STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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c/o Youtz & Valdez, P.C.
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Albuquerque, New Mexico 87102
Attn: Stephen Curtice

Santa Fe County Attorney's Office
102 Grant Avenue
Santa Fe, New Mexico 87501
Attn: Rachel Brown

Holcomb Law Office
3301-R Coors Blvd. NW #301
Albuquerque, New Mexico 87120
Attn: Dina Holcomb

Re: ***AFSCME, Council 18 v. Santa Fe County; PELRB 121-15***

Dear Mr. Curtice, Ms. Holcomb and Ms. Brown:

This letter constitutes my amended decision regarding the Respondent's Motion for Summary Judgment or for Dismissal filed December 18, 2015. The Union responded to the Motion on December 29, 2015 following a one day extension of time on an unopposed motion. 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:

As I read the County's motion, it conflates two different standards:

First the County seeks dismissal as a matter of law for both untimely filing and for failing to state a claim, and;
Second, because the material facts viewed in the light most favorable to the Union militate in favor of judgment for the County.

The first standard may be analogized to a Motion to Dismiss 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.

The second standard may be analogized to 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:

1. Complainant is the exclusive bargaining representative of certain employees at the Santa Fe County Detention Center. (Complaint and Answer ¶¶ 1).
2. Santa Fe County and Complainant entered into an initial collective bargaining agreement with an effective date of October 28, 2014 and although the Affidavit of Bernadette Salazar ¶ 3 indicates that the CBA is effective through June 30, 2015 I take administrative notice of the fact that the CBA is effective through June 30, 2018.
3. Santa Fe County Detention Center has utilized lapel cameras since at least 2012. (Affidavit of Mark Caldwell ¶¶ 3 and 4).
4. Pursuant to the collective bargaining agreement, bargaining unit employees facing possible disciplinary action are afforded a pre-determination meeting. (Affidavit of Bernadette Salazar ¶ 4).
5. Following the pre-determination meeting, a decision on the proposed disciplinary action is provided by the Santa Fe County Human Resources Director or her designee. (Affidavit of Bernadette Salazar ¶ 5).
6. Pursuant to the collective bargaining agreement, bargaining unit employees may appeal the decision of the Human Resources Director to the County Manager. (Affidavit of Bernadette Salazar ¶ 5; CBA Section 4 (B)(1)).
7. The County Manager may meet with a bargaining unit employee in addition to receiving the employee's written appeal. (CBA Section 4 (B)(2)).

8. Pursuant to the collective bargaining agreement, the County Manager's decision on disciplinary action is appealable to arbitration. (CBA Article 16 (B)(2)).

DISPUTED MATERIAL FACTS

1. Notwithstanding that the Santa Fe County Detention Center has "utilized" lapel cameras since 2012 it remains disputed as to the extent bargaining unit members have been required to wear them and what the parameters of any requirement may have been prior to August of 2015. Compare the Affidavit of Mark Caldwell ¶¶ 5 and 6 with the Affidavit of Daniel Solis, ¶¶ 6, 7 and 8. See also, Ex. A to the Solis Affidavit; an e-mail message dated December 24, 2014, directing Shift Commanders to begin to wear lapel cameras "effective immediately."
2. A collateral disputed fact, whether a substantial change in the Employer's procedure regarding the wearing and use of lapel cameras sometime in August of 2015, arises out of the foregoing.

ISSUE PRESENTED:

Whether the County is entitled to dismissal of the PPC herein as a matter of law under one or both of the two standards delineated above.

DISCUSSION AND RATIONALE:

I. The Complaint is Not Time-Barred.

The PELRB's Rules require that a Complaint be filed no later than six months following the conduct alleged to have violated PEBA or after Complainant "discovered or reasonably should have discovered" the conduct. NMAC 11.21.3.9. The Union refuted the affidavit of Warden Caldwell and the supporting documents including an invoice for purchase of 4 lapel cameras dated August 23, 2012 and email dated January 29, 2014 directing Lieutenants and Sergeants to wear lapel cameras. During the effective dates of those documents, AFSCME did not represent Lieutenants and would have no basis on which to be concerned with policy changes affecting that rank. Therefore, it remains a material disputed fact whether the County unilaterally instituted a policy that required Sergeants to wear body cameras within six months of the filing of the PPC as alleged in PPC ¶8. See, NMAC 11.21.3.9. Accordingly, accepting all well-pleaded factual allegations as true and resolving all doubts in favor of sufficiency of the complaint, dismissal on 12(B)(6) grounds as an untimely filing would not be appropriate. Neither would it be appropriate to dismiss as time barred under the Summary Judgment standard because the Union's counter-affidavit and attachments thereto give rise to the disputed facts herein.

II. The Complaint Fails to State a Claim for Which Relief Can Be Granted as to its Allegation That The County Has Failed Or Refused To Provide Information to The Union Needed to Represent its Bargaining Unit Employees.

