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

February 28, 2018

AFSCME, Council 18
1202 Pennsylvania NE
Albuquerque, New Mexico 87110
Attn: Steve Griego, Council Representative

Holt Mynatt Martinez, P.C.
PO Box 2699
Las Cruces, New Mexico 88004-2699
Attn: Benjamin Young

Re: *AFSCME, Council 18 v. Mesilla Valley Regional Dispatch Authority; PELRB No. 128-14.*

Dear Mssrs. Griego and Young:

This letter constitutes my decision regarding the Respondent's Motion for Summary Judgment filed December 18, 2014. The Complainant responded to the Motion on January 9, 2014. AFSCME did not submit any counter affidavits in support of its response. For the reasons set forth below I have determined that the Motion should be **GRANTED**.

STANDARD OF REVIEW:

In a Prohibited Practice Complaint proceeding, the Petitioner bears the ultimate burden of proof. See NMAC § 11.21.1.22 (2004) although when deciding a motion for summary judgment the PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056. *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. *See N.M. Rul. Civ. Pro.* Rule 1-056. 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). *See also, Bartlett v. Mirabal,* 2000-NMCA-36, 917, 128 N.M. 810, 999 P.2d 1062, quoting *Eoff v. Forest*, 109 N.M. 695, 701, 789 P.2d 1262 (1990). If the showing is made, the burden shifts to the party opposing the summary judgment to show that a genuine issue of material fact exists. *Gardner-Zemeke,* 1990 NMSC 034, ¶ 11. The non-moving party "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat

the Motion once a *prima facie* showing has been made:" *Ochswald v. Cristie*, 1980 NMSC 136, ¶ 6, 95 N.M. 251, 620 P.24:1 1276. As non-movant, Petitioner's response must contain specific facts showing that there is an actual issue to be tried. *Livingston v. Begay*, 1982 NMSC 121, 9 35, 98 N.M. 712, 717, P.2d 734.

MATERIAL FACTS NOT IN CONTROVERSY:

1. Petitioner, American Federation of State County and Municipal Employees, Council 18, (AFSCME) is the duly recognized representative for a collective bargaining unit at Respondent, Mesilla Valley Regional Dispatch Authority (MVRDA), (Complaint par. 1; Answer par. 1) consisting of regular, non-probationary employees in the following job titles:

   > Call Taker, GIS/CAD Administrator, NCIC Assistant, NCIC Coordinator, Network Systems Administrator, Quality Assurance Specialist, Telecommunicator and Telecommunicator Trainee. (Exhibit 1).

2. The parties entered into a Collective Bargaining Agreement (CBA) on January 8, 2014, Exhibit 1, which is the applicable CBA at issue in this case.
3. MVRDA's employees agreed to abide by certain workplace rules, policies, and procedures. Exhibit 2, Workplace Rules and Procedures.
4. One of the policies specifically prohibits the use of personal cell phones and media devices while on the dispatch floor or in the training area. Exhibit 3.
5. From August 2, 1998 to September 2, 2014, Chris Padilla was employed as a Telecommunicator, a position covered under the parties' CBA Exhibit 4, Affidavit of H. Costa at ¶ 8
6. In 2013 Ms. Padilla was reprimanded and subsequently suspended for violating the cell phone policy on two separate occasions. Ex. 4. at ¶¶ 8 and 9.
7. Ms. Padilla was placed on administrative leave on June 3, 2014, for violating the cell phone policy a third time. Exhibit 5, Affidavit of A. Flores at ¶¶11 and 12.
8. On June 7, 2014 Ms. Padilla agreed to a corrective action plan wherein a similar cell phone violation within 90 days of the agreement would result in immediate termination without the right to a grievance. Ex. 5 at ¶ 11, 12 and 13.
9. On September 1, 2014, Ms. Padilla violated the cell phone policy by using her cell phone on the dispatch floor. Ex. 5 at ¶ 14.
10. On September 2, 2014, MVRDA terminated Ms. Padilla for the repeated violations of MVRDA's cell phone policy. Ex. 5 at ¶15.
11. Despite the waiver in the corrective action plan, Ms. Padilla was afforded the opportunity to grieve the termination decision. Ex. 4 at ¶13.
12. Deputy Director Flores affirmed the decision to terminate Ms. Padilla on October 20, 2014 in Step 2 of the grievance process. Ex. 5 at ¶15.
13. During the Step 3 meeting, Ms. Padilla informed Director Costa that she would not be able to guarantee that the same infraction would not reoccur because she forgets she has the cell phone with her. Ex. 4 at ¶ 15.

