

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,

Complainant,

v.

PELRB No. 124-15

CITY OF ESPAÑOLA,

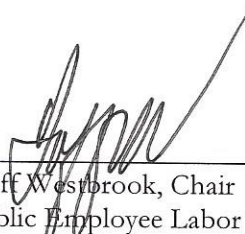
Respondent

ORDER

THIS MATTER comes before the Board on appeal by AFSCME, Council 18 from the Hearing Officer's Report and Recommended Decision issued June 29, 2016. Upon a 3-0 vote at the Board's August 9, 2016 meeting the Board adopted as its Order the Hearing Officer's Report and Recommended Decision, including its Findings, Conclusions and rationale, except with regard to the Hearing Officer's reliance on the U.S. Supreme Court case of *Connick v. Meyers*. Instead, by application of the factors set forth by the NLRB in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), we obtain the same result as that reached by the Hearing Officer in his Recommended Decision.

THEREFORE, IT IS HEREBY ORDERED that Complainant having failed to make a *prima facie* case with regard to alleged violations of the PEBA § 19 (A), (B) (D) or (E), having failed to rebut reasonable business reasons for management's actions and without meeting its burden of proof by a preponderance of the evidence to substantiate its claimed violations of the PEBA §§ 19(C), (G) and (H), this Complaint is **DISMISSED** and the Complainant is granted no relief.

Date: 8-9-16



Duff Westbrook, Chair
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18
LOCAL 923,

Complainant,

v.

PELRB No. 124-15

CITY OF ESPAÑOLA and the
CITY OF ESPAÑOLA DEP'T
OF PUBLIC SAFETY,

Respondents

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, on the Merits of its Second Amended Prohibited Practices Complaint (PPC) filed November 21, 2014 alleging a series of actions against Union executive board officers demonstrating hostility toward and retaliation because of their union activities. Additionally, the PPC alleges a coordinated effort by the employer to influence bargaining unit members to withdraw financial support for the union. The City timely answered the Complaint. On January 14, 2016 an Amended Scheduling Notice was issued setting deadlines for filing motions, exchanging witness and exhibit lists, scheduling a Hearing on the Merits, etc. That Scheduling Notice was modified on February 29, 2016 at the request of the parties changing the dates for the Merits Hearing from April 6 and 7 to April 13 and 14, 2016. Respondents filed a Motion to Defer to Arbitration on March 15, 2016, which was denied, and a Motion for Partial Summary Judgment which was granted in part and denied in part. As a result of decision on Partial Summary Judgment the Union's claims that elimination of Robert Vigil's take-home vehicle privilege and Jeremy Apodaca's loss of a 10% bonus as a dog handler were dismissed. Summary Judgment was

denied as to whether inducements or encouragement were offered to any of the officers submitting requests to stop union dues payroll deductions in order to destabilize the local by withholding dues.

A hearing on the merits was held on April 13 and 14, 2016, continuing on May 17 and 18, 2016 and concluding on June 3, 2016. Closing briefs were simultaneously submitted on June 15, 2016. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally and their briefs were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT:

1. Petitioner is a labor organization duly certified to represent all public employees in a bargaining unit recognized within the City's Department of Public Safety (Department) as defined by NMSA 1978 § 10-7E-4(I) and (L). (Second Amended Complaint ¶ 1 and Answer thereto).
2. Petitioner and Respondents are parties to a collective bargaining agreement ("CBA") governing the terms and conditions of those employees' work. (Second Amended Complaint ¶ 2 and Answer thereto).
3. Although the term of that CBA expired June 30, 2011, it continues in effect year to year following that date pursuant to "evergreen" provisions in the Public Employee Bargaining Act (PEBA) and the Respondents have continued to follow it despite the expiration of its term. (Testimony of Kelly Duran).

4. No local labor board exists for the adjudication of prohibited labor practice complaints by or against the City of Española. (Second Amended Complaint ¶ 3 and Answer thereto).
5. The Respondents are collectively a “public employer” as that term is defined by NMSA 1978 § 10-7E-4(S) and all claims herein allege violations of NMSA 1978 § 10-7E-19. (Second Amended Complaint ¶¶ 1 and 2, and Answers thereto).
6. On September 22, 2015, The Española City Council voted to “decommission the Espanola Police Department K-9 Officer Gabanna” and to “entrust Officer Jeremy Apodaca with the K-9. (Exhibit 20; Testimony of Jeremy Apodaca).
7. As Gabanna was the only canine in the unit, by decommissioning Gabanna the Department’s K-9 unit was disbanded. (Testimony of Jeremy Apodaca).
8. Upon disbanding the K-9 unit a 10% bonus paid to Officer Apodaca as Gabanna’s handler, ceased. (Exhibit 20; Testimony of Jeremy Apodaca).
9. Officer Apodaca did not grieve the loss of the 10% K-9 bonus. (Testimony of Jeremy Apodaca).
10. The stated purpose for disbanding the K-9 unit was to devote the cost savings toward assigning an acting patrol sergeant on the night shift. (Exhibit 20; Exhibit GG; Testimony of Richard Gallegos, Kelly Duran).
11. Sammy Marquez is President of Complainant, AFSCME, Local 923, and was employed as a Police Officer by the City of Española until his termination on January 15, 2016. (Testimony of Sammy Marquez; Exhibit 17.)
12. Solomon Romero, formerly employed as an Española police officer and a corporal, testified that during a car trip returning from Internal Affairs Investigation Training in November of 2014 Deputy Chief Maez said that he

would promote Romero to sergeant if he would help dismantle the union; Romero said he wouldn't be able to do that. (Testimony of Solomon Romero; Exhibit 23).

13. Miguel Maez denied that the conversation related above took place (Testimony of Miguel Maez)
14. Solomon Romero, testified that in November of 2014 he withdrew his union dues authorization because he didn't believe the union was doing anything for him individually as contrasted with doing enough for the members or acting for the common good of the department, and because he didn't agree with the election of Marquez and Vigil as President and Vice-President. (Testimony of Solomon Romero Exhibit 22).
15. The disputes with and complaints about Union Vice President Robert Vigil, Solomon Romero testified both he and Deputy Chief Maez, had, were of a personal nature and not union related. . (Testimony of Solomon Romero Exhibit 22). He testified that Maez inquired about ways to "get rid of the union" and he suggested Maez "petition", survey or poll the members' level of interest in the union. (Testimony of Solomon Romero).
16. Although at one point in his testimony Solomon Romero testified that during a discussion with management over a staffing issue, Chief Gallegos concurred with a statement by someone in that meeting that the Department would be "better off without a union" he also testified on cross examination that the Chief "never really said much about the union".
17. Solomon Romero filed a hostile environment grievance against Deputy Chief Maez in January 2015. (Exhibit 23).

18. When Sammy Marquez applied for employment as an Española police officer Solomon Romero, was assigned by Deputy Chief Maez, who was then serving for a brief interlude as Acting Chief, to conduct the routine background investigation that is part of the application process. Romero testified that when he reported an issue associated with Mr. Marquez' former employment with the Albuquerque Police Department, Deputy Chief Maez directed him to cease further investigation; that he had no intention of hiring Sammy Marquez.
19. Shortly after the events described in Finding 12 above, Miguel Maez left the Española Department of Public Safety for a job in the Los Alamos Police Department, Richard Gallegos was hired as the new Chief and he hired Sammy Marquez. (Testimony of Solomon Romero).
20. Miguel Maez subsequently returned to the Española Public Safety as Deputy Chief and according to Solomon Romero, Deputy Chief Maez sent him to the Albuquerque Police Department Internal Affairs division to obtain information about Sammy Marquez' issue referenced in Finding 12 above and that he intended to release that information to the press in order to fire Sammy Marquez. (Testimony of Solomon Romero). I do not find this testimony credible because when he failed to contact the Internal Affairs Investigator at the Albuquerque Police Department, there was no demand by Maez for an explanation for his failure to make contact, no consequences for that failure, no follow up by Deputy Maez to resume contact with APD and on cross examination Romero could not explain why Deputy Chief would need to release information to the press in order to effect a termination of Sammy Marquez. Ultimately, no "issue" with Marquez' employment with Albuquerque Police

Department was a factor is his termination. Furthermore, the witness' credibility is impugned by his lack of honesty arising out of the events documented in Exhibit UU wherein he was charged misappropriating firearms and ammunition and converting them to his own use.

