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February 6, 2015

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Re: ***AFT-NM v. Cuba Independent School District; PELRB No. 129-14***

Dear counsel:

This letter constitutes my decision regarding the Respondent's Motion for Summary Judgment filed on January 9, 2015. The Complainant responded to the Motion on January 30, 2015. 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 Complainant bears the ultimate burden of proof. See NMAC § 11.21.1.22 (2004).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); *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 DISPUTE:

1. Taking both the Motion for Summary Judgment and the Response thereto as a whole the parties do not dispute that Cuba Unified Educators (CUE) is an affiliate of the Complainant herein, American Federation of Teachers (AFT/NM), which is the duly recognized representative for a collective bargaining unit at Cuba Independent School District (District or Employer), that Nora Diaz was employed by the Respondent as a teacher for two academic years, from the Fall 2012 to the Spring 2014 (Exhibit 2) and that her position was within the bargaining unit represented by the Complainant.
2. Ms. Diaz was the President of the CUE. Complaint ¶1, Answer ¶5.
3. Ms. Diaz was one of six members of the negotiating team for the CUE that negotiated the parties' current collective bargaining agreement (CBA). (Answer ¶5, Exhibit 5).
4. On October 16, 2013, the Cuba Independent School District was approved for an award $20,000.00 for a Graduation Reality and Dual Role Skills (GRADS) program at Cuba High School, (Exhibits A, B and D).
5. GRADS is a school based pregnant and parenting teen program for males and females in multiple high school settings including traditional, charter and alternative schools. (Exhibits B and L).
6. Ms. Diaz was assigned to be the teacher for and to implement the GRADS program at Cuba High School. (Exhibits A, B and E).
7. Ms. Diaz failed to implement the following elements of the GRADS program resulting in Respondent's loss of reimbursement under the grant:
    a. Completion and maintenance of Students' Needs Questionnaire forms.
    b. Completion and maintenance of Confidentiality forms
    c. Completion and maintenance of Agency referral forms
    d. Research and secure items to assist students in the GRADS program

(Exhibits A, B and F).
8. All public school district teachers are required to be evaluated at least annually in accordance with State law. NMAC 6.69.4.8(C).
9. Ms. Diaz's evaluation for the 2013-2014 school year was an overall score of 98.25 which is a "minimally effective" rating - the second lowest level a teacher can receive. (Exhibit A).
10. On November 22, 2013 Ms. Diaz sent a letter in her capacity as CUE President requesting identification of all positions within the District for the 2013-2014 school year, their job descriptions, credentials/licensure for each individual identified, years of experience credited to each individual, years of employment with the District and individual salaries. (Exhibit 5).
11. The request referenced above was directed to the "Records Custodian" and date stamped as received on December 3, 2013. The letter did not indicate what the purpose of the request was, such as being made in connection with a grievance, for enforcement of the parties' CBA, to prepare for negotiations or pursuant to the Inspection of Public Records Act. (Exhibit 5).

12. The record does not indicate that Ms. Diaz received any response to her letter of November 22, 2013. However, there is a second request for similar information submitted to the District's Superintendent by Judy Johnston, AFT-NM Field Representative, on January 14, 2014. (Exhibit 6).
13. Apparently the Ms. Johnston's request for information was initially denied because Exhibit 6 is a letter dated January 31, 2014 from Judy Johnston to the Superintendent referring to a January 29, 2014 letter (which is not in evidence) denying the request based on his interpretation of a provision in the CBA pertaining to personnel records. Ms. Johnston's letter clarified that her request was made pursuant to the Inspection of Public Records Act, Section 14-2-8(D) NMSA (1978). (Exhibit N.)
14. In response to the January 31, 2014 letter, Exhibit N, the District informed Ms. Johnston by letter on February 5, 2014 that "The public records you are requesting...are available for inspection" and invited Ms. Johnston to contact the District's Administrative Assistant to schedule a time for such inspection. (Exhibits A and O).
15. The District's Superintendent sent an e-mail message to all District staff on February 4, 2014, informing them of the information Ms. Johnston had requested, characterizing the request as one that "involves all of our personnel records" and that the District was obligated to permit inspection of those records. The stated purpose of the e-mailed message was to give staff an opportunity ahead of the inspection "...to give feedback to myself, Ms. Johnston or local AFT Representative Ms. Nora Diaz about the intent of the inspection." (Exhibit 1 to the PPC; Exhibit A).
16. The request filed by Ms. Johnston requested "public records" and information concerning "employees in the Cuba Independent School District". (Exhibits A and N).
17. On January 14, 2014, Superintendent Hartom distributed a memorandum via email reiterating a previously established policy that all fundraisers must be pre-approved by the School Board. There is no reference in that memorandum to an exception to the pre-approval policy for "low level" or "ongoing" fundraising activities. (Exhibit 2 to PPC).
18. Ms. Diaz, as Junior Class Sponsor, submitted two requests for fundraisers during the 2013/2014 School Year. (Exhibits B, G and H).
19. The fundraiser request form reminds employees that all funds collected with a fundraiser must be deposited within 24 hours or one banking day, in bold, all capital letters. (Exhibits G and H).
20. The requirement to deposit funds collected is set forth in state law. NMAC 6.20.2.14(C).
21. Ms. Diaz made cash deposits as Class of 2015 Sponsor on December 12, 2013, February 24, 2014, March 25, 2014, March 31, 2014, April 30, 2014, and May 15, 2014. (Exhibits B and J).
22. Ms. Diaz had not filed any requests for approval to conduct a fundraiser associated with any of the dates contained in Paragraph 21 above, and none were approved by the School Board as shown in the Board meeting agendas and minutes. (Exhibits B, I and K).
23. During the week of February 3-7, 2014 Ms. Diaz was fundraising, selling soda, candy, and chips from her classroom, without prior Board approval. (Exhibits B, C, J and K).
24. On May 5, 2014, the District informed Ms. Diaz that her contract for employment would not be renewed for the following school year, pursuant to Section 22-10A-24, NMSA 2003.

