

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18
and ANDREW GILMORE,
Petitioners,

v.

PELRB No. 105-16

LUNA COUNTY,
Respondent

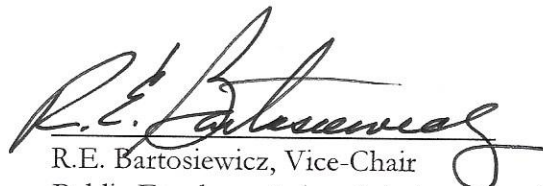
ORDER

THIS MATTER comes before the Board on appeal by Luna County from the Hearing Officer's Report and Recommended Decision issued July 13, 2016. Upon a 2-0 vote at the Board's August 9, 2016 meeting (Chair Westbrook having recused himself in all cases involving Luna County) the Board adopted as its Order the Hearing Officer's Report and Recommended Decision, including its Findings, Conclusions and rationale, without modification. Accordingly, Luna County is Ordered to immediately reinstate Andrew Gilmore to his former position with all back pay and benefits including but not limited to PERA contributions, seniority rights and leave accruals beginning the week of March 22, 2016 and continuing each week until Respondent reinstates him to his previous position.

IT IS FURTHER ORDERED that Luna County shall cease and desist from violations of the PEBA §§19 (A), (B), (D) and (E) as found by the Hearing Officer and shall post in all locations where notices to employees are commonly posted and on the website, for a period of no less than 30 days, a notice of the above violations in a form substantially conforming to that attached to the Recommended Decision as Appendix A.

Date

August 9, 2016


R.E. Bartosiewicz, Vice-Chair
Public Employee Labor Relations Board

**STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

In re:

**AFSCME COUNCIL 18, AFL-CIO
and ANDREW GILMORE,**
Complainants,

PELRB No. 105-16

v.

LUNA COUNTY,
Respondent.

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 Complainants' allegation that the County's actions in giving notice of its intent to terminate Andrew Gilmore's employment and eventually effecting that termination, violated Sections 19 (A), (B), (D) and (E) of the Public Employee Bargaining Act. The Union brought its complaint on March 10, 2016, which included a "Request for Immediate Injunctive Relief", prior to adjudication on the merits of the complaint. I received an e-mail from Counsel for the County on March 21, 2016 to which was attached a document purporting to be an Answer to the PPC.¹ No other copy of the "Answer" or any request for extension of time in which to answer was filed with the Board until after March 31, 2016 when I wrote to counsel informing her that the referenced electronic submission does not constitute a proper filing under Board Rule NMAC 11.21.1.10. I therefore issued a finding of default. Counsel for Luna County then hand-delivered a copy of its Answer along with a Motion to Disqualify Thomas Griego and Board Chair Duff Westbrook, but those copies did not bear original signatures – the issue whether such filings comport with the requirements of NMAC 11.21.1.10 having been

¹ Although the Title of the pleading purports to be an "Answer to Prohibited Practices Complaint and Request for Injunctive Relief and Counterclaim" I can discern no Counterclaim in the pleading and no relief consistent with a counterclaim is prayed for by the County.

delegated to the Director's discretion on an *ad hoc* basis by the Board at its June 7, 2016 meeting. The Request for Immediate Injunctive Relief and the Motion to Disqualify Chair Westbrook was heard by the PELRB at a Special Meeting scheduled for that purpose on April 1, 2016. Both the Union's request for pre-adjudication injunctive relief and the County's Motion to Disqualify Chair Westbrook were denied at that meeting. The motion to disqualify me was tabled until the May Board meeting in order to give me time to respond.

On April 6, 2016 Luna County moved to set aside the default determination and filed an Amended Motion to disqualify me. At the Board's regularly scheduled meeting on May 3, 2016 the Board heard both Luna County's Amended Motion to Disqualify the Executive Director and its request to set aside the default determination. On May 13, 2016 the Amended Motion to Disqualify the Executive Director was denied and the Motion to Set Aside Default was granted for excusable neglect.

