law characterizes this right as the *Weingarten* rule or doctrine, a shorthand label used throughout this Recommended Decision. *See, NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975).

The operative facts in this case are as follows:

1. This matter comes before the Executive Director designated as the Hearing Officer in this case through a Prohibited Labor Practice Complaint (PPC) filed October 29, 2012, and subsequently amended November 5, 2012, alleging that on May 1, 2012 the Respondent's (CYFD) Human Resources Director sent an e-mail message to Cathy Townes, an AFSCME Steward and Vice President of AFSCME Local 477 regarding her attendance at an "ORM" meeting on behalf of an employee referred to as "Francine". In that e-mail the Human Resources Director, *inter alia*, expresses her opinion that "CYFD (State of New Mexico) is not subject to Weingarten under the NLRA. Weingarten and the NLRA do not apply to the public sector employees."

2. The Respondent filed its Answer to the Amended Complaint on November 21, 2012 and defended the allegations in part by denying the Union's allegation that the PELRB has previously determined in a case involving the CYFD that *Weingarten* rights apply in New Mexico under the Public Employees Bargaining Act.

3. At a Status and Scheduling Conference December 14, 2012 the parties agreed that the pleadings give rise to a threshold issue regarding the applicability of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) to cases before the PELRB. The parties agree that in the interest of administrative economy both would benefit from a decision on that limited issue before proceeding with scheduling any other pre-hearing motions or the merits of the Complaint. Accordingly, the parties agreed to brief the threshold issue before proceeding further with the case, reserving any issue(s) regarding whether the similar rights as those afforded under the *Weingarten* rule appertain pursuant to contract or other applicable law(s).

4. At the December 14, 2012 Status and Scheduling Conference, the Hearing Officer established a briefing schedule whereby the Complainant was required to submit its brief arguing for application of *Weingarten* rights by January 14, 2013 and Respondent was to submit its Response brief by February 4, 2013. Both parties timely submitted their briefs with supporting documents and case authorities.

5. The Hearing Officer takes Administrative Notice based on prior admissions in this and other cases before the PELRB involving the parties and also based on clarification by Respondent's counsel at the December 14, 2012 Status and Scheduling Conference that AFSCME Council 18 is, and was at all pertinent times, the duly recognized and acting labor representative (although perhaps not the duly *elected* representative as plead) and the collective bargaining agent for a group of employees in the Children. Youth and Families, Department that includes the employee at issue in this case.

6. Respondent, New Mexico Children, Youth and Families, Dept. is a political subdivision of the State as admitted and is a public employer as that term is defined by §10-7E-4 (S) NMSA 1978.

DISCUSSION AND CONCLUSIONS OF LAW

The PELRB has jurisdiction over the parties and the subject matter of this dispute pursuant to its authority to consider and remedy complaints of a public employer' s failure to comply with PEBA, NMSA 1978, § 10-7E-9. I take Administrative Notice of the Board's own files and records with regard to the PELRB Decisions and Orders referenced herein.

Upon my initial review of the Amended PPC and the e-mailed statement by Respondent's Human Resources Director (Exhibit 1 thereto) I was inclined to regard her statement as a harmless though overly technical interpretation of *Weingarten* by a layperson unfamiliar with the shorthand term of art employed by many in the labor-relations arena when they refer to "*Weingarten* rights". Likewise, I was inclined to regard the union's filing of a PPC

because of that statement to be an overly sensitive reaction to a mere expression of opinion which did not seem to have any effect on whether the employee at issue was actually represented by her union. However, such a cursory approach would not be warranted because the Respondent's Answer to the PPC denies that PELRB has previously determined that *Weingarten* rights apply in New Mexico under the Public Employees Bargaining Act and the union's allegations that representational rights, whether arising under PEBA by the *Weingarten* doctrine or under the parties' CBA, awaits future factual development. The parties have agreed, and I concur, that before undertaking that further factual development, clarity is needed on the question whether PELRB has previously determined that *Weingarten* rights apply in New Mexico under the Public Employees Bargaining Act. This threshold question therefore raises a serious and significant issue affecting public sector collective bargaining statewide, and issues that are important to the consistent and uniform administration of the PEBA, throughout the State of New Mexico.