25. State law allows a school district to not renew a certified teacher's contract who has been employed for less than three (3) years, for any reason the District deems sufficient. (Section 22-10A-24, NMSA 2001). However the parties CBA applies the "just cause" standard to bargaining unit members without regard to tenure. (CBA Article 6, §§ 1.6, 1.6.2; Exhibit 7).
26. On November 4, 2014, Complainant filed a Prohibited Practice Complaint (PPC) alleging violations of Sections 10-7E-19(A), (B), (C), (D), (G) and (H) because Ms. Diaz was terminated based on "her role as a leader in the Union exercising collective bargaining rights as the Union's exclusive labor representative." (PPC at p. 2).

ISSUES PRESENTED:

Whether under the uncontested facts of this case the District is entitled to Judgment in its favor as a matter of law with respect to whether it committed a PPC by violating PEBA §19(A) (discriminating against a public employee with regard to terms and conditions of employment because of that employee's membership in a labor organization); §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:

The PELRB has jurisdiction to hear and decide this matter. As the Complainant, AFT-NM bears the ultimate burden of proof although in the context of this motion for summary judgment the District is required to set out a concise statement of all material facts about which there is no genuine dispute and if, based on those facts, viewed in the light most favorable to union, the union must then demonstrate the existence of specific evidentiary facts which would require trial on the merits. I conclude that the District has demonstrated the absence of material fact issues and the union has not successfully rebutted the material facts established by the District that lead to the conclusion that it is entitled to have the PPC dismissed for the reasons that follow:

I. THERE ARE NO MATERIAL FACTS AT ISSUE THAT WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT WITH REGARD TO WHETHER IT DISCRIMINATED AGAINST MS. DIAZ WITH REGARD TO TERMS AND CONDITIONS OF EMPLOYMENT BECAUSE OF HER MEMBERSHIP IN A LABOR ORGANIZATION CONTRARY TO PEBA §19(A).

The PELRB follows the *Wright Line* line of cases with regard to whether there has been anti-union discrimination. An employer violates PEBA where protected union activity or status is a substantial or motivating factor in a decision to take adverse action against an employee. In *Wright Line*, 251 NLRB 1083 (1980), the NLRB established the following two-part test to determine whether an employee has been discriminated against for union activity:

First the employee must "make a prima facie showing sufficient to support the inference that

protected conduct was a 'motivating factor' in the employer's decision" to take certain adverse employment action." *Id.* at 1089. A prima facie case is established by showing there was (a) union activity, (b) knowledge of such union activity, and (c) animus against the union. See *Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998). Animus can be inferred from circumstantial evidence. *Id.* Second, once a prima facie case is established, the burden shifts to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Id.* at 1089; See also *NRLB v. Transportation Management Corp.*, 462 US 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989).

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact remains at all times with the Complainant. See *CWA v. Dept. of Health*, PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a prima facie case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence.