A hearing on the merits was scheduled and held May 26, 2016. The Complainants appeared in person and through legal counsel. The Respondent elected not to appear, having submitted a purported "Notice of Non-Appearance" the day preceding the Merits Hearing. After responding to the faxed "Notice" informing the parties that I could find no legal basis to support such a pleading, that the County's counsel had not moved to continue the Hearing and had not plead unavailability, she filed a Motion for Continuance on the day of the scheduled merits hearing. That Motion does not conform to NMAC 11.21.1.16 requiring a request for postponement of a scheduled hearing to be filed and served on the opposing party at least five days before commencement of the hearing. Because the Respondent's failure to appear constitutes a default the Merits Hearing took place in the absence of the County.

Following the Merits Hearing and before submission of this Recommended Decision counsel for Luna County filed yet another Motion to disqualify me, which Motion is hereby **DENIED** as without merit and as having been filed in bad faith and interposed for delay.

Despite the County electing not to appear at the Merits Hearing, it may nevertheless still be said that all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. 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:

JURISDICTION:

The PELRB has both personal and subject matter jurisdiction over the parties and subject matter pursuant to §10-7E-9(F) and §§19 (A), (B), (D), (E) and (G) of the Public Employee Bargaining Act (PEBA).

FINDINGS OF FACT:

1. Andrew Gilmore is a “public employee” as that term is defined in Section 4(R) of the PEBA.
2. Respondent is a “public employer” as that term is defined in Section 4(S) of PEBA.
3. Complainant AFSCME Council 18, AFL-CIO (AFSCME) filed a Petition for Certification under the Public Employee Bargaining Act seeking recognition as the exclusive bargaining representative for a group of Luna County employees, which Petition was assigned PELRB Case No. 310-15.
4. In response to AFSCME’s Petition, Respondent claimed that among those Luna County employees AFSCME sought to represent, those holding the ranks of sergeants and lieutenants at its detention facility should be excluded from collective

bargaining. Accordingly, on February 22, 2016, a representation hearing pursuant to PEBA and the Board's rules was held to determine the disputed employees' inclusion or exclusion.

5. At the February 22, 2016 representation hearing, Complainant Andrew Gilmore sat at counsel table as the designated employee representative and was one of the three witnesses who appeared in and gave testimony at the hearing in support of AFSCME's Petition.
6. On April 22, 2016 a scheduling conference in PELRB Case No. 310-15 was held resulting in a Scheduling Order pursuant to which AFSCME submitted its portion of a Stipulated Pre-Hearing Order to counsel for the County on February 5, 2016. (See Union Ex. 11).²
7. In its portion of the Stipulated Pre-Hearing Order referenced in Finding No. 6 above, AFSCME identified documents referred to throughout the representation proceeding as "post orders", as an exhibit to be introduced at the representation hearing.
8. Counsel for Respondent did not object to the use of the post orders upon the February 5, 2016 disclosure, nor did she claim at that time that the County's post orders were confidential or otherwise alert the Hearing Officer or opposing counsel to any issues concerning AFSCME's having obtained the post orders or their disclosure.
9. The post orders are not marked as "Confidential" nor is it apparent on their face that they are to be treated as such.

² Unless otherwise specified, all exhibits referenced herein refer to the Union's exhibits that were entered into evidence at the April 1, 2016, hearing on AFSCME's request for pre-adjudicative relief