14. In Step 3 of the grievance process, Director Costa issued a final decision on December 3, 2014, affirming Ms. Padilla's termination. Ex. 4 at ¶ 16.

ISSUES PRESENTED:
Whether under the uncontested facts of this case, MVRDA is entitles to Judgment in its favor as a matter of law with respect to whether is committed a PPC by violating PEBA §19(B) (interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act; §19 (C) dominating or interfering in the formation, existence or administration of a labor organization; §19 (G) (refusing or failing to comply with PEBA or a board rule); or ; §19 (H) (refusing or failing to comply with a collective bargaining agreement).

DISCUSSION AND RATIONALE:

A. Interference with, Restraint or Coercion of Chris Padilla in the Exercise of a Right Guaranteed by PEBA.

It appears from the Complaint and from AFSCME's Response to the Motion for Summary Judgment that the action taken by MVRDA alleged to have constituted interference with, restraint or coercion, is a waiver provision in a corrective action plan agreed to by the employee on June 7, 2014. Among other things, the plan called for the employee to waive appeal of any termination decision made within 90 days of the agreement for violating the cell phone policy for which she had previously been disciplined. The union claims that the employer's waiver of appeal rights requirement violates PEBA §10-7E-15 because those rights are a bargained-for provision of the parties' CBA (Article 14). Therefore, so the argument goes, requiring an employee to waive contractual rights constitutes the kind of interference restraint or coercion prohibited by PEBA §19(B).[1]

PEBA §10-7E-15 provides in subparagraph (B):

> "B. This section does not prevent a public employee, acting individually, from presenting a grievance without the intervention of the exclusive representative. At a hearing on a grievance brought by a public employee individually, the exclusive representative shall be afforded the opportunity to be present and make its views known. An adjustment made shall not be inconsistent with or in violation of the collective bargaining agreement then in effect between the public employer and the exclusive representative."

AFSCME relies on that portion of §15(B) that provides. "An adjustment made shall not be inconsistent with or in violation of the collective bargaining agreement then in effect between the public employer and the exclusive representative." The union has not shown that this case presents

[1] MVRDA argues in its brief that its use of a corrective action plan does not violate the Public Employee Bargaining Act or the CBA. AFSCME's PPC and Response to the motion are concerned not so much with the use of a corrective action plan (which may or may not be discipline) as with the waiver of employee appeal rights clause within the plan so that much of the Employer's argument is misdirected.

an adjustment of a grievance contemplated by §15(B) because the grievance over the employee's termination was not filed until after the waiver of rights in the corrective action plan was executed. A similar result obtained in *AFSCME, Council 18 v. New Mexico Dep't of Corrections*, PELRB No. 106-07; 04-PELRB-2007 (December 13, 2007). In that case the PELRB found that the employer violated Section 10-7E-19 (F) when the warden met with a member of the bargaining unit, outside the presence of the union, *to adjust a grievance that had been filed by the union on the employee's behalf*. Here, the grievance process was not implicated. The union was not representing the employee concerning the corrective action plan and although the employee may have been able to invoke her right to representation during that meeting, she did not do so.

Even if AFSCME relied on some provision of PEBA other than §15(B) or on other case law to argue that covered employees may not enter into individual agreements with the employer that are contrary to the CBA, I am not satisfied that this employee's waiver of her appeal rights is contrary to either the CBA or PEBA. There is no express prohibition against such waivers to be found in PEBA and other than §15(B), AFSCME does not indicate any sections of PEBA that are contrary to such a waiver.

I do not agree with AFSCME that the waiver is contrary to Article 11 of the parties' CBA. Subparagraphs A through D of Article 11, provide for "just cause" and progressive discipline standards to be applied and provide for the use of administrative leave pending investigation of proposed discipline. The uncontested facts establish that MVRDA complied with all those subparagraphs. Subparagraphs E and F provide:

> "E. All bargaining unit employees have the legal right to represented by a steward or Union staff representative or by a union officer at any phase of an investigation against the employee that may lead to disciplinary action. Such representation will be permitted, within a reasonable delay, upon request from the employee.
>
> F. Prior to the imposition of discipline the employee shall
>
> 1. Investigate the alleged misconduct
> 2. Reasonably attempt to meet with the employee
> 3. Consider any mitigating factors
> 4. Provide to the employee a written memorandum, excluding disciplinary actions resulting in counseling and verbal warning or reprimands, of the disciplinary action which includes:
>
> a. The specific facts leading to the alleged violation.
> b. MVRDA policy/regulation that has been violated.
> c. Summary of any germane investigation conducted by MVRDA.
> d. "Notice of Intent to Discipline".