Here, the primary union activity and anti-union animus asserted is that CUE President, Ms. Diaz, wrote a letter to the District expressing concerns" about the release of staff due to weather related issues. (PPC at ¶2; Exhibit T). The response by the Superintendent to Ms. Diaz's letter was to thank her for the letter, acknowledge disparity in the events, invite any individuals with concerns to contact him, and state his happiness with her concern with safety issues. (Exhibit U), The Superintendent then invited Ms. Diaz to the Safety Committee Meeting. *Id.* A second instance of union activity is the November 22, 2013 letter sent by Ms. Diaz in her capacity as CUE President requesting all positions within the District for the 2013-2014 school year, their job descriptions, credentials/licensure for each individual identified, years of experience credited to each individual, years of employment with the District and individual salaries. (Exhibit 5)

That letter did not indicate what the purpose of the request was, such as being made in connection with a grievance, for enforcement of the parties' CBA, to prepare for negotiations or pursuant to the Inspection of Public Records Act. (Exhibit 5). Those facts combined with the fact that it was directed to an unspecified "records custodian" mitigate any implication that the apparent failure of management to respond to her letter request and no support for a reasonable inference that the Superintendent or anyone associated with labor relations for the District had knowledge of the request much less that it should be responded to as a legitimate request for information needed in connection with legitimate union business.

The District's response to a second union request for substantially the same information by Judy Johnston 2014 further negates an inference of anti-union animus. Although the request for information appears to have initially been denied by the District that denial was based on a concern for maintaining personnel files' confidentiality and is premised on a reasonable, albeit misplaced reliance on a provision in the parties' CBA pertaining to personnel records. It is only after the union clarified that the request was made pursuant to the Inspection of Public Records Act and did not seek the disclosure of protected information that the District complied with the request. There is no evidence of anti-union animus in these facts but even if there was, Ms. Diaz was only peripherally involved in the "dispute", the main protagonist being

Judy Johnston.

Neither does the Superintendent's e-mail to staff provide support for any anti-union animus. Even though arguably in error for its characterization of the union's request for information as one that "involves all of our personnel records" dissemination of that memo to staff was consistent with his earlier stated concern for preserving confidential information. While it may be argued that it wasn't a very "friendly" thing to do it is not for me to second guess the Superintendent's management decision without more evidence from the union that it violated an articulated PEBA-protected right.

No anti-union animus may be found in the Superintendent's dissemination of a fundraising procedures memorandum on January 14, 2014. By issuing that memorandum, Mr. Hartom merely reiterates a previously established policy that all fundraisers must be pre-approved by the School Board. That requirement applies equally to all District staff to whom the memorandum was directed. There is no connection there with anything having to do with union activity.

The union produced evidence of Ms. Diaz's representation of an employee, Will Marino, contesting an evaluation he received. There is no connection made between that representation and the ultimate decision not to renew Ms. Diaz' contract. The mere fact that she was involved in a grievance once upon a time does not establish any union animus.

The Complainant has not briefed or otherwise supported by affidavit or submission of documentary evidence allegations of its PPC pertaining to a "Negotiations Survey" purportedly sent by Ms. Diaz to bargaining unit members concerning issues for negotiations. (PPC at ¶ 7). I am therefore, considering that issue to have been abandoned.

It is not necessary to consider whether the District is credible or not concerning its claim that the Superintendent was not aware of Ms. Diaz' involvement in the various union activities alleged because his awareness is not relevant unless some action by him gives rise to a question of fact with regard to improper conduct motivated by anti-union bias. Reiterating that it might be so in the hopes of developing facts at a future hearing is not sufficient to avoid summary judgment.

In order to present an issue of material fact that would require a merits hearing on its allegation of union discrimination under §19(A) the Complainant would need to provide me with some point of comparison, such as evidence of non-bargaining unit employees being treated differently than was Ms. Diaz with regard to some aspect of the activities alleged together with some evidence that would demonstrate the need for a hearing on whether any such differences were the result of union membership. No such questions have been advanced.

Based on the foregoing I conclude that the Complainant has not demonstrated the existence of a factual dispute requiring an evidentiary hearing on the question whether any of Ms. Diaz' union activities created anti-union animus, whether taken alone or in the aggregate, much less that any resulting union animus was a motivating factor in the decision not to renew her employment contract or that in that decision she was treated any differently than any other employee based on her union activities. See *Vulcan Basement Waterproofing v. NLRB*, 219 17.3d 677 (7th Cir. 2000).

Accordingly, its complaint under §19(A) must be dismissed.