10. Pursuant to the above referenced Scheduling Order in PELRB Case No. 310-15, counsel for Respondent provided its portion of the Pre-Hearing Order on February 12, 2016 (Union Ex. 2).
11. Again, the County did not object to the possession, use or introduction of the post orders at that time, nor did it claim that the County's post orders were confidential or otherwise alert the Hearing Officer or opposing counsel to any issues concerning AFSCME having obtained the post orders or their disclosure.
12. In its portion of the Pre-Hearing Order the County identified "Any and all records and documents produced by Petitioner" as possible exhibits, which necessarily includes the post orders, thereby signaling its own intent to use them as evidence in the representation hearing.
13. Pursuant to the Scheduling Order in PELRB Case No. 310-15, the parties exchanged copies of the exhibits they intended to introduce on February 15, 2016, which included the post orders at issue. (Union Ex. 3)
14. Again, the County did not object to the possession, use or introduction of the post orders at that time; nor did its counsel claim that the post orders were confidential in any manner and should be treated as such.
15. Counsel for Respondent submitted the integrated Pre-Hearing Order to the PELRB on February 15, 2016 (Union Ex. 4), again without raising any concerns or objections regarding the use or possession of the post orders.
16. At the beginning of the February 22, 2016, hearing, the County stipulated to the admission of all of the exhibits identified by the Pre-Hearing Order, reserving only arguments as to relevance or materiality, again without raising any concerns or objections about the admission of the post orders or their use in a public hearing.

(Administrative Notice of Audio record of Merits Hearing in PELRB No. 310-15, Part 1 at 13:38 to 15:22.)

17. During the cross-examination of Complainant Gilmore in the PELRB Case No. 310-15 Merits Hearing the County's counsel asked Mr. Gilmore a compound question about whether he had given the documents to his "...lawyer in these proceedings – are you the person who gave the copy of the post orders to your counsel in these proceedings?" to which he answered "No Ma'am". His answer to counsel's follow up question "How did he get a copy of the post orders?" is inaudible.

(Administrative Notice of Audio record of Merits Hearing in PELRB No. 310-15, Part 3 at 21:16 to 21:30.)

18. Based on Mr. Gilmore's testimony at the hearing in this matter there is ambiguity as to whether he thought the question referred to "council" as in the Union AFSCME Council 18 or "counsel" referring to a lawyer.

19. Following the questions and answers outlined above Respondent's counsel questioned Mr. Gilmore about whether it was a breach of security and a breach of the detention facility's standard operating procedure to provide a copy of the post orders to "anyone that hasn't the right to see them..." and continued a line of questioning that presumed Mr. Gilmore had violated standard operating procedures by making the post orders available to AFSCME, that by doing so he breached security and by not reporting that supposed security breach he committed a further violation of standard operating procedure. (Administrative Notice of Audio record of Merits Hearing in PELRB No. 310-15, Part 3 at 21:30 to 22:56.)

20. After the above-described cross-examination of Complainant Gilmore that Counsel for the Respondent raised for the first time an objection to the use of the post orders

as exhibits and asked that they be sealed, which the PELRB is not empowered to do. (Administrative Notice of Audio record of Merits Hearing in PELRB No. 310-15, Part 3 at 25:40 to 26:01.)

21. Neither Mr. Gilmore nor AFSCME's counsel have provided the post orders to any third party other than the PELRB and have complied with all the County's requests to treat the documents as confidential. (Testimony of Gilmore).
22. The post orders are relevant to the PELRB's statutory duty to determine appropriate bargaining units and in that context AFSCME, in order to prepare its case, the PELRB and its Hearing Officer, in order to determine the issues, are all privileged to receive them, because they are not "unauthorized" persons to whom the County's SOPs indicate they are not to be released.
23. Until Mr. Gilmore's testimony in PELRB No. 310-15 the County acted in a manner consistent with AFSCME, the PELRB and its Hearing Officer being persons authorized to receive the post orders.
24. It is the custom and practice in the correctional industry in New Mexico to mark safety-sensitive or confidential documents as such, to train correctional employees in the handling of safety-sensitive or confidential documents and to provide a log-in system for the removal of post orders from designated locations in correctional facilities in order to safely manage the documents, but at all times material hereto, Luna County did not apply any of those customs and practices to the post orders at issue in this case. (Testimony of Rob Trombley, Andrew Gilmore and Lucio Caballero.)
25. Shortly after the February 22, 2016, hearing at which Andrew Gilmore testified, the County placed him and other members of his shift under investigation for potential