The PPC is premised in part on allegations that the County has "failed or refused to provide information to the Union" that it needs to represent its bargaining unit employees (PPC ¶4) and that

such failure breached a prior settlement agreement (PPC ¶19). Those allegations presume that the Union is entitled to disclosure of all evidence in support proposed discipline "prior to the predetermination hearing" (PPC ¶16) either as a matter of applicable case law or as a result of the referenced settlement agreement.

Public employees are entitled to due process before a decision to impose discipline is made and the leading case on the procedural due process in the pre-determination context is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487 1493, 84 L.Ed.2d 494 (1985). *Loudermill* has been followed in New Mexico case decisions on the issue, for example in *Benavidez v. City of Albuquerque*, 101 F.3d 620 (10th Cir.1996); *Linney v. Board of County Com'rs of Chaves County*, 743 P.2d 637, 106 N.M. 378 (N.M. App., 1987) and *Wheatley v. County of Lincoln*, 887 P.2d 281, 118 N.M. 745 (N.M., 1994. *Loudermill* established as the essential elements of due process (1) notice, and; (2) an opportunity for a hearing appropriate to the nature of the case. See *Benavidez*, 101 F.3d at 627. At the predetermination stage the hearing is not to resolve definitively the propriety of the charge, but only to determine whether there are reasonable grounds to believe the charges are true and the action is correct. The hearing need not be elaborate and something less than a full evidentiary hearing is sufficient. *Id.* What employees are entitled to are: (1) oral or written notice of the charges; (2) an explanation of the evidence against them, and; (3) an opportunity to present their side of the story. *Id.* With regard to the employee Ortiz the information that the Union requested but that was not "timely" provided is "...all related documents, including a complete investigation video and audio...". Although the specific requests made by employees Thomas and McLemore were not plead the union did allege that "similarly", the County "has failed to provide requested disciplinary information relating to the disciplines" [sic] of those two employees.

The requested information far and away exceeds that to which the employee is entitled at the predetermination stage in contrast to what the employee may be entitled to at an evidentiary hearing once discipline is imposed applying the *Loudermill* standard. Therefore, I conclude that the County's failure to provide the requested information *prior to* the County's decision to impose discipline did not violate accepted standards established by the case law on the subject.

The Union argues that the mutual obligation to bargain in good faith in Section 17(A)(1) of the Public Employee Bargaining Act (NMSA 1978, § 10-7E-17(A)(1) (2003)) and the provision of Section 19(F) making it a prohibited practice for the public employer to "refuse to bargain collectively in good faith with the exclusive representative" entitles it to the information requested because the duty to bargain in good faith also includes the duty to provide information necessary to the exclusive bargaining representative's role. The cases cited by the union address information needed by the bargaining representative in contract negotiations and administration of the contract. They also acknowledge that an employer must provide the requested information in a *timely* manner.

I am not persuaded by the Union's argument both because the timeliness element present in the "good faith bargaining" context is consistent with the limited disclosures contemplated by *Loudermill* at the predetermination stage and because adopting the Union's rationale would erase the distinction between a predetermination hearing where something less than a full evidentiary hearing is sufficient

and a post-determination hearing where employees are entitled to confront witnesses again them and to refute documentary evidence.

Neither the settlement agreement or the CBA impose any disclosure requirements on the County apart from that in *Loudermill*. The settlement agreement (to which the Hearing Officer s not privy) provides that the County will "…provide the Union, in a timely fashion, and to the extent permitted by law, with all non-privileged material the County relied upon to form the basis of the discipline for any bargaining unit employee." PPC ¶ 19.

That language supports my conclusion that full disclosure of evidence is not required until *after* the decision to discipline has been made – not at the predetermination stage. The portions of the parties' CBA provided by the Union in response to the Motion to Dismiss do not address predetermination proceedings. The grievance and discipline sections address procedures applicable once the determination to discipline has been made and discipline imposed. Therefore, there is nothing that has been given to me in the CBA that would compel a contrary decision to that herein.

CONCLUSION:

I conclude that the County is obliged to share evidence supporting discipline once discipline is imposed, not when it is proposed. The Union's obligation to enforce and administer its contract is not impaired by withholding supporting documentation until after that time as long as it discloses enough information to meet the requirements of *Loudermill* and its progeny.

To the extent the Union may be able to show that the County failed to produce post-determination relevant information deemed to be confidential without formulating a reasonable accommodation, any such claim, if proved survives. However, as I read the PPC it is concerned with information requests made prior to the imposition of discipline and therefore, whether analyzing the Motion as calling for dismissal on 12(B)(6) grounds (accepting all well-pleaded factual allegations as true and resolving all doubts in favor of sufficiency of the complaint) or as a Motion for Summary Judgment The Union's complaint that the County has failed or refused to provide information to the Union needed to represent its bargaining unit employees should be, and hereby is **DISMISSED** except in so far as it alleges any failure to provide requested information after discipline was imposed.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director