21. Officer Robert Vigil is the Vice-President of the Petitioner union AFSCME, Local 923. (Testimony of Robert Vigil).
22. Officer Jeremy Apodaca is the Secretary/Treasurer of the Petitioner union AFSCME, Local 923. (Testimony of Jeremy Apodaca).
23. On September 15, 2015 Officer Robert Vigil notified Deputy Chief Miguel Maez that he had a family emergency requiring him to be absent from his scheduled shift the following day. Consequently, Deputy Chief Miguel Maez ordered the shift supervisor, CPL Daniel Espinoza, to arrange coverage for the absent Officer Vigil. (Exhibit 1; Testimony of Robert Vigil).
24. In response to the Deputy Chief's order to find coverage for the absent Officer Vigil, CPL Espinoza contacted "several Officers" who were unable to fill in for Officer Vigil because they had already made plans for the time in question. (Exhibit 1; Testimony of Robert Vigil).
25. In due course CPL Espinoza contacted then-Detective Sammy Marquez, who agreed to cover the shift. CPL Espinoza then told Marquez to report in Class A uniform and to shave his beard. (Exhibit 1; Testimony of Robert Vigil).
26. The Department's Rules and Regulations provide at Section 23.1.18 that:
 - A. Personnel shall wear uniforms or other clothing in accordance with established department rules and procedures.
 - B. Except when acting under proper and specific orders from a supervisor, personnel on-duty shall maintain a neat, well-groomed appearance and shall style their hair according to department regulations."

(Exhibit KK). Although the uniform and grooming regulations referenced in Section 23.1.18 are not in evidence, the witness testimony is consistent that wearing clothing other than a Class A uniform, such as BDU's and full facial hair are exceptions to the rule.

27. Marquez objected to wearing a Class A uniform rather than BDU's and a tactical vest, as he had previously been allowed to do, and communicated his displeasure in an e-mail string in which he called CPL Espinoza's directive "bullshit". (Testimony of Daniel Espinoza and Sammy Marquez; Exhibit E).
28. Marquez ultimately did not report for duty as ordered because he called in sick due to a migraine headache. (Testimony of Daniel Espinoza and Sammy Marquez; Exhibit E).
29. Sammy Marquez testified that the text messages appearing in Exhibit E were transmitted over private cell phones, not City-issued phones. I find that fact to be a distinction without a difference because they dealt entirely with department business and the Department's regulations include standards of conduct that apply to both on-duty and off-duty conduct. (Exhibit KK).
30. On September 16, 2015 CPL Espinoza documented a verbal reprimand of Sammy Marquez for the above-described conduct. (Exhibit 1).
31. On September 17, 2015 Officer Marquez did not report to work as scheduled in order to "take care of some personal issues" followed by some business at the Motor Vehicle Department. According to Marquez, he had submitted a request for leave by either placing it in CPL Espinoza's in-basket or by slipping it under the Corporal's office door the previous night. Espinoza did not receive the leave

request until after he returned to his office from business in Santa Fe later on September 17, 2015. (Testimony of Espinoza and Marquez; Exhibit 2; Exhibit 4).

32. As a result of the events outlined above, CPL Espinoza issued a written reprimand to Marquez on September 17, 2015 for failure to report to work without authorized leave and for not submitting his leave request at least 24 hours in advance as required by Personnel Policy 7.2(C). (Exhibits A and 2).

33. On September 28, 2015, Marquez was issued a verbal warning by CPL Espinoza for insubordination – failure to comply with or to accept a reasonable and proper written or oral order from an authorized supervisor in violation of Department policy 23.1.13(2) and Marquez appealed that warning to the City Manager. (Exhibit 1, Exhibit N.).

34. Officer Marquez filed a “Hostile Work Environment”¹ complaint the next day, September 29, 2015 by a memorandum to Chief Gallegos in which he criticized Chief Gallegos and/or the Department of Public Safety on the following bulleted points:

- “• Why did the corporal [Daniel Espinoza] lie about court paperwork and timesheets when his intent was to serve me with discipline? (referring to service of the verbal and written reprimands issued September 16 and 17, 2015).
- Why didn’t the corporal serve me with the discipline on the 24th when he already had me in his office?
- Why wasn’t the corporal sent in for a fitness for duty examination when he attempted suicide, and why wasn’t he terminated when he pointed a loaded firearm at Officers Peter’s [sic] and Sanchez, who sued the City and won?
- Why have the corporal’s indiscretions been awarded [sic] with promotions to corporal and sergeant?”

¹ Although the phrase “hostile work environment” is a term of art referring to state or federal law and U.S. Department of Labor policy against harassment of employees based on race, color, religion, sex (including gender identity and pregnancy, national origin, age, disability, genetic information, sexual orientation, or parental status, its use by the Officers in this case was not intended to denote such claims.

The Memorandum concludes:

“I am deeply concerned for my safety and the safety of others in the Espanola Police Department, yet you have done nothing to make me feel safe. This memo is to inform you of the hostile work environment created by Daniel Espinosa. It is now up to you to make a decision and take some action. I have already voiced my concerns to the City Manager, Kelly Duran, and I want to ensure my safety as an employee of the City of Espanola. I hope to hear from you soon on this matter.”

(Exhibit 4; Testimony of Marquez).

35. At some point prior to September 23, 2015 the Union filed a grievance asking for removal of Detective George Martinez from his assignment in the Department’s Criminal Investigations Division because it was a temporary assignment and he had exceeded the time in which one may hold a temporary position without a permanent appointment. (Testimony of Kelly Duran, Robert Vigil, Sammy Marquez, George Martinez.)
36. The applicable section of the parties’ CBA, Article 5, Section A provides that the City may fill a temporary vacancy “according to current City Policy (Promotions and Transfers)” and that any such temporary assignment must be for no more than twelve months, after which the employee will revert to his or her previous classification and salary without right of appeal. (Exhibit B).
37. Article 5, Sections D, E and F of the CBA provide:
 - “D. For eligibility to participate in a Specialized Division to Detective, Traffic Officer, S.W.A.T. Operator, Field Training Officer, School Resource Officer, K-9 Handler, Bicycle Patrol Officer and Community Relations Officer the minimum experience shall be two (2) years as a sworn Officer with one (1) consecutive year with the Española Police Department from the date of hire and completion of the probationary period as outlined in Article 3.
 - E. The selection process will be handled in accordance with the current Department regulations and procedures for the period of this agreement.

F. The City does not have the right to assign, transfer, and retain employees in the positions of Corporal, Sergeant, and Detective unless the minimum requirement for promotions has been met through this article.”

(Exhibit B).

38. The City’s Personnel Policy at page 19 mirrors the language of the CBA with regard to temporary transfers. Neither the CBA or the Personnel policy require testing for assignment to a Detective position; to the contrary, Policy 3.4 (A) states:

“A. The City encourages current City employees to apply for vacant positions for which they are qualified. Promotions and transfers are based on the Department Director’s recommendation, work force requirements, performance evaluations, job descriptions, and related City requirements. Regular Employees are eligible for promotion, transfer or voluntary demotion.”

39. The City agreed to remove Detective Martinez from his temporary assignment with the result that two Detective positions were open for competitive placement; one permanent position, the other a temporary position. (Testimony of Robert Vigil, Sammy Marquez, Kelly Duran).
40. Stephanie Martinez was formerly employed by the Respondents in its Human Resources Department and was so employed at the time the two Detective positions referenced above were being competitively filled. (Testimony of Stephanie Martinez, Kelly Duran and Sally Baxter).
41. Stephanie Martinez is a personal friend of Sammy Marquez. They belong to the same motorcycle club, socialize away from the office. Sally Baxter testified that Sammy Marquez spent an inordinate amount of time visiting with Stephanie Martinez at her workplace but Martinez denied any relationship with Marquez that was out of the ordinary friendly relationship she had with many employees

of the Española Department of Public Safety. (Testimony of Stephanie Martinez and Sally Baxter).

