STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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September 1, 2016

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Attn: Dina Holcomb

Re: ***NMCPSO v. City of Rio Rancho and the Rio Rancho Police Dep't. ; PELRB No. 113-16***

Dear counsel:

This letter constitutes my decision regarding the Respondent's Motion for Summary Judgment or for Dismissal filed August 5, 2016. By letter decision dated August 29, 2016 the Union's Response to the Motion was stricken and is therefore not considered in rendering this decision. After considering the movant's arguments, affidavits and other evidence submitted I have determined that the Motion should be **DENIED** in part and **GRANTED** in part for the reasons set forth below:

STANDARD OF REVIEW:

First the County seeks dismissal as a matter of law for failure to comply with my request for supporting evidence pursuant to rule 11.21.3.12 (C) and for both untimely filing and for failing to state a claim. Finally, the City challenges this Board's jurisdiction to determine the Constitutionality of alleged free speech violations.

There are two legal standards to be applied in resolving the City's Motion; First, as a Motion to Dismiss analogous to a Motion brought under New Mexico Rule of Civil Procedure 1-012(B)(6). When deciding such motions the PELRB has historically applied the standard found in SCRA 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. Dismissal on 12(B) (6) grounds is appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces,* 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4. Second, as a Motion for Summary Judgment under New Mexico Rules of Civil Procedure, Rule 1-056. When deciding a motion for summary judgment the PELRB has followed SCRA 1-056 and the cases decided thereunder. See *AFSCME Council 18 v. New Mexico Department of Labor,* 01-PELRB-2007 (Oct. 15, 2007). (Applying that rule the movant shall set out a concise

statement of all material facts about which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which the party relies. Summary Judgment will be granted only when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.* 150 N.M. 123, 257 P.3d 943, (N.M. 2011); *Smith v. Durden*, 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). An award of summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Koenig v. Perez*, 1986-NMSC-066, ¶6 104 N.M. 664. ¶10 (*citing Westgate Families v. County Clerk of Los Alamos,* 100 N.M. 146, 667 P.2d 453 (1983) and *Meeker v. Walker*, 80 N.M. 280, 454 P.2d 762 (1969)).

MATERIAL FACTS NOT IN CONTROVERSY. I incorporate from the City's Motion the following uncontroverted facts:

1. Complainant is the exclusive representative for certain City of Rio Rancho public safety employees who work at the Rio Rancho Police Department . ("Department"), including police officers, corporals, and sergeants (hereinafter "the Bargaining Unit"). (PPC ¶2 and Answer ¶2).
2. A collective bargaining agreement (CBA) is in effect between the Complainant and Respondents which governs wages, hours, and working conditions for employees within the Bargaining Unit. (PPC ¶4 and Answer ¶4).
3. Justin Garcia is a member of the Bargaining Unit, holding the rank of Corporal. (PPC ¶5 and Answer ¶5).
4. In late 2014, the Department commenced an Internal Affairs ("IA") investigation against Vernon Ford, a former police officer of the Department, upon the results of a random drug test. (PPC ¶7 and Answer ¶8).
5. Thereafter, on or about January 20, 2015, Officer Ford resigned his employment with the Department. (PPC ¶7 and Answer ¶9).
6. Corporal. Garcia served as Officer Ford's union representative during some portions of the investigative processes. (PPC ¶8 and Answer ¶10).
7. On or about October 19, 2015, Officer Ford, through his attorney, Sam Bregman, filed a lawsuit against the City of Rio Rancho. (PPC ¶9 and Answer ¶11).
8. Attorney Bregman identified Corporal Garcia as a witness for Plaintiff Ford. (Exhibit A to Respondent's Motion).
9. On or about March 15, 2016, Corporal Garcia was deposed by the Rio Rancho City Attorney's Office in furtherance of its defense against the Ford lawsuit. (PPC ¶10 and Answer ¶12).
10. The Rio Rancho City Attorney's Office provided a Notice of Deposition to Attorney Bregman to depose Corporal Garcia. (Exhibit B to Respondent's Motion).

11. On or about April 6, 2016, Corporal Garcia was served with a Memorandum by Deputy Chief Paul Rodgers, placing Corporal Garcia on Administrative Leave pending an internal affairs investigation. (PPC ¶18 and Answer ¶22).
12. Placement of Corporal Garcia on Administrative Leave required Corporal Garcia to surrender his badge, weapon, and service vehicle. (PPC ¶19 and Answer ¶23).
13. While under investigation, Corporal Garcia's work assignment was altered from traffic patrol to an administrative assignment. (Affidavit Rodgers at ¶6, Exhibit C to Respondent's Motion).
14. While under investigation, Corporal Garcia's work days were changed from Wednesday through Saturday for ten (10) hour shifts to Monday through Friday for eight (8) hours shifts. (Affidavit of Rodgers at ¶8).
15. On or about April 21, 2016, Corporal Garcia filed a contractual grievance with the Department. (PPC ¶27, and Answer ¶31).
16. On or about April 25, 2016, Deputy Chief Rodgers served Corporal Garcia with the Department's response to the grievance. (PPC ¶28 and Answer ¶32).