To say that *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) and the National Labor Relations Act do not apply to public sector employees begs the question. The threshold issue to be determined is whether the bundle of union-represented employee rights known in legal shorthand as "Weingarten rights" may be found in PEBA just as the U.S. Supreme Court found those rights to have arisen out of the NLRA in the *Weingarten* case. The elements of a violation of rights accorded employees under the *Weingarten* rule may be summarized as follows:

First, there must be some kind of "interview" which the complainant reasonably believed might result in disciplinary action. Second, the complainant must request that a union representative be present and that the request was denied. Finally, subsequent to the employer's denial of representation, the employer must insist that the employee continue with the interview.

A. PRIOR RELATED DECISIONS

This is not an issue of first impression. The New Mexico Public Employee Labor Relations Board and its Hearing Officers have previously decided challenges by the State's public employers to *Weingarten* rights arising under PEBA. After an evidentiary hearing and briefing the Board's Hearing Officer in PELRB 121- 05, issued a Decision against the Public Defender Department directing it to retract a policy which refused to recognize employees' *Weingarten* rights. An appeal to the Board from that Decision was withdrawn as a condition of settlement in which the Department acknowledged the Director's findings, posted notice acknowledging its violation of PEBA and rescinding the policy "prohibiting non-agency and Union officials from appearing to represent Department employees in Weingarten meetings." *See* Agreement between New Mexico Public Defender Department and AFSCME Council 18 in PELRB 121- 05 dated July 14, 2006.

As part of the rationale behind his Recommended Decision in PELRB 121- 05 Hearing Officer Juan Montoya equated the protections afforded employees by Section 7 of the NLRA to act in concert for mutual aid and protection, with the rights guaranteed by PEBA §10-7E-

5 to form, join or assist a labor organization for the purpose of collective bargaining. His Decision contains the following Conclusion of Law:

> "The PDD violated 10-7E-19(B) NMSA 1978 by denying Mr. Michael Lovato's right to have a Union representative accompany him during employee-employer meetings where he thought discipline might result and was in fact disciplined."

(*See*, letter decision of May 24, 2006, Conclusion No. 3, PELRB 121-05).

Because the parties reached a settlement agreement which required the Union to withdraw its complaint the Hearing Officer's Recommended Decision was not reviewed on appeal to the PELRB. I am cognizant here of NMAC 11.21.3.19 (D) provides that a hearing examiner's report and recommended decision that is not appealed to the Board may be adopted *pro forma*, in which case the report and decision shall be final and binding upon the parties but shall not constitute binding board precedent. For that reason I cite to PELRB 121-05, not as binding precedent in this case, but in order to provide a historical context for the cases that follow and as a prior decision worthy of consideration.

In *Pita S. Roybal v. Children, Youth & Families Department*, PELRB 156-05 the Hearing Officer dismissed a PPC filed by a CYFD employee on the ground that the meeting at issue in that case "was not to investigate Ms. Roybal's activities but to discipline her for her prior acts, [and therefore] the Weingarten rights do not apply." *See*, Letter of Dismissal in PELRB 165-05 dated February 7, 2006. Ms. Roybal appealed that decision to the Board with the result that the Board entered a Decision and Order on May 16, 2006 approving and adopting the Hearing Officer's decision as its own. *See*, 02-PELRB-2006. In its Order the PELRB wrote:

> "The issue on appeal concerns solely whether Children, Youth and Families Department denied Ms. Roybal her 'Weingarten Rights.' Those 'Weingarten Rights' are union member protection rights, handed down by the United States Supreme Court. Those rights are: If a member is called into a meeting with management and the meeting could in any way lead to the member being disciplined or terminated or could affect the member's personal working conditions, the member has the right to inform management that the member requests his or her union representative to be present at the meeting. Until that representative arrives, the member may choose not to participate in the discussion."