42. Kelly Duran and Sally Baxter received information that Stephanie Martinez may have given copies of the written test prepared for the competitive Detectives placement to Marquez prior to the test being administered and so, decided not to administer the written exam. (Testimony of Stephanie Martinez, Kelly Duran and Sally Baxter).
43. Following the decision to cancel the written test then-City Manager Kelly Duran met with Marquez and Vigil in their roles of union officers to discuss constituting a three-member panel to review the applicants for the Detective positions and recommend hiring for the positions. (Testimony of Robert Vigil, Sammy Marquez, Kelly Duran).
44. Robert Vigil, Sammy Marquez and Kelly Duran agreed that Española Department of Public Safety Deputy Chief Miguel Maez, Española Fire Department Deputy Chief Eric Tafoya and State Police Captain Robert Thornton would comprise the review panel. (Testimony of Robert Vigil, Sammy Marquez, Kelly Duran).
45. Only after the meeting in which the review panel was selected did Kelly Duran learn that Sammy Marquez applied for one of the Detective positions and had he known that fact earlier he would not have included him in the selection of the panel. (Testimony of Kelly Duran).
46. Prior to convening the review panel, Deputy Chief Maez called in sick and so, Chief Richard Gallegos substituted for him. (Testimony of Robert Vigil, Sammy Marquez, Kelly Duran).

47. Following the review panel interviews, Sammy Marquez ranked fourth after Daniel Espinoza, Eric Gallant and George Martinez. Michelle Ortega was ranked after Sammy Marquez. (Testimony of Kelly Duran and Sally Baxter).
48. Chief Gallegos offered the Detective position to the two highest ranked Officers but CPL Espinoza declined the assignment in order to accept a sergeant position for which he also qualified. Accordingly, Chief Maez offered the assignment to the next highest ranked Officer, George Martinez and so Officers Gallant and Martinez became the Detectives. (Exhibit L; Testimony of Gallegos).
49. Kelly Duran spoke to Sammy Marquez about not being selected for one of the Detective positions after he complained that George Martinez had been pre-selected. Mr. Duran explained that having been in that position for 2½ years and having done a good job while he was there, it was not unusual that Detective Martinez was among the most highly ranked. (Testimony of Kelly Duran).
50. Kelly Duran denied pre-selection or any anti-union animus with regard to the Detective assignment at issue. (Testimony of Kelly Duran).
51. On October 15, 2015 Deputy Chief Miguel Maez sent a memorandum to Chief Richard Gallegos informing him that SGT Daniel Espinoza reported that, while on sick leave on October 13, 2015, Officer Marquez drove his police unit to a scheduled appointment for window tinting and drove the unit to a job interview for School Resource Officer on October 15, 2016. According to the memorandum it was his opinion that Marquez' use of the vehicle as described constituted insubordination, conduct unbecoming an officer and a breach of conditions of employment. (Exhibit 5).

52. On October 15, 2016 Deputy Chief Maez issued a written reprimand to Sammy Marquez for abuse of sick leave when he failed to return to work after a week-long period of excused absence, calling in sick for an additional two days thereafter. (Exhibit 6).
53. On October 22, 2015, the Union filed a grievance alleging that the issued verbal and written reprimands together with the manner in which they were served constituted violation of the CBA and Department policies. (Exhibit 8)
54. Concurrently with the Grievance referenced above, on October 22, 2015 Officer Marquez submitted a memorandum to Chief Gallegos and Deputy Chief Maez, through Kelly Duran alleging a hostile work environment and retaliation by management. (Exhibit R).
55. Marquez alleged in Exhibit R that “your [Chief Gallegos] appointed temporary sergeant, Mr. Espinosa, was attempting to intimidate [him]”, that certain action reports given to Marquez on September 28, 2015 by SGT Espinosa and verbal and written action reports given to Marquez on October 18, 2015 “by [the Chief’s] appointed, temporary sergeant Michelle Ortega...” were part of an intimidation campaign.
56. Exhibit R included the following statements by Marquez:
- a. “Dear Mr. Gallegos, This letter is to inform you of my intent to take further action against you, Mr. Maez, and Mr. Espinosa.”
 - b. “I find it concerning that you promoted a sergeant who has absolutely no idea how to issue proper discipline. He violated department policy and union contract by his actions, and they were totally acceptable by you and Mr. Maez.

- c. "I also find it concerning that action reports are issued by Mr. Maez for insubordination and abuse of leave, when he is also guilty of the same infractions. If you need your memory refreshed, it was during the interviews for detective when he called in sick to avoid having to conduct the interviews. Now you can say, 'Who are you to dictate when someone can call in sick'? And I would say the same to you. The very fact that Mr. Maez and you are even questioning whether or not I was genuinely sick is unethical and borders on HIPAA privacy violations."
- d. "Of course you and your staff would not know anything about that because you are all inept at your jobs... no one here; yourselves included, cannot [sic] even pass a corporal or sergeants test."
- e. "You have chosen to enable your staff taking no account for [sic] any documented skills and qualifications because you yourself [sic] do not possess any."
- f. "The winds of change are coming, sir. I am also concerned that you would sign off on an action report alleging timesheet fraud, knowing full well that you yourself are guilty of timesheet fraud. Does GREAT [a middle school anti-drug campaign] overtime and the money you were forced to pay back ring a bell?"
- g. "If I may be so bold as to make a recommendation and request that you consider retirement to salvage what's about to be the rest of your career."
- h. "I will continue to do my homework and I have begun to make contacts with the Attorney General's Office and the Assistant US Attorney's Office."

- i. "I honestly believe this department can be a great place to work, as soon as the lack of leadership and corruption is addressed. Because you have refused to respond to my first letter, I will take it, and this one to the Department of Public Safety in Santa Fe where I will request an inquiry into you and your staff."
- j. "You had a chance to make positive change, sir, and you have chosen to squander it away on bad decisions and lack of education and training. I pray for the day when the Española Police Department can be recognized for something other than bad press. When it can be known for its leaders who possess traits like intellect, ethics, education and good moral conduct; instead of the appointed, enabled, managers we have now."

57. Sammy Marquez testified that he believed that when acting in his role as Union President he is free to communicate with management as a peer, which he believes entitles him to employ such language as in Exhibit R.
58. City Manager Kelly Duran and Sally Baxter met with Officer Sammy Marquez regarding the allegations in Exhibit R made against the Chief, the Deputy Chief and both Sergeants. Ms. Baxter offered to temporarily relocate Marquez to City Hall doing Code Enforcement duties while the allegations were under investigation at his regular rate of pay. Officer Marquez accepted the reassignment. (Testimony of Sally Baxter; Exhibit T).
59. Following the meeting on October 22, 2015 Sally Baxter issued a memorandum to Officer Marquez recommending his temporary assignment to Code Enforcement while his allegations were investigated. (Exhibit 7).

60. On October 23, 2015 Officer Robert Vigil submitted a letter to HR Director Sally Baxter alleging a "Hostile Work Environment", which set forth the following points:
- a. Chief Gallegos yelled at Vigil in a conversation about a shift coverage problem;
 - b. Three years previously, when Chief Gallegos was a sergeant, he yelled at Vigil;
 - c. That revocation a Vigil's take-home car privilege in October of 2015 after the City modified its policy on that privilege was in retaliation for filing grievances on behalf of Union members in fulfillment of a threat to that effect made approximately a year earlier;
 - d. Prior complaints of a hostile work environment submitted to the prior administration were not acknowledged;
 - e. Deputy Chief Maez was rude to him during a phone conversation regarding prioritizing calls; thereafter he was delayed in being released from duty at the end of his shift because of lack of coverage so that his 10-year-old son was without adult supervision for a period of time;
 - f. Acting SGT Espinoza would not approve his October 13, 2015 request for time off to attend to his mother's medical issues unless he arranged for coverage "since Officers have been calling in sick", which he took to be referring to Sammy Marquez' use of sick leave;
 - g. He alleges daily harassment but provides no details other than those outlined above.

Vigil concludes his complaint with references to the allegations that some time ago SGT Espinoza pointed his weapon “at two separate officers on two separate occasions” and that Espinoza recently “got into the face of Union President Sammy Marquez and threatened him as well in which resulted [sic] in Mr. Marquez filing a Hostile work environment.” [sic] and alleges that the foregoing constitutes attempts at a constructive discharge.