Based on Exhibits 2, 4 and 5 it appears that MVRD complied with subparagraphs E and F.

Finally, I conclude that MVRD did not violate Article 11(G) because its language is discretionary, not mandatory. Article 11(G) provides:

> "G. All disciplinary actions *may* be appealed through the grievance procedure contained in this agreement. Disciplinary actions which may result in suspension without pay, demotion or termination *may* be appealed up to and including arbitration." (Emphasis added).

The CBA's grievance procedure anticipates that an employee may elect not to pursue an appeal. As discussed above I can find no other provision of PEBA or the CBA that would prohibit an employee waiving those grievance rights in the context of a corrective action, assuming that all the other legal requirements of waiver are met.

On this point AFSCME relies on an NLRB decision in *Alan Ritchey, Inc. and Warehouse Union Local 6, Int'l Longshore and Warehouse Union, AFL-CIO*. Cases 32–CA–018149, 32–CA–018459, 32–CA–018526, 32–CA–018601, and 32–CA–018693; 359 NLRB No. 40 (December 14, 2012) for the proposition that because discipline changes an employee's terms and conditions of employment, the employer must bargain with the Union over the terms of any Memorandum of Understanding or "Last Chance" Agreement affecting that discipline. *Ritchey, Inc.* cannot be read that broadly. The NLRB concluded in *Ritchey, Inc.* that:

> "…an employer must provide its employees' bargaining representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, *absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes."*

Id. at 41. (Emphasis added).

In this case, the parties have negotiated a grievance and arbitration procedure, Article 14 of the parties' CBA, which satisfies the good faith bargaining requirement that exists both under the NLRA and under the PEBA.

B. Domination or Interference in the Formation, Existence or Administration of a Labor Organization.

A provision of the NLRA essentially identical to PEBA §19 (C) makes it clear that the prohibition against domination or interference in the formation, existence or administration of a labor organization is directed against a very narrow type and limited number of activities, 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. Under the uncontested facts in this case there is no basis to support a violation of PEBA §19 (C).

C. Refusing or Failing to Comply with PEBA or a Board Rule; or Refusing or Failing to Comply with a Collective Bargaining Agreement.

As a general statement, once a union is certified as exclusive representative, it is the one with whom the employer must deal in conducting bargaining negotiations and the employer can no longer bargain directly or indirectly with the employees. *See General Elec. Co.,* 150 NLRB 192, 194 (1964), *enf'd,* 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). The prohibition against direct dealing also extends to the discussion or settlement of grievances. *See AFSCME Council 18 v. New Mexico Department of Corrections*, 04-PELRB-2007 (December 13, 2007). Likewise, it is a *per se* breach of the duty to bargain 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.

AFSCME argues that MVRDA committed a PPC by violation of PEBA §19 (G) when it failed or refused to comply with PEBA §15(B)'s requirement that "An adjustment [to a workplace grievance] shall not be inconsistent with or in violation of the collective bargaining agreement then in effect between the public employer and the exclusive representative." AFSCME also alleges that the same conduct also constitutes refusal or failure to comply with Articles 11 and 14 of the parties' CBA in violation of PEBA §19 (H).

For the reasons set forth above execution of the waiver in this case did not violate any provision of PEBA or the parties' CBA. In light of the union representing the employee during the pre-disciplinary process but not during the meeting in which the corrective action plan was agreed to, the employee might have challenged the validity of the waiver on the grounds that she arguably did not enter into the agreement voluntarily and fully informed. However, the union did not raise that claim and could not raise that claim because the employer declined to enforce the waiver and a grievance is now pending. Any such challenge would therefore, be moot.

CONCLUSION:

Summary Judgment is appropriate when the movant demonstrates by such evidence as is sufficient in law that there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. Once that burden is met the Complainant is required to rebut those facts or otherwise demonstrate the existence of specific evidentiary facts which would require trial on the merits. Here, the undisputed facts support the legal conclusions that MVRD is entitled judgment in its favor as a matter of law. Therefore, I conclude that the Motion for Summary Judgment should be **GRANTED.**

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director