This Board subsequently again adopted the same principle in another case heard by Hearing Officer Pilar Vaile; *AFSCME, Council 18 v. N.M. Dep't of Health*, PELRB 168-06 (Aff 'd, as 06-PELRB-2007). In her Recommended Decision adopted as a Board Order we read:

> "...PEBA protects peaceful concerted activity for mutual aid and support to the same extent as does the NLRA... Comparing PEBA to the NLRA, I conclude that the protections provided by PEBA are sufficiently similar to those

> provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees engaged in more general concerted activities, not only those activities performed to assist a labor organization. *See Regents of UNM v. NM Federation of Teachers*, 125 NM 401 (1998) (The PELRB will give great weight to interpretation of the NLRA where the relevant provisions 'are the same or closely similar' to those of PEBA)."

The Hearing Officer also wrote:

> "Section 5 of PEBA guarantees public employees other than management and confidential employees the right to 'form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion.' while section 7 of the NLRA guarantees covered employees the right to 'form join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' The two provisions provide for basically the same rights and the differences in text in PEBA appear to be directed to streamlining the language utilized in the NLRA, rather than limiting or narrowing the enunciated rights."

(Hearing Examiner's Report in PELRB No. 168-06, at p. 7.)

The Department of Health did not appeal the Board's Order adopting the Hearing Officer's Report and Recommended Decision to the District Court.

The Adult Protective Services Division of the Aging and Long-Term Services Department raised the same threshold issue that I address here in *AFSCME v. Adult Protective Services Division*, PELRB 111-10 (Board Decision and Order 09- PELRB- 2010, October 12, 2010). In that case, the employer moved for Summary Judgment on the grounds that the Union was contractually obligated to arbitrate its dispute, that there were insufficient facts to support the violations alleged, that no *Weingarten* violation occurred and that even if a *Weingarten* violation did occur it would not be a violation of PEBA. *See,* Respondent's Motion for Summary Judgment in PELRB 111-10, p. 7, 2nd full paragraph. The Union Responded to the Motion and filed its own Counter Motion for Summary Judgment (designated as a "Cross Motion"). In its pleadings the Union skirted the *Weingarten* issue somewhat, arguing:

> "The Employer's legal analysis falls short. While it is AFSCME's position that public employee's under PEBA *do* have *Weingarten* rights that legal question need not be answered here. Ms. Bynum's right to union representation at the disciplinary investigation conducted by the Employer is clearly and unequivocally set forth in the CBA."

Union Response and Counter Motion, p. 6, 1st full paragraph. (Emphasis in the original).

By relying primarily on the CBA's protections, which were greater than those afforded under *Weingarten*, the union did not fully develop a legal argument concerning the issue here, whether *Weingarten* rights are also afforded covered public employees in New Mexico under the PEBA. Nevertheless, the Hearing Officer's letter decision granted Summary Judgment in favor of the union concluding that violations of both *Weingarten* and the CBA occurred. The Hearing Officer explicitly recognized *Weingarten* protections as extending to State of New Mexico Employees as distinct from representation rights arising out of the CBA:

> "Weingarten requires that the employee reasonably believe that discipline could result from the investigatory meeting and ask for union representation... Therefore the prerequisite first alcohol positive test is part of the discipline process and qualifies for Weingarten protection and triggers the CBA, Article 24, Section 2(1) (a) rights."

See, Hearing Officer's Decision PELRB 111-10 at p. 8.

On appeal from the Hearing Officer's Decision the employer did not challenge the Hearing Officer's Conclusion that *Weingarten* rights applied and although it again raised the same *Weingarten* issue argued in its Summary Judgment Motion, it did so by tacitly admitting *Weingarten*'s application, citing to federal authority on its protections and from Pennsylvania Labor Board and appellate decisions construing *Weingarten* rights, arguing only that *Weingarten* rights were not violated under the facts of the case.