61. On October 27, 2015 Chief Gallegos responded to Officer Marquez’ grievance and allegations of “hostile work environment” and rebutted each allegation. (Exhibit 9).
62. At some point around October of 2015, the Española City Council revised its policy regarding a vehicle take-home privilege reducing the number of miles, within which the privilege may be exercised, from 50 to 40 with the result that Robert Vigil, who not only lives outside of the 40 mile limitation but outside of the 50 mile limitation, lost the privilege. (Second Amended Complaint ¶ 10 Exhibit A to Respondents’ Motion for Partial Summary Judgment; Testimony of Robert Vigil).
63. Officer Vigil filed a grievance the loss of his take-home car privilege and on October 30, 2015 the matter was resolved at Step II of the grievance process on the following terms:
 - a. Officer Vigil was considered to be “grandfathered” and not affected by the new take home policy because of a 2008 memorandum from former City Manager Veronica Albin approving a take home vehicle for Officer Vigil despite his living outside of the then 50 mile limit.

- b. Because the Deputy Chief and the City Manager did not have authority to grant an exemption from City policy indefinitely and the matter was to be addressed by the governing body to determine whether to issue a resolution grant grandfathered status while Vigil maintained his position as Patrol Officer.
 - c. Should Officer Vigil accept another position within the City, the more restrictive current take-home vehicle policies and procedures will be in effect. (Second Amended Complaint ¶ 10; Exhibit A to Respondents' Motion; Letter Decision on Partial Summary Judgment issued February 2, 2016).
64. The question whether suspension of Robert Vigil's take-home car privilege constituted retaliation or discrimination in violation of PEBA was resolved in favor of the City in my Letter Decision on Partial Summary Judgment herein issued February 2, 2016 and my Findings of Fact and Conclusions of Law therein are incorporated into this Recommended Decision. (Letter Decision on Partial Summary Judgment issued February 2, 2016).
65. Officer Robert Vigil testified that he is currently on Administrative Leave pending the outcome of a pending Internal Affairs Investigation. Other than the pending investigation he has no disciplinary record.
66. As Union Vice-President Vigil represents members' interests in the discipline grievance process. He testified that in a meeting with Chief Gallegos regarding suspension of his vehicle take home privilege the Chief said "I've never seen that letter from [prior chief allowing exception]. If I were you I would not be filing grievances" which he interpreted as a threat not to file any more union grievances.

67. Prior to his running for office Vigil testified that the union was not active, few grievances were filed and meetings were more like “bickering sessions”. After his election he called AFSCME representative Sam Chavez to obtain training and received steward training.
68. The City cooperated in granting him leave from work in order to attend that training in Taos. (Testimony of Robert Vigil).
69. Vigil testified that grievances he filed on behalf of others included one for Richard Trujillo regarding comp time, two grievances for Cody Martinez - an unpaid sign on bonus grievance, and discipline that was rescinded shift bid grievance and the grievance concerning George Martinez’ temporary Detective Assignment. He also assisted with contacting employees regarding a 10% reduction in PERA contributions, staffing issues and resolving a grievance on behalf of Jason Gallegos.
70. Robert Vigil testified that before filing the grievance over the temporary detective assignment the union held a meeting to gauge employee attitudes and those attending unanimously supported filing the grievance. (Testimony of Vigil).
71. I find insufficient grounds for Officer Vigil to have feared for his safety during the October 23, 2025 Zia Estates incident in light of the testimony of other who responded to the call coupled with the fact that Officer Vigil was wrong about the credentials of his Rio Arriba County back-up officer on that call.
72. I find there to be insufficient evidence to support a conclusion that Robert Vigil’s feeling unsafe and harassed in the workplace because of his union involvement or activities has a reasonable basis. (Exhibit X).

73. I find there to be insufficient evidence to support a conclusion that Robert Vigil was treated differently than other similarly situated officers with regard to granting leave based on the absence of evidence regarding leave for officers other than Vigil (other than his reference to Greg Esparza in Exhibit XX, which is hearsay and without foundation as to any similarity in sick leave use. In Exhibit XX in Officer Vigil admits to recently using “a lot of sick leave” alleges that the denial of leave and change in shift in question was retaliation “for being ill” and for “the use of sick leave when it is necessary”; not retaliation for his union activities.
74. The culture within the Española Police Department fosters a “rumor mill” that perpetuated unsubstantiated allegations against Union leaders, such as, that the Union’s President and Vice-President Marquez and Vigil were always showing up late to Union meetings; that grievances were filed every day, every other day or “every time you turned around”; and that those grievances were filed to personally benefit Officers Marquez and Vigil. Officer Richard Trujillo, testifying that he withdrew union support because he thought Marquez and Vigil were running the union for their own benefit. As examples he gave Vigil’s grievance over suspension of his take-home vehicle benefit and Marquez’ a grievances over his disciplinary actions. However, on cross examination he also testified that Vigil filed a grievance for him over the loss of comp time.
75. Many of these rumors or gossip originated with Officer Eric Gallant. For example, Solomon Romero testified that he was unaware of grievances filed by Marquez and Vigil to enforce the contract and testified that he would have been pleased to know that those had been filed. Other witnesses testified similarly.

(Testimony of E. Gallant, J. Apodaca, B. Martinez, C. Lopez, S. Romero, R. Vigil, Cody Martinez.)

76. Relying on such unsubstantiated rumors an element within the union membership unsuccessfully ought to remove Marquez and Vigil from office in October, 2015 and rather than wait approximately six weeks for a scheduled executive board election, on October 27, 2015, on group of six Española police officers and detectives met with Human Resources Director Sally Baxter for the purpose of delivering memoranda requesting that their authorized payroll deductions for union dues cease. Later that same day, another Officer delivered to Sally Baxter a signed memorandum just like the other six previously delivered. (Exhibits Z, AA, BB, CC, DD, EE, FF RR and II).
77. The above-reference memoranda were identical but for the signatures and were either prepared by or prepared from a sample provided by Officer Eric Gallant. (Testimony of E. Gallant, J. Apodaca, B. Martinez, C. Lopez, S. Romero, R. Vigil, Cody Martinez.)
78. On November 6, 2015 Ms. Baxter met with Officer Marquez and asked whether he wanted to go back to the Police Department the following week, reminding him that his assignment to Code Enforcement duties was intended to be temporary. (Testimony of Sally Baxter).
79. Marquez said he had things he was working on at Code Enforcement that he wanted to complete and that he wanted to stay on Code Enforcement while she was reviewing his complaints against the Police Chief, including complaints he made during the November 6 meeting. (Testimony of Sally Baxter.)

80. Reinstatement of Cody Martinez by Kelly Duran contributed to his subsequent removal as City Manager in because thereafter the Mayor said she could no longer trust him. (Testimony of Kelly Duran).
81. Former SGT Jeff Martinez testified that Gallegos and Macz, in a meeting between the three of them, expressed a wish to be rid of the Union. Cody Martinez said that such a sentiment was then communicated to him by Jeff Martinez in a one-on-one meeting. (Testimony of C. Martinez and J. Martinez).
82. Union Secretary/Treasurer Jeremy Apodaca testified that Chief Richard Gallegos falsified a police report under Apodaca's name and then asked Apodaca to change his story just days before this hearing process started. That testimony is irrelevant to any PEBA issues herein but does adversely impact the Chief's credibility.
83. At the hearing on the merits a recording of the encounter between Sammy Marquez and SGT Espinoza on September 28 2015 was heard. That recording refutes the multiple accounts that there was screaming and yelling, belies the testimony of SGT Espinoza and Danny Pacheco and I find their credibility to be lacking therefore.
84. There is no evidence to connect false accounts or inaccurate accounts of that meeting with any anti-union animus on the part of the City or management of the Police Department, though the evidence does support substantial personal animus on the part of SGT Espinoza and Danny Pacheco toward Sammy Marquez.
85. Cody Martinez, a Police Officer with the City of Española since 2012 and a union steward since January of 2016, testified that Robert Vigil, as an officer of

the union, filed a grievance on his behalf in 2015 to recover a sign-on bonus, represented him in an investigation in July 2015 regarding his handling of a case and filed a second grievance for discipline meted out after that investigation, which was resolved at Step II of the grievance process. (Review by City Manager Kelly Duran.)