II. THERE ARE NO MATERIAL FACTS AT ISSUE THAT WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT WITH REGARD TO WHETHER IT INTERFERED WITH, RESTRAINED OR COERCED A PUBLIC EMPLOYEE IN THE EXERCISE OF A RIGHT GUARANTEED PURSUANT TO THE PUBLIC EMPLOYEE BARGAINING ACT IN VIOLATION OF PEBA §19(B).

The Complainant identifies the right guaranteed by the PEBA at issue in this case as being derivative of rights found in the parties' CBA. PPC ¶¶ 2 and II (6). The Complainant argues that the CBA's express recognition of "the right of the representatives to carry out their Federation responsibilities" (Exhibit 7) means that, by her union activities, Ms. Diaz was exercising both her own PEBA-protected rights as well as those of others in the bargaining unit. In addition, the CBA protects bargaining unit members from being dismissed without just cause and from the District using the evaluation system as a means to terminate employees rather than as a way to improve instruction. (Exhibit 7, Article 15). Further, the "primary purpose of employee evaluations will be the improvement and the delivery of instructions to their students," not discipline. *Id.*, Article 26.1.

In the face of a Motion for Summary Judgment the Complainant may not rest on the allegations of its Complaint to avoid dismissal but is obliged to provides some scintilla of evidence that would give rise to a material factual issues concerning whether Ms. Diaz's rights under the CBA (and consequently under PEBA) were violated. The mere fact that Ms. Diaz' contract was not renewed does not *per se* constitute a violation of the "just cause" standard or the requirement that progressive discipline must be utilized. With regard to the "just cause" standard, it appears that by contract the District has agreed that the standard will be applied to "terminations" and "discharges" and without regard to whether Ms. Diaz is an employee with less than three years' tenure.[1] Additionally, in cases such as this where teachers' rights are at issue, it is important not to conflate the terms "termination" and "discharge". In contrast to a "discharge", a "termination" such as we are dealing with here, is the act of not reemploying an employee for the ensuing school year. See *Aguilera v. Bd. of Educ.* 137 N.M. 642, 114 P.3d. 322, aff'd, remanded, 2006-NMSC-015, 132 P.3d 587. What constitutes "just cause" will necessarily vary depending on whether one is dealing with discharge or termination.

To demonstrate the existence of a factual question concerning this Count Complainant relies primarily on its allegations of anti-union animus coupled with the absence of just cause and

[1] §22-10A-24(A) NMSA (2003) provides that "A local school board or governing authority of a state agency may terminate an employee with fewer than three years of consecutive service for any reason it deems sufficient." Subsection A stands in contrast to Subsection D of the same statute that provides: "A local school board or governing authority may not terminate an employee who has been employed by a school district or state agency for three consecutive years without just cause."

progressive discipline. As discussed under Point I above, while the Complainant has established that Ms. Diaz was the union's President and engaged in in some protected activities it has not established any connection between those activities, her status as the Union President and the decision not to renew her contract.

Many discussions of just cause reference the "7 Tests" espoused by Arbitrator Carroll Daugherty in the oft-cited case *Enterprise Wire Co.* 46 LA 359, (1966). The 7 tests for whether an employer's action meets the "just cause" standard for *discharge* are: (1) Employee was forewarned of consequences of his actions; (2) company's rules are reasonably related to business efficiency and performance employer might expect from employee; (3) effort was made before discharge to determine whether employee was guilty as charged; (4) investigation was conducted fairly and objectively; (5) substantial evidence of employee's guilt was obtained; (6) rules were applied fairly and without discrimination; and (7) degree of discipline was reasonably related to seriousness of employee's offense and employee's past record.

Here, the evidence established that on January 25, 2013, then-Principal Randy Houk provided a document to Ms. Diaz listing 17 problem areas involving complaints from parents, complaints from other staff members, failure to follow protocol and policies with regard to the computer lab, closing classroom windows, student attendance and failure to follow protocol resulting in the loss of two of the District's laptop computers. (Exhibit V). After Ms. Diaz was assigned to the GRADS program her teaching schedule was reduced to a half day (Exhibits A and E) but she failed to successfully implement the GRADS program, failed to follow school policies and state law regarding fundraising and had a marginal annual evaluation score. (Exhibit W). As a marginal performer in the classroom Ms. Diaz's failure to follow policies and directives takes on added significance. After application of the 7 tests I conclude that the evidence would support just cause for discharge (which is a higher standard than for termination) and that the complainant has not countered any of that evidence.

Accordingly, I can find no material issue of fact that would require an evidentiary concerning whether the District violated PEBA §10-7E-19(B) and that claim should be dismissed.