- discipline, removed him from his typical duties, and placed him in the maintenance unit where he was assigned to pull weeds and clean toilets. (Testimony of Andrew Gilmore.)
26. On March 8, 2016, the County provided Andrew Gilmore of notice of its intent to terminate his employment for providing the post orders for use at the hearing, despite the County's stipulation that they were admissible and relevant to those proceedings. (Union Ex. 5).
 27. On March 16, 2016, the County changed the basis for his termination providing Andrew Gilmore an amended notice alleging that his termination was a result of providing the documents for the PELRB hearing and for being "untruthful during the internal investigation." (Union Ex. 6 and testimony of Andrew Gilmore.)
 28. Mr. Gilmore testified in this proceeding that during Luna County's internal investigation of the disciplinary charges against him he admitted that he provided the post orders to AFSCME's attorney for the sole purpose of the representation hearing before the PELRB.
 29. Mr. Gilmore testified in this proceeding that the questions asked by the County's counsel regarding the terms "council" or "counsel" confused him as to whether she was referring to AFSCME, Council 18 or its Attorney.
 30. The evidence identified by the County in its notice of termination includes a "partial transcript of Andrew Gilmore testimony at PELRB Hearing", which the County claims is "evidence in support of the allegations" against him indicating that his termination on March 22, 2016 was in retaliation for providing relevant information and testimony necessary for the PELRB to determine the appropriate bargaining unit in PELRB Case No. 310-15. (Union Ex. 7).

31. During his sixteen years of employment with Luna County Mr. Gilmore had little prior disciplinary record. (Testimony Gilmore).
32. After Mr. Gilmore was terminated the County began to institute customary precautions to protect the post-orders described in Finding 25 above. (Testimony Caballero).
33. The County did not timely inform Mr. Gilmore, AFSCME, its counsel, the PELRB or its Hearing Officer, that it considered the post orders to be safety sensitive.
34. Luna County employees have a reasonable expectation under County Personnel Policy that termination of their employment may only be accomplished for “just cause” and that disciplinary actions will conform to “applicable laws and rules”, which necessarily includes the Public Employee Bargaining Act. (Administrative notice of Luna County Ordinance 23 Section 7.1.) I also take administrative notice of Luna County Personnel Ordinance Number 23, Amended January 14, 2016, which provides in pertinent part:

“5.8 DISMISSAL. Elected Officials and Department Directors shall have the authority to recommend dismissal of regular employees for cause when appropriate...”

35. Andrew Gilmore’s reassignment and termination did not comport with those provisions of the PEBA protecting employees for their union activities as found herein and which are incorporated into the County’s Personnel Ordinance by its reference to other applicable rules and law.

REASONING AND CONCLUSIONS OF LAW:

The New Mexico Public Employee Bargaining Act NMSA 1978 §10-7E-5 - Rights of Public Employees (2003) states:

“Public employees, other than management employees and confidential 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 and shall have the right to refuse any such activities.”

The PEBA Section 5 has a corollary in Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. NLRA Section 8(a)(1) - Interference with Section 7 Rights, forbids an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” , which are the rights of employees to organize, to form, join, or assist a labor organization, to bargain collectively, to engage in other concerted activities for mutual aid or protection, or to refrain from any or all of these activities. This is a broad prohibition on employer interference and cases decided under the NLRA may be applied here by analogy.

Examples of violations of Section 8(a)(1) are:

- Threatening employees with loss of jobs or benefits if they should join or vote for a union.
- Questioning employees about their union activities or membership in such circumstances as will tend to restrain or coerce the employees.
- Work transfers.

See John E. Higgins, THE DEVELOPING LABOR LAW (6th Ed.) at Chapter 7.II.C.1.