86. Both grievances referred to above were resolved in favor of Cody Martinez. (Testimony of Cody Martinez and Kelly Duran).
87. Cody Martinez testified that prior to Marquez and Vigil becoming President and Vice-President of the Union it was inactive – he does not remember a meeting being scheduled or held prior to their becoming executive board officers. (Testimony of Cody Martinez).
88. Chief Gallegos has never talked to him about the union or his involvement in it. (Testimony of Cody Martinez).
89. On December 4, 2015 Officer Marquez received Notice of the Department's intent to terminate his employment for "...engaging in harassing behavior against...coworkers and superior officers...[making] false accusations, verbally and in writing...in an attempt to provoke, demean, defame, intimidate and/or harass...coworkers and superior officers." (Exhibit 13).
90. The memorandum to Chief Richard Gallegos dated October 22, 2015 Exhibit R, was a significant, though not the only, basis for his termination. (Exhibit 13; Testimony of Richard Gallegos and Miguel Maez).
91. The charges against Marquez were referred to a private enterprise, Universal Investigations for investigation of the charges. (Exhibits 14 and 15).

92. The results of the investigation into the charges against Marquez supporting termination were issued on December 30, 2015 and sustained all charges. (Exhibit 16).
93. Based on the outcome of the investigation by Universal Investigations the City terminated Officer Marquez' employment on January 15, 2016 (Exhibit 17).
94. On March 3, 2016 Robert Vigil was placed on administrative leave pending investigation of whether he violated department policy by use of his discretion to destroy a small amount of marijuana seized in connection with a detention without an arrest and by not filing charges against two juvenile offenders. (Exhibit 25)
95. The Union meeting at which Marquez and Vigil were elected to their union offices was held in the Department's training room which is routinely video recorded by a motion activated system. A video recording of the union election was shown to the Mayor and the City Manager by Deputy Chief Maez. (Testimony of Solomon Romero).
96. The union elicited testimony from Kelly Duran that while he was City Manager the Mayor sought to remove the Information Technology Manager , who was also the President of AFSCME Local 1188. He testified that the attempted removal did not disturb him because the employee was privy to confidential information that may have presented a conflict of interest between the employee's union duties and those of the job and arguably justified the Mayor's statement that she could not "trust" that employee. (Testimony of Kelly Duran.)
97. Within a week or two of his decision returning Cody Martinez to work he was terminated from his position as City Manager.

98. When the Mayor relieved Mr. Duran as City Manager she told him that she could no longer trust him. Mr. Duran believed that his decision re Cody Martinez was a factor in the Mayor's belief that she could no longer trust him but included other disputed personnel matters including non-union employees. (Testimony of Kelly Duran).
99. Deputy Chief Maez expressed concern to Kelly Duran regarding his meeting with union officials Vigil and Marquez "too much" as violating the department's chain of command, but he considered those meetings to be consistent with his open door policy applicable to both union employees and non-union employees. He considered the time union officers attend to union business to be "off the clock" during which the chain of command does not apply. (Testimony of Kelly Duran).
100. At the time he overturned Cody Martinez' termination he told Vice President Vigil that he was concerned that decision would cost him his job. (Testimony of Kelly Duran).
101. Duran was "surprised" by the mass withdrawal of union dues by members of Local 923. (Testimony of Kelly Duran).
102. Despite the absence of an evergreen provision in the union contract the City continued to honor the CBA as an indication of good faith toward the union. (Testimony of Kelly Duran).
103. The Mayor never told Kelly Duran to get rid of the police union, the fire department union or AFSCME Local 1188. During his tenure the City had no plan and he was given no directive to get rid of the union. Regarding Deputy Chief Maez, Mr. Duran testified that he was "frustrated" with the union and

made several comments expressing that frustration but Duran considered those comments to be an expression of the normal “tension” that always exists between labor and management. (Testimony of Kelly Duran).

104. One of the reasons he was hired as City Manager was his experience in dealing with labor unions. (Testimony of Kelly Duran).
105. His philosophy in dealing with union officials was always to regard them as peers in as much as they share the same goal of fair and impartial treatment of employees. (Testimony of Kelly Duran).
106. There was no connection between disciplinary action C, D, F, G, H, I and J and Marquez’ union activities. (Testimony of Kelly Duran)
107. George Martinez testified to “a lot of tension” between union leadership and employee members because of what the membership perceived to be a lack of financial accountability and dispute over what he perceived as a lack of response to a request for a copy of the union by-laws. Management did not prompt him to sign Exhibit 22.
108. Jason Gallegos testified that he received a new vehicle within a year after pulling his union dues but others, including Sammy Marquez who remained in the union, also received new vehicles.
109. Richard Trujillo testified that there was no management involvement in his withdrawing support from union and no change in his employment status since withdrawing. Has been appointed to supervise the SRT but no testimony that that assignment carries any benefit with it.
110. Idalee Lopez, School Resource Officer, testified that she withdrew from the union because she saw no benefit to being a member. Before filing withdrawal

(Exhibit BB) she and several other officers met at the home of Officer Michelle Ortega to discuss withdrawing from the union. Gallant drafted Exhibit 22 and she agreed to sign it and Exhibit AA around the same time. There was no management involvement in drafting Exhibit 22, Exhibit AA or her decision to withdraw support.

111. Retired SGT Jeff Martinez testified that he was formerly the President of Local 923. In a meeting with Chief in March or April 2015 a comment was made that Department would be better off without the union, but he doesn't know whether Deputy Chief Maez or Chief Gallegos said it. Neither Chief Gallegos nor Deputy Chief Maez discussed union issues with him.
112. Sammy Marquez testified that prior to his election as the Union President he had heard negative comments from his fellow officers about union and poorly run union meetings. He made comparisons between Española's CBA to the contract at the Albuquerque Police Department and corroborated testimony by Robert Vigil regarding the various grievances filed on behalf of members and their effectiveness. Two concerns upon assuming his duties as Union President were establishing a testing process for promotions and holding the temporary detective position for longer than the term allowed by contract.
113. Officer Marquez approached George Martinez about vacating the temporary detective position and establishing a testing procedure, obtained a written test from Santa Fe County to use as a guide and denied the rumor that once drafted the test had been released to him in advance by Stephanie Martinez.
114. Marquez protested using only the oral board for the competitive Detective selection but admitted that there was no basis for a grievance.

115. At the conclusion of his testimony Officer Marquez offered defenses for the series of disciplinary actions for insubordination and leave abuse, (Exhibits G-N) and stated that the basis for the anti-union retaliation claim herein was that SGT Espinoza was “abusing his power”. If true, that does not establish a connection between his union activities and the discipline or anti-union animus on management’s part.
116. Marquez testified that the City’s use of the independent contractor Universal Investigations to conduct his Internal Affairs investigation violated the parties’ CBA and constitutes disparate treatment on the basis of his union activities, but all qualified investigators in the Department were disqualified as investigators in the case because Marquez had named them in his complaint and resort to an outside contractor is a reserved management right under Article 2(p) of the CBA.
117. Michelle Ortega, former Treasurer for Local 923, testified that Eric Gallant drafted the dues withdrawal memo (Exhibit 23). Union members met at her house one evening to discuss their interest in remaining in the union. At that meeting she expressed her belief that Marquez and Vigil were filing grievances only for their own benefit. She was promoted to Sergeant after she pulled her union dues but the evidence is insufficient to establish that she received that promotion *because* she withdrew from the union.
118. Eric Gallant testified that he grew suspicious about the union when he asked for the union to contribute flowers to Idalee Lopez following the death of her husband in September or October of 2015 and no funds were available for that purpose.