The Union in its Response to the Notice of Appeal in PELRB 111-10 again relied primarily on violations of the parties' CBA rather than *Weingarten* rights *per se*. Although it did argue that both *Weingarten* rights as distinct from rights arising under the CBA were violated.

The Board upheld the Hearing Officer's recognition of *Weingarten* rights in his Recommended Decision granting the union's "Cross Motion" and denying the employer's Motion for Summary Judgment, declining to adopt only that portion of the Hearing Officer's decision concluding that *Weingarten* rights apply to an action "prerequisite" to a disciplinary interview, which action is not in and of itself disciplinary. That conclusion, if it had been adopted by the Board, would have represented an expansion of *Weingarten* rights. (Decision p. 9, paragraph 5):

> "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."

Board Decision and Order, 09-PELRB-2010, issued October 12, 2010.

The Board's Decision and Order adopted without exception the Hearing Officer's Conclusions of Law including:

> "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'."

The Adult Protective Services Division did not appeal the Board's Order to District Court thereby making it final and binding. (NMAC 11.21.3.19.) I was not able to find any prior Board Orders or New Mexico Court cases declining to apply *Weingarten* rights to public employees under PEBA.

Based on the foregoing, it appears that this Board has an established history of recognizing that *Weingarten* rights arise under the PEBA. I decline to depart from that history both for reasons of *stare decisis*, as well as because the Board's prior decisions on this issue constitute a well-reasoned interpretation of PEBA. The New Mexico Supreme Court has recognized that "much of the language in PEBA was derived from the National Labor Relations Act." *Regents of the Univ. of N.M. v. N.M. Fed. of Teachers*, 125 N.M. 401, 962 P.2d 1236 (1998). For that reason, "[a]bsent cogent reasons to the contrary, [courts] should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Id.* (quoting *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 123 N.M. 239. 938 P.2d 1384 (Ct. App. 1997).

Accordingly, I follow the rationale in the preceding PELRB cases construing the rights guaranteed by PEBA at §10-7E-5 NMSA 1978 to form, join or assist a labor organization for the purpose of collective bargaining as substantially the same as the protections afforded employees by Section 7 of the NLRA to act in concert for mutual aid and protection. I concur with the previously established rationale that the protections provided by PEBA are sufficiently similar to those provided by the NLRA to warrant the inference that the New Mexico Legislature intended to protect public employees to the same extent as does the decision in *Weingarten v. NLRB.*

Furthermore, by declining to deviate from the Board's prior decisions on this issue, this Recommended Decision is in harmony with the actual custom and practice prevailing throughout the State. Many important collective-bargaining agreements, including that between the parties in this case, have provisions that afford employees rights of union representation at investigatory interviews. The union provided examples of long-standing Agency policies adopting *Weingarten* protections, such as the New Mexico Department of Corrections' *"Weingarten* Rights" policy attached as Exhibits 1 and 2 to its brief and in Exhibit 1 to the instant PPC the Respondent's Human Resources Director acknowledges "language in the CBA that is similar to Weingarten rights in Article 24, so we do have to comply with the contract language."

B. Doctrine of Collateral Estoppel

The Union argues that the "State" should be estopped from challenging the application of *Weingarten* under the doctrine of collateral estoppel. The principle case in New Mexico cited for the application of collateral estoppel is *Shovelin v. Central New Mexico Elec. Co-op., Inc.*, 850 P.2d 996, 115 N.M. 293 (N.M., 1993). Before collateral estoppel is applied to preclude litigation of an issue the moving party must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. *See also, Silva v. State*, 106 N.M. 472, 474-76, 745 P.2d 380, 382-84 (1987). If the movant introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation. *Id.* at 474, 745 P.2d at 382. Application of the collateral estoppel doctrine in the instant case would raise questions concerning whether this Board's Orders entered in cases where the Respondent was New Mexico's Public Defender Department, Department of Health, Adult Protective Services Division or some other Agency of the State, should be given preclusive effect in a case involving a different Agency, the Children, Youth & Families Department, Respondent in the instant case. Unless a State Agency such as the State Personnel Office purports to speak on behalf of the entire State in any given PELRB proceeding, it would not be just to apply offensive collateral estoppel against all other agencies of the State.