The essential elements of an unlawful discharge under Section 8(a)(3) of the NLRA are “a knowledge on the part of the employer that the employee is engaged in union activity and the actual discharge of the employee because of this activity. *Id.*; citing *Wheeling-Pittsburg Steel Corp. v. NLRB*, 618 F.2d 713, 67 LRRM 2686 (3rd Cir. 1980); *Sterling Aluminum Com. v. NLRB*, 391 F.2d 713, 67 LRRM 2686 (8th Cir. 1968).

Based on the totality of the circumstances of this case Respondent’s conduct demonstrates anti-union animus. By the foregoing Findings, it is apparent that Mr. Gilmore’s reassignment to maintenance and termination of employment shortly after his testimony at a PELRB

hearing and because he provided testimony and documentary evidence at that hearing in support of AFSCME, Council 18's position regarding the scope of the bargaining unit, constituted discrimination with regard to terms and conditions of employment because of the his membership in a labor organization contrary to NMSA 1978, § 10-7E-19(A) (2003). Similarly, the preponderance of the evidence supports a conclusion that Luna County interfered with, restrained or coerced him and other bargaining unit members in the exercise of rights guaranteed by the PEBA to provide support and assistance to a labor union in violation of Section 19(B) (NMSA 1978, § 10-7E-19(B) (2003). Coming as it did on the eve of a representation election in Luna County and based in the main on assistance and testimony provided by Mr. Gilmore in connection with that organizing effort the preponderance of the evidence supports the further conclusion that his reassignment and eventual termination constituted discrimination in regard to his tenure or terms of employment in order to discourage membership in a labor organization in violation of PEBA Section 19(D) (NMSA 1978, § 10-7E-19(D) (2003). PEBA Section 19(E) makes it a prohibited practice to "discharge or otherwise discriminate against a public employee because he has ... given information or testimony pursuant to the provisions of the [PEBA] or because a public employee is forming, joining or choosing to be represented by a labor organization". The preponderance of the evidence is that Mr. Gilmore was terminated for providing support and assistance to AFSCME Council 18 in violation of that section as well. Thus, I conclude that there are four separate violations of the PEBA proven, any one of which would entitle the Union and Mr. Gilmore to the relief requested.

Respondent's actions not only adversely affected Andrew Gilmore's employment, but they appear to have been calculated to discourage other public employees from providing information to the PELRB that is relevant and necessary for the PELRB's statutory duties. The accuracy of Mr. Gilmore's testimony at the representation hearing concerning his providing a copy of the Post Orders is ambiguous, given the compound questions asked by the County's counsel and confusion regarding the terms "council" or "counsel" as explained by Mr. Gilmore in his testimony in this proceeding. The manner in which AFSCME acquired copies of the post orders is collateral to their relevance in determining the duties performed and exercise of independent judgment in a representation proceeding. There is no evidence to support a conclusion that his testimony on that collateral issue was deliberately or maliciously false. Even if the County could establish that his testimony was false that does not necessarily preclude reinstatement and back pay. See, *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994). Similarly, in *Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295, the Fifth Circuit upheld the Board in protecting the conduct of employees who executed affidavits that they later acknowledged to be inaccurate. See also *Big Three Industries Gas & Equip. Co.*, 212 NLRB 800, 806 (1974) (discharge of employee for giving "inaccurate" testimony at NLRB hearing held unlawful where employee did not 'knowingly and willfully testify falsely.')

Mr. Gilmore was "sandbagged" by Respondent during his testimony in the representation hearing. Courts express reluctance to find fundamental error in the premature admission of evidence when the result would be to permit the sandbagging of opposing counsel by failing to raise an objection to the evidence until appeal. See, *State v. Andrade*, 124 N.M. 690, 954 P.2d 755 (Ct. App. 1997). See also *Gracia v. Bittner* 120 N.M. 191, 900 P.2d 351 (Ct. App. 1995) (Where there exist theories of recovery that are both within the pleadings and within

the evidence, we should not reverse on an issue raised for the first time on appeal after the opportunity to correct any error presented by the issue. To hold otherwise would countenance sandbagging by trial attorneys) citing to *Maldonado v. Haney*, 94 N.M. 335, 337, 610 P.2d 222, 224 (Ct. App. 1980) (appellate court will not allow litigant to sandbag the trial.)