119. Gallant complained directly to AFSCME, Council 18 about Marquez and Vigil being non-responsive to members (Exhibit PP; Testimony of E. Gallant) and testified that when questioned about finances, Sammy Marquez took the questions as a personal affront and didn't like having his authority questioned. (Exhibit QQ; Testimony of E. Gallant).
120. Gallant testified that it was his opinion that Marquez and Vigil were using their roles as union officers to benefit themselves and that he "heard talk" about multiple grievances being filed by them for the purpose of harassing the City. (Exhibit RR). However, on cross-examination Officer Gallant admitted that he knew nothing about what grievances had actually been filed and there was no basis for his testimony that Marquez and Vigil filed "grievance after grievance".
121. Officer Gallant testified that he was not willing to wait 6-8 weeks for scheduled union elections and so without being able to remove them immediately he took steps reflected in Exhibit 23 to remove financial support for AFSCME, Local 923 after he was not successful in having them immediately removed from office. (Testimony of E. Gallant).
122. Gallant was not pursuing decertification of the union but was seeking "another union to represent our Union Members". (Exhibit Z).
123. Officer Daniel Pacheco testified that he did not sign Exhibits Z or RR because he "believes in the union" despite his disapproval of its current officers. He signed Exhibit 22, but said he signed it but only because he misunderstood it. He had no knowledge of AFSCME's request to bargain a new contract. (Testimony of D. Pacheco).

124. Retired Lieutenant Christian Lopez rebutted Pacheco's denial that he drew and pointed his service weapon at a fellow officers because he was assigned as an investigating officer at the time, making it more likely than not that such events probably occurred. However, the truth of that matter is irrelevant to Marquez learning of the incidents through the rumor mill years after the events occurred and using that information in an aggressive, offensive manner. (Testimony of C. Lopez).
125. SGT Daniel Espinoza's testimony was not credible because it was rebutted by Christian Lopez, his memory was selective, his demeanor was highly agitated and his report of the September 2015 encounter ran contrary to the recorded conversation.
126. Sally Baxter, the City's Human Resources Director, denied ever having a conversation with the Chief about getting rid of the union, getting rid of Marquez, Vigil or Jeremy Apodaca or to assert control over the union.
127. With regard to delivery of Exhibit 22 by a group of disaffected officers Ms. Baxter testified that she was attending a staff meeting at the time and that meeting was interrupted in order that she might attend to the group's request that she meet with them. She related a conversation with Eric Gallant by which she understood him to be the drafter of the Exhibit 22 withdrawal of dues. She was not aware before it was submitted to her that those signing Exhibit 22 intended to withdraw dues and to her knowledge management played no role in their withdrawal of support for the Union.
128. Chief Richard Gallegos denied any management involvement in the creation of Exhibits RR, 22, ZZ, AA, BB, II, C, D, F, G, H, I, J, L and denied ever having

any conversations with his son, Officer Jason Gallegos about getting rid of Marquez or Vigil.

129. At the time then Sergeant, now Chief Richard Gallegos was being considered for promotion to Lieutenant, Christian Lopez argued for following the CBA's procedure for promotion in a conversation that included Gallegos, Miguel Maez and a former Chief of Police, Joe Martinez. During that conversation Miguel Maez made anti-union statements such as "We don't need the union" and "Why do you let the union tell you what to do. You're the Chief; you make the decision. You can do this." He said similar statements of that kind were common under Chief Martinez's administration, however, Chief Gallegos never made anti-union comments. (Testimony Christian Lopez; reported statement denied by Miguel Maez on sur-rebuttal.)
130. Customary procedures for conducting I.A. investigations (Testimony Christian Lopez) are irrelevant under the circumstances of this case because it was impossible to follow those procedures in a small department when all trained I.A. investigators are named as subjects of the investigation.
131. Christian Lopez was Union President in 2005-2006, beyond the statute of limitations in this case, during which time he testified management harbored anti-union sentiment. Despite such alleged anti-union sentiment he held the rank of Detective Sergeant and apparently suffered no anti-union retaliation being subsequently promoted to Lieutenant. His testimony did not include any allegations of anti-union retaliation against him. (Testimony of Christian Lopez).

JURISDICTION: The Public Employee Labor Relations Board (PELRB) has both personal and subject matter jurisdiction over the parties and subject matter of this complaint as stipulated by the parties in the Pre-Hearing Order.

REASONING AND CONCLUSIONS OF LAW:

The Union's Second Amended PPC alleges that the employer committed the following prohibited practices:

1. Discrimination with regard to terms and conditions of employment in violation of § 19(A) of the Public Employee Bargaining Act;
2. Interference with, restraint or coercion in the exercise of a right guaranteed by the PEBA in violation of § 19 (B) of the Act;
3. Dominating or interfering in the formation, existence or administration of a labor organization in violation of § 19 (C) of the Act;
4. Discrimination in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization prohibited by the PEBA § 19 (D).
5. Violating § 19 (E) of the PEBA, which prohibits discharging or otherwise discriminating against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization;
6. Refusing or failing to comply with a provision of the Public Employee Bargaining Act or board rule; in violation of § 19 (G) of the Act; and finally,

7. Refusing or failing to comply with a collective bargaining agreement in violation of § 19 (H).

To state a claim under § 19 (A), (B) (D) or (E) the union must establish that the employer's opposition to a protected activity or status is a substantial or motivating factor in their 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 disciplined or otherwise discriminated against for union activity, rather than for a legitimate business reason:

1. 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) employer had 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 and is relevant to show a nexus or connection between the adverse action and the allegedly impermissible considerations. *Id.*

2. 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. *Wright Line* 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) and *Carpenters, supra*, at 265-266.

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.

- A. **THE UNION DID NOT ESTABLISH A *PRIMA FACIE* CASE THAT RESPONDENTS VIOLATED THE PUBLIC EMPLOYEE BARGAINING ACT SECTIONS 19 (A), (B) (D) or (E). HAVING FAILED TO SATISFY THE FIRST PRONG OF THE *WRIGHT LINE* TEST IT IS NOT NECESSARY TO ANALYZE THE SECOND PRONG, HOWEVER, I CONCLUDE THAT THE PREPONDERANCE OF THE EVIDENCE DEMONSTRATES REASONABLE BUSINESS REASONS FOR MANAGEMENT'S ACTIONS THAT THE UNION HAS NOT REBUTTED.**

The union's claim of anti-union discrimination and retaliation depends on nine allegations that may be summarized as follows:

1. That management promised rewards or rewarded individuals to destabilize the bargaining unit and cause dissension so as to dismantle the Union;
2. That without just cause, management took five disciplinary actions against the Union's President, Sammy Marquez in the span of about two months, beginning on or around September 16, 2015. Those disciplinary actions are:
 - a. A verbal warning on September 16, 2015, for abusing sick leave;
 - b. A written reprimand on September 17, 2015, for failing to report for duty;
 - c. A verbal warning on October 15, 2015, for abusing sick leave;
 - d. A written warning on October 15, 2015, for abusing sick leave;

- e. Being placed on paid administrative leave and issued a Notice of Contemplated Disciplinary Action, on December 4, 2015, for acts taking place between September 28 and November 6, 2015 constituting "...engaging in harassing behavior against...coworkers and superior officers... [making] false accusations, verbally and in writing...in an attempt to provoke, demean, defame, intimidate and/or harass...coworkers and superior officers." (Exhibit 13).
3. That the Notice of Contemplated Action referenced above purports to "ban" Marquez from contacting "potential witnesses" and "any such persons at work or otherwise" in violation of rights assured under the PEBA.
4. Union President Sammy Marquez has been retaliated against and subjected to a "hostile work environment" by the following actions:
 - a. being demoted from Detective to Patrol on September 23, 2015;
 - b. being reassigned from uniformed Patrol to the Department of Code Enforcement for the City on October 22, 2015.
5. Union Vice-President Robert Vigil has been has been retaliated against and subjected to a "hostile work environment" by the following actions:
 - a. loss take-home vehicle privilege, subsequently reinstated;
 - b. being put in an unsafe situation on October 23, 2015, when a sergeant allegedly refused to provide adequate backup during a possible drug overdose call;
 - c. being treated differently than others when requesting sick leave and his current pending discipline.

6. Officer Jeremy Apodaca, Secretary/Treasurer of the Union, has been retaliated against and subjected to a “hostile work environment” by the following actions:

- a. The City Council voted to decommission police dog Gabanna and as a result Officer Apodaca lost bonus pay of 10% that came with being the dog’s handler with the salary savings being used to fund a new night shift patrol sergeant.

7. In contrast to the foregoing other officers allegedly complicit with management were rewarded by management for anti-union actions.