III. THERE ARE NO MATERIAL FACTS AT ISSUE THAT WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT REGARDING DOMINATION OR INTERFERENCE IN THE FORMATION, EXISTENCE OR ADMINISTRATION OF A LABOR ORGANIZATION IN VIOLATION OF PEBA §19(C).

Complainant did not produce any evidence that would support the existence of a factual issue surrounding violation of Section 19(C). As far as I am able to ascertain this Count is premised on the allegation that Ms. Diaz was terminated for "informing members of their rights under collective bargaining and performing other duties of representation described in Section 11 of [the PPC]" (PPC at p. 5) but in response to the Motion for Summary Judgment Complainant provides nothing to support that claim. 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. There is no allegation of that kind of conduct at issue here. Even if we were to consider the termination of a non-tenured teacher who by coincidence is also the Union President to state a claim under §19 (C) the uncontested facts in this case demonstrate that there is no support for a violation of that subsection. The record reflects significant departures by the employee from the District's policies coupled with marginal performance. That evidence has not been factually refuted by the Complainant as being a sufficient basis for non-renewal of Ms. Diaz's contract. Complainant may not rest on the mere allegations of its complaint in response to a Summary Judgment Motion. The above undisputed facts also demonstrate forewarning and progressive discipline to the extent that is a requirement. The parties' CBA acknowledges that progressive discipline is not needed in every case. Consequently, without any evidence that gives rise to an actual factual dispute the claim must be dismissed.

IV. THERE ARE NO MATERIAL FACTS AT ISSUE THAT WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT WITH REGARD TO WHETHER IT REFUSED OR FAILED TO COMPLY WITH PEBA OR A BOARD RULE IN VIOLATION OF §19 (G).

This Board has previously taken the position that §19(G) of PEBA is directed against claims arising under sections of PEBA other than §19. To interpret §19(G) otherwise would result in the finding of repetitive and duplicative liability. There is no reason to believe the New Mexico Legislature intended every violation of a subsection of §19 to result in two separate counts of liability. Accordingly, the Complainant has not established a violation of §10-7E-19(G) to the extent it alleges only violations of §19.

Arguably, Complainant has alleged violation of a section of PEBA other than §19 which, if supported, would give rise to a colorable claim under §19 (G). At page 4 of its PPC, Section III, Complainant refers to Section 5 of PEBA for the proposition that "Public employees… may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion…" For the reasons discussed under Points I, II and III above, I conclude that there are no issues of material fact present in this case that would compel an evidentiary hearing with regard to the alleged violation of §19(G) and the claim should be dismissed.

V. THERE ARE NO MATERIAL FACTS AT ISSUE THAT WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT WITH REGARD TO WHETHER IT REFUSED OR FAILED TO COMPLY WITH A COLLECTIVE BARGAINING AGREEMENT IN VIOLATION OF §19 (H).

According to the PPC Ms. Diaz has been denied rights derived from the CBA. The Complaint stated that Union representatives "are recognized as leaders in their worksites. This recognition carries with it the right of the representative to carry out" Union responsibilities. (CBA Article 6, §§ 1.6, 1.6.2; Exhibit 7). Complainant alleges that by arguing for the rights of bargaining unit employees Ms. Diaz was exercising both her rights and the rights of those in the bargaining unit. In addition, the CBA protects bargaining unit members from being dismissed without just cause and from the District using the evaluation system as a means to terminate employees rather than as a way to improve instruction. The axiom that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason referenced by the District's case citations has no place in the presence of the just cause standard. However, as previously discussed, the record contains legitimate, non-discriminatory reasons for Ms. Diaz's termination that satisfy all the above-referenced contractual requirements.

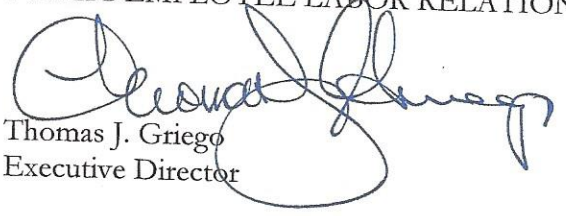
Because the ultimate burden of proof resides with the Complainant and it "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made, I conclude that there is no disputed material fact present here than requires an evidentiary hearing on this issue. Consequently this Count should be dismissed.

CONCLUSION:

Movant has demonstrated sufficient evidence that there are no issues of material fact and Complainant has not rebutted that evidence or otherwise demonstrated the existence of specific evidentiary facts which would require a hearing on the merits. Therefore, I conclude that the Motion for Summary Judgment should be **GRANTED.**

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



Thomas J. Griego
Executive Director