The following Finding of Facts are taken from the PPC and the City's Answer thereto:

17. On or about April 21, 2016, Corporal Garcia filed a contractual grievance with the Department. (PPC ¶27 and Answer thereto).

DISCUSSION AND RATIONALE:

I. The Complaint is not subject to Dismissal for violation of Board Rule 11.21.3.12 (C).

As is customary, on May 20, 2016 I wrote to the parties acknowledging receipt of the PPC, informing them that it was "facially adequate" and, pursuant to NMAC 11.21.3.12(B), requesting that the Complainant "…present to me all evidence now available… in support of the complaint, including documents and an outline of the testimony of any witnesses or their affidavits, within 10 days of this letter. *There is no need to duplicate submissions already made.*" (Emphasis added.)Review of the file indicates that the union did not respond to that request within the 10 days referenced in the letter. My purpose of making requests for additional information pursuant to NMAC 11.21.3.12(B) such as that outlined above is three-fold: (1) to satisfy my obligation to investigate prohibited practice charges beyond the initial review for facial adequacy; (2) to obtain as much supporting information and put it on the record as soon as possible, insofar as it already exists; (3) to compel the Complaining party to substantiate its complainant well head of a hearing on the merits.

In this case the PPC, when filed, was supported by nine documentary supporting exhibits, including a lengthy transcript of a sworn deposition. That supporting documentation submitted contemporaneously, with the PPC when filed is sufficient to meet the purposes of Rule

11.21.3.12(B), especially in light of the fact that the letter making the request also informs the complainant that "there is no need to duplicate submissions already made".

Even when all available evidence has been submitted with the complaint, the better practice is to respond to the request for information within the required 10 days, if just to inform me that Complainant has done so. Given the supporting evidence submitted with the complainant at the time of its filing, it is not appropriate to dismiss the complaint for the union's failure to separately respond to my letter of May 20, 2016.

II. Whether Analyzed as a Motion Under NMSC Rule 1-056 or NMSC Rule 12(B) (6), Material Questions of Fact Exist Requiring a Hearing on The Merits So That Judgment in Favor of the City as a Matter of Law is Not Warranted.

The Employer correctly points out that under the *Wright Line* test it "must be determined... whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities." *Wright Line*, 251 NLRB No. 150 (1980). While this is an accurate statement of the Complainant's burden at the Hearing on the Merits, it is the City that bears the burden of proof on its Motion, that either accepting all well-pleaded factual allegations as true and resolving all doubts in favor of sufficiency of the complaint or, in the alternative, that there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party so that the extreme remedy of dismissal as a matter of law is warranted. The undisputed facts proffered by the employer do not rise to that level. At best, the Employer has demonstrated by the Motion's supporting documents that it has the right and obligation to investigate allegations of misconduct, to authorize overtime payment and to assign and transfer an employee. However, it is axiomatic that legal means may not be employed to achieve an illegal end. Therefore, the City's Motion fails to dispel questions of fact remaining with regard to whether anti-union animus exists, whether there was adverse action in connection with the employer's knowledge of protected union activities.

III. The PELRB Lacks Subject Matter Jurisdiction over Any Alleged Violation of Article II, Section 17 of the New Mexico Constitution.

Complainant alleges a violation of Corporal Garcia's constitutional right to freedom of speech. (PPC at ¶35). To the extent Complainant seeks redress from the PELRB for a constitutional violation it is not within the Board's power to grant that relief. As a constitutional claim, the District Court has original jurisdiction over any claim of a violation of constitutional rights. See, Article VI, Section 13 of the New Mexico Constitution. It does not follow that by acknowledging that the PPC references constitutional free speech rights, however, that the PPC is seeking relief for its violation. There is nothing in its prayer for relief, for example, seeking redress for the alleged violation of constitutional rights. It is possible that conduct giving rise to the allegation that constitutionally protected free speech rights were violated may also violate the PEBA §§ 5, 19(A), (B), (D), (E) or (G) and Section 19 violations have been plead and the prayer for relief includes those claims.

To the extent the PPC asserts a claim for violation of the New Mexico Constitution (which I am not confident that it does) such claim is properly dismissed. Dismissal of a constitutional claim that arguably may or may not have been intended does not require dismissal of the entire complaint, nor does it foreclose an argument that the same conduct may establish a violation of the PEBA over which this Board *does* have jurisdiction.

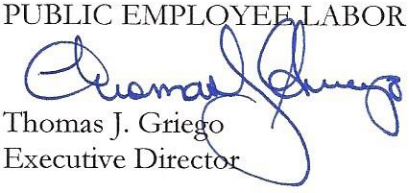
CONCLUSION:

To the extent the PPC asserts a claim for violation of the New Mexico Constitution (which I am not confident that it does) such claim should be, and hereby is **DISMISSED.**

With regard to the remaining claims, the Department's Motion for Dismissal and/or for Summary Judgment should be, and hereby is **DENIED** for the reasons stated herein.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



Thomas J. Griego
Executive Director