8. Respondents fostered dissension among bargaining unit members and coordinated a mass movement to stop dues deduction on behalf of nine members of the bargaining unit, thereby depriving the Union of the funds necessary to administer the affairs of the bargaining unit. In support of this allegation the Union relies on the following circumstantial evidence:

- a. The nine bargaining unit members rescinding their union dues payroll deduction authorizations on October 26, 2015 used the stationery of the Public Safety Department to communicate their grievances with AFSCME, Local 923 leadership;
- b. Among the signatories to the petition of October 26, 2015, is the Public Safety Director’s son, Jason Gallegos;
- c. Among the leaders of the signatories is Officer Eric Gallant, who was rewarded by management with a promotion to Detective, taking the place of Sammy Marquez;

d. Members of the bargaining unit have been recruited to take action against the Union with the promise of promotions or special privileges including being awarded newer police units, promotions to Sergeant and Detective, and appointment to the Special Response Teams (SRT).

e. Among the concerns expressed by those rescinding their union dues payroll deduction authorizations on October 26, 2015 is the filing of grievances by the Union, which is a right protected by the CBA and the PEBA.

9. On January 5, 2015, Solomon Romero submitted to Chief Gallegos a written complaint of "hostile work environment" and retaliation by Deputy Chief Miguel Maez, in which he reported that Maez promised him a promotion to Sergeant if he could assist him to "dismantle" the union.

The preponderance of the evidence is not sufficient to support an inference that protected conduct was a motivating factor in any of the employer's decisions or action outlined above. The only expressions of anti-union sentiments and promises of reward to anti-union action are attributed to Deputy Chief Miguel Maez, who was not in a position to grant the benefits allegedly promised and there is the person to whom the promise was made took no action to carry out the supposed desire to "dismantle" the union. The key union witness on this point was Solomon Romero, who testified that during a car trip returning from Internal Affairs Investigation training in November of 2014 Deputy Chief Maez said that he would promote Romero to sergeant if he would help dismantle the union. I note that the accusation that Maez made such a statement (which he denies making) was raised by Romero for the first time in a memorandum complaining of harassment by Miguel Maez. Although he withdrew from the union in November of 2014 he did so because he didn't believe the union was

doing anything for him individually and because he didn't agree with the election of Marquez and Vigil as President and Vice-President, not in furtherance of any management scheme to get rid of the union. Although at one point in his testimony Solomon Romero testified that during a discussion with management over a staffing issue, Chief Gallegos concurred with a statement by someone in that meeting that the Department would be "better off without a union" he also testified on cross examination that the Chief "never really said much about the union". Another witness, testified that Romero told him Maez had offered to promote him to Captain, much like a fisherman's tale wherein the "one that got away" gets bigger with each re-telling. Furthermore, Romero also testified that at the point Deputy Chief Maez supposedly made the offer to promote Romero already had complained to Chief Gallegos about alleged harassment by Deputy Chief Maez and that after the offer of promotion had allegedly been made, the harassment by Maez supposedly continued. Romero apparently has a pending lawsuit against the Respondents for wrongful termination and violation of whistleblower protections. The level of confidence Maez would necessarily have to invest in Romero in order to accomplish a conspiracy to dismantle the union is inconsistent with simultaneous ongoing harassment Romero alleges. His testimony is otherwise not credible for the reasons stated in the Findings herein.

With regard to the discipline assessed against Sammy Marquez, there is insufficient evidence to establish a nexus between Mr. Marquez' any corrective or disciplinary actions in evidence, including his termination, and his union activities. In this respect I wish to make clear that I am not passing judgment on whether there is just cause to sustain his termination – that decision is before an arbitrator on the pending contract grievance – except to the extent that the Union has not rebutted the reasonable business reasons for management's actions. For the purpose of determining whether the PEBA has been violated I conclude that Mr.

Marquez may not breach established standards of conduct with impunity claiming sanctuary in his role as a union officer. I reject the premise that because the October 22, 2015, letter to the Chief and Deputy Chief from Sammy Marquez purports to have been sent by him as Union President, that there can be no violation of policy. His notion that as Union President he can be as uncivil, antagonistic and insubordinate as he likes without recourse is not only incorrect in light of rules governing off-duty conduct but is simply unwise as a means of fostering good labor-management relations. On this point I take administrative notice of NMSA (1978) §10-7E-2 wherein one of the stated purposes of the Public Employee Bargaining Act is to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. The contents of the letter were not a matter of public concern and were thus not protected speech. See *Connick v. Myers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994), *City of San Diego v. Roe*, 543 U.S. 77 (2004) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Accordingly, the preponderance of the evidence does not support a conclusion that anti-union animus played any part in the Department imposing discipline on Sammy Marquez.

Any concerns that I have regarding whether it was appropriate to contract with a private enterprise outside of the Department for his internal affairs investigation are mitigated by the fact that all qualified investigators in the Department were disqualified as investigators in the case because Marquez had named them in his complaint and resort to an outside contractor is a reserved management right under Article 2(p) of the CBA. Any bias resulting from Respondents employing an outside investigator is more properly the subject of a grievance arbitrator who will decide the issue of just cause and due process; not this Board which is concerned solely with violations of the PEBA.

Likewise, I conclude there is no anti-union animus established in connection with Marquez being “demoted” from Detective to Patrol on September 23, 2015, when the competitive testing that resulted in the selection of other applicants was done at the insistence of the union to enforce its own contract. The selection was done by a review panel and there is no evidence that the questions or the scoring by the evaluators was improper in any way. That some of the interview questions were subjective is immaterial. I note that the union cast aspersions on Deputy Chief Miguel Maez for calling in sick allegedly to avoid participation on the interview panel while now claiming that he is the prime mover behind Respondents’ anti-union animus. The union does not explain why it would prefer that he serve on the interview panel instead of the less vocally anti-union Chief Gallegos who replaced him. In the absence of any other explanation I conclude that the Union believes that if management does something it must be wrong. That attitude does not foster good labor-management relations.

Likewise, I conclude there is no anti-union animus established in connection with Marquez having been reassigned from uniformed patrol to the Department of Code Enforcement. That move was done with his concurrence and in order to protect him from the workplace harassment of which he was complaining.

The union’s closing brief does not address the argument that the Notice of Contemplated Action given Sammy Marquez prior to his termination purports to “ban” Marquez from contacting “potential witnesses” and “any such persons at work or otherwise” in violation of rights assured under the PEBA. Consequently, I consider that argument to have been abandoned. In any event I recognize a distinction between preventing contact with potential witnesses in order to prevent taint or intimidation and the necessary contact allowed under the PEBA which the Respondents recognize in the same Notice of Contemplated Action

when they write “You may have a representative of AFSCME Local 923 present at any meetings regarding this matter in accordance with the Contract FY 2010-2011.”

Similarly, the preponderance of the evidence does not support a conclusion that Union Vice-President Robert Vigil has been has been retaliated against and subjected to a “hostile work environment”. I dispensed with the claim that the loss of his take-home vehicle privilege was motivated by anti-union animus by Summary Judgement on February 2, 2016. In my letter decision I concluded that Respondents established not only that it has a legitimate business related purpose in restricting the vehicle take-home radius but that its purpose was pursued in an equitable fashion without reference to union membership or activities. Vigil’s privilege was eventually reinstated and by doing so Vigil is cast in the role of one seeking not to be treated equally with his peers, but to maintain a privilege greater than that enjoyed by his peers.

With regard to the allegation that Robert Vigil was put in an unsafe situation on October 23, 2015, when a sergeant allegedly refused to provide adequate backup during a possible drug overdose call, I find the allegations to be wholly without merit.

Similarly, I find the evidence that he was treated differently than others when requesting sick leave to be woefully deficient. The preponderance of the evidence suggests the opposite – that the employer took pains to accommodate his frequent sick leave requests include searching diligently for coverage when his absences would leave the assigned shift undermanned. See Exhibit XX.

With regard to disparate treatment arising out of his exercise of discretion when he destroyed a small amount of marijuana seized in connection with a detention without an arrest, I note that while a Police Officer may have discretion to be flexible as circumstances may require, sometimes that exercise of discretion has consequences. I accept his testimony

that many officers will destroy small amounts of contraband without being disciplined for doing so. However, in this instance the destruction of contraband was done in the presence of complaining witnesses and coupled with a questionable decision not to file charges against two juvenile offenders. Those additional facts distinguish his discretionary act from others he referenced. Again, I wish to make clear that I am not passing judgment on whether there is just cause to sustain his discipline, only that the union has not substantiated its burden to prove anti-union retaliation or discrimination under the Act.