Even in *Pita S. Roybal v. Children, Youth & Families Department*, 02-PELRB-2006, where the parties are the same in both the instant and the prior case, and that case is clearly a different one than that before us now, I cannot confidently apply the collateral estoppel doctrine because, it is not clear that the parties actually litigated the issue of whether the right to union representation at investigatory interviews guaranteed private sector employees under federal labor law, is also afforded covered public employees under our PEBA. Both in its answer to the PPC in PELRB 156-05 and its Response to the Appeal before this Board in that case the Children, Youth and Families Department presumed the existence of the statutory *Weingarten* rights that are contested here, defending the allegations against it solely on the ground that the presumed rights were not violated.

Concluding that the limited issue now before me was not actually litigated in PELRB 156-05 is consistent with the principle that application of the doctrine of collateral estoppel against the State is generally disfavored. The doctrine is "rarely applied against the State and then only in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it." *Wisznia v. State Human Servs. Dep't*, 125 N.M. 140, 958 P.2d 98 (1998); See e.g., *Lopez v. State*, 122 N.M. 611, 930 P.2d 146 (1996); *Nat'l Adver. Co. v. State ex rel. State Highway Comm'n*, 91 N.M. 191, 193, 571 P.2d 1194, 1196 (1977); *Ross v. Daniel*, 53 N.M. 70, 75, 201 P.2d 993, 996 (1949).

Therefore, I do not decide this preliminary issue on collateral estoppel grounds.

Conclusion and Recommended Decision

The foregoing analysis of prior decisions of this Board on the applicability of *Weingarten* rights compels the conclusion that those public employees covered by the PEBA are entitled to union representation in investigatory interviews which they reasonably believe might lead to disciplinary action and that denial of an employee's *Weingarten* rights as defined herein is a prohibited labor practice under §10-7E-19(B) by interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the PEBA.

I find nothing in the PEBA inconsistent with the policy expressed by the United States Supreme Court construing language in the NLRA. Nor would the New Mexico Legislature's concern for protecting the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions be imperiled by the adoption of the federal courts' construction of Section 7 rights under the NLRA in establishing the parameters of employee rights under §10-7E-5 NMSA 1978. In fact, this reading supports the Legislature's general concern for promoting harmonious and cooperative relationships between public employers and public employees.

In the interest of providing the clarity sought, I also determine that the rights described herein are the employee's, not the Union's, and must be invoked by the employee, not by the Union on his or her behalf. I find no requirement under *Weingarten* that the employer must advise the employee of his or her *Weingarten* rights. The Union does not have an independent statutory right to participate in a management-initiated investigatory meeting with an employee. The Union's interest in participating in investigative interviews is derivative from the right of the individual employee, and is dependent upon the assertion of that right by the individual employee.

My conclusion that employees of the Children, Youth and Families Department have statutory *Weingarten* rights does not resolve the merits of the PPC because AFSCME Council 18 still must establish the elements of a proper invocation *Weingarten* protections on behalf of the individual employee or that the elements of one or more of its other alleged violations were met. As a result of this letter decision a further hearing to take evidence and hear argument concerning whether the employee at issue made a timely request for union representation and whether the Union can meet its burden of proving each element of the violations delineated in their complaint.

Sincerely,

Thomas J. Griego
Executive Director, PELRB

Cc: Sandy Martinez, SPO Labor Relations Director