Despite his claims of anti-union animus, Deputy Chief Maez issued Vigil a letter of commendation (Exhibit VV) which is inconsistent with the notion that he was being harassed and subjected to a constructive discharge for his union activities.

The claim that Secretary/Treasurer of the Union, Officer Jeremy Apodaca was retaliated against and subjected to a "hostile work environment" when the City Council voted to disband the K-9 unit and he lost bonus pay of 10% as a result was also determined against the union by Summary Judgment on February 2, 2016. As with the vehicle take-home issue the Respondents demonstrated a prudent business-related reason for discontinuing the program in order to use the funds for a night shift sergeant position. As with the vehicle take-home issue the Union has shown no nexus between disbanding the K-9 unit and any anti-union animus. Nothing presented at the merits hearing changed that conclusion.

The union has not established by a preponderance of the evidence that those officers withdrawing dues deduction authorization were complicit with management and were rewarded by management for anti-union actions. While some who withdrew union support received subsequent promotion favorable assignments or other benefits, not all did. The evidence that such benefits were bestowed because of their withdrawal of union support is lacking. On this point I find the testimony of the Union's witness, Kelly Duran, and

management's witness, Sally Baxter, to be persuasive. Mr. Duran, a former member of Laborers' Local 16, was hired as the City Manager because of his Union experience. He believed that the purpose of the Union was to act as a check and balance to management and to assure due process. Both denied pre-selection or any anti-union animus with regard to the personnel decisions generally and the Detective selection process specifically. There is insufficient evidence to establish a nexus between those who pulled their dues in October 2015 and any alleged "rewards" for doing so such as Eric Gallant and George Martinez being assigned detective duties, Idalee Lopez becoming a School Resource Officer, Daniel Espinoza and Michelle Ortega being promoted to sergeant, Greg Esparza being assigned a new vehicle and being approved to attend supervisory classes or Jason Gallegos allegedly receiving favorable treatment regarding his vehicle, SRT service and training positions. With regard to the claim that Respondents fostered dissension among bargaining unit members and coordinated a mass movement to stop dues deduction on behalf of nine members of the bargaining unit, I conclude that the union has not met its burden by a preponderance of the evidence. I ascribe no significance to the fact that the dues withdrawal notice was submitted on City of Española letterhead because the witnesses unanimously testified that the letterhead was available to all employees and was authorized for all internal correspondence including communication of union matters. The witnesses are unanimous in their testimony that that dissention in the Union ranks was not instigated by management but exists because certain Union members don't like the way Marquez and Vigil were performing their duties as union officers. While it is also apparent that union members' discontent was based on half-truths, innuendo and outright lies, there is no evidence to support a conclusion that those canards originated with management. The testimony established that they originated primarily with union member Eric Gallant who resented

Sammy Marquez' response to his request that union funds be used to purchase flowers on behalf of the union for fellow officer Idalee Lopez after the untimely death of her husband. Thereafter an internal union dispute over maintenance of a bank account and proper fiscal management erupted. Accordingly, I conclude that withdrawal of dues deduction authorization was an internal Union matter which did not arise out of management's union animus. In reaching this conclusion I am cognizant of NMSA (1978) § 10-7E-5 as it regards the rights of public employees to both form,

join or assist a labor organization as well as the right to "refuse any such activities".

For the reasons discussed above I conclude that the Union has not established by a preponderance of the evidence that any connection exists between the adverse actions and the complainants' union activities. Therefore, the union did not establish a *prima facie* case that respondents violated the Public Employee Bargaining Act §§ 19 (A), (B) (D) or (E).

B. THE UNION DID NOT ESTABLISH THAT RESPONDENTS VIOLATED THE PUBLIC EMPLOYEE BARGAINING ACT SECTION 19 (C), DOMINATING OR INTERFERING IN THE FORMATION, EXISTENCE OR ADMINISTRATION OF A LABOR ORGANIZATION.

Domination or Interference with a Union is prohibited by the PEBA § 19(C). Interference claims may overlap with and those for discrimination and/or retaliation. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 88 ("[t]he Board has noted since its earliest days that a violation by an employer of any of the ... subdivisions of Section 8, [the National Labor Relations Act equivalent of our prohibited practice section] is also a violation of subdivision one." [the NLRA's prohibition on interfering, restraining or coercing employees]. Under the NLRA, an interference claim is directed against a very narrow type activities, such as establishment of a "company union" or infiltration of unions by lower-

level supervisors.² See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 448-449. The PELRB has applied § 19(C) of PEBA to an employer's failure give the union notice of a mandatory employee meeting concerning the terms and conditions of employment, when the union had previously alerted the employer that such notice was required and expected. See *AFSCME Council 18 v. Department of Health*, 06-PELRB-2007 (Dec. 3, 2007).

There is no evidence in the instant case, as there was in *AFSCME Council 18 v. Department of Health* that the parties suffered from tense and antagonistic labor-management relations for several years. The evidence here, suggests benign neglect by the union and some measure of disregard by the employer prior to the election of Marquez and Vigil. The evidence of illegal animus in the instant case does not rise to the level seen in *AFSCME Council 18 v. Department of Health*. Some evidence suggests that management sought a cooperative and productive relationship with the Union. (Exhibits YY, ZZ, BBB, CCC, DDD and GGG). But even if the quantum and quality of our evidence as to anti-union animus exceeded that presented in the older case I conclude, as did the Hearing Officer in *AFSCME Council 18 v. Department of Health*, that union animus alone - even strong union animus- cannot support a claim under § 19 (C) absent a showing of adverse employment action or adverse change of employment conditions *and* a nexus between that and the alleged animus. For the reasons stated in Point A above, I conclude that the Union has not established by a preponderance of the evidence that any connection exists between the adverse actions alleged and the complainants' union activities. For that reason the Union's claim under § 19 (C) necessarily fails.

C. THE UNION DID NOT ESTABLISH THAT RESPONDENTS VIOLATED THE PUBLIC

² Claims of retaliation for or interference with a union officer conducting union business are asserted under §§ 8(a)(1) and 8(a)(3) of the NLRA, which correspond almost word-for-word with § 19(B) and § 19(D) of PEBA. See *Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979).

**EMPLOYEE BARGAINING ACT SECTIONS 19 (G),
REFUSING OR FAILING TO COMPLY WITH A
PROVISION OF THE PUBLIC EMPLOYEE
BARGAINING ACT OR BOARD RULE; OR 19 (H)
REFUSING OR FAILING TO COMPLY WITH A
COLLECTIVE BARGAINING AGREEMENT.**

The Union's closing brief does not specify which provisions of the Act or Board rules or which sections of the parties CBA were violated in order to sustain claims under §19 (G) and (H). From the Second Amended Complaint the §19 (G) claim apparently rests upon the PEBA §5's guarantee 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 or may refuse to engage in such activities. In addition to the allegations discussed under Point A above for retaliation and discrimination, There are several alleged contract violations alleged that might support a claim under §19 (H), For example, on October 22, 2015, the Union filed a grievance alleging that the verbal and written reprimands issued to Marquez together with the manner in which they were served constituted violation of the CBA and Department policies. (Exhibit 8). Also, Marquez testified that the City's use of the independent contractor Universal Investigations to conduct his Internal Affairs investigation violated the parties' CBA. Finally, Marquez complained "I find it concerning that you promoted a sergeant who has absolutely no idea how to issue proper discipline. He violated department policy and union contract by his actions, and they were totally acceptable by you and Mr. Macz."

For the reasons set forth in the discussion of Point A above the evidence is insufficient to sustain a violation of PEBA §5. Because a claim under section 19 (G) must be premised on a violation of PEBA other than section 19 and the evidence does not substantiate a violation of §5 the claim under 19 (G) fails. Similarly, the claim under §19 (H), as the evidence is insufficient to substantiate the violation of any of the contract provisions as alleged.

DECISION: For the reasons stated herein the complaint should be **DISMISSED** and the Complainant should receive no relief.

Issued, Wednesday, June 29, 2016.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD


Thomas J. Griego, Hearing Officer