LUNA COUNTY'S AFFIRMATIVE DEFENSES ARE WITHOUT MERIT.

a. **Exhaustion of Administrative Remedies.** The County does not identify a specific administrative remedy that Complainants have failed to avail themselves. I can only deduce that it is referring to the discipline grievance procedure found in its Personnel Ordinance. The claims before me are brought pursuant to the State's Public Employee Bargaining Act, over which this Board is the exclusive administrative arbiter. This Board has long taken the position that exhaustion is not required as to any claim for which deferral to grievance or arbitration would be inappropriate in the first instance. See *AFSCME v. NM Department of Health* PELRB No. 168-06 Letter Decision on the Merits. (if the matter is not appropriately deferred to grievance-arbitration in the first instance, a motion to dismiss for failure to exhaust the grievance-arbitration procedure will be moot). I take Administrative Notice of Luna County Personnel Ordinance Number 23, Amended January 14, 2016. There is nothing in it to suggest that it is the exclusive remedy for employees seeking redress for disciplinary action taken in violation of the PEBA, nor could it be so because a PPC concerns non-contractual, statutory rights such as retaliation, discrimination or interference under the Act and over which the PELRB has exclusive jurisdiction and therefore they are not a proper subject for determination under the County's personnel ordinance in the first instance.

b. **Claim Preclusion and Issue Preclusion.** As stated above the same issues could not be heard in any other administrative proceeding before any other agency. That

both the County and this Board continued processing their separate issues arising out of Gilmore's termination does not bar this Board on grounds of *res judicata* (claim preclusion) or collateral estoppel (issue preclusion). Those doctrines do not apply because the two actions are not regarding the same subject matter, and do not involve the same claim for the reasons stated above. Whether the County's actions violated the PEBA has not been "actually litigated" and therefore the ultimate fact or issue in this case was not necessarily determined in the County's grievance appeal under its Personnel Ordinance. The claims in this case fall squarely within the types of independent PPCs over which the PELRB is granted exclusive authority under PEBA. See § 19(A), (B), (D), and (E) of PEBA (guaranteeing the right to form, join or assist a union, and the right to be free from discrimination or retaliation for union activities or involvement).

As a final consideration, I note that by enacting NMSA 1978 §10-7E-9(F) (2003) the Legislature empowered this Board to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies. The Legislature would not afford the distinct and separate rights under PEBA outlined above and create the PELRB to enforce those rights, without intending that the PELRB also be able to afford a prompt and effective remedy for violations of those rights. Accordingly, I conclude that reinstatement with back pay and benefits is an appropriate remedy for a violation of the PEBA under the circumstances of this case.

RECOMMENDED DECISION

The PELRB shall:

- (1) Declare that Respondent has violated the following provisions of the PEBA:
 - a. § 10-7E-19(A) by discriminating against Andrew Gilmore with regard to terms and conditions of his employment because of his membership in a labor organization;

- b. § 10-7E-19(B) by interfering with, restraining or coercing Andrew Gilmore in the exercise of his right to provide support and assistance to a labor union;
- c. § 10-7E-19(D) by discriminating against Andrew Gilmore in regard to his tenure or terms of employment in order to discourage membership in a labor organization;
- d. § 10-7E-19(E) by discharging or otherwise discriminating against Andrew Gilmore because he has given information or testimony pursuant to the PEBA or because he is forming, joining or choosing to be represented by a labor organization.

(2) Order Respondent to immediately reinstate Andrew Gilmore to his former position with all appropriate back pay and benefits including but not limited to PERA contributions, seniority rights and leave accruals beginning the week of March 22, 2016, and continuing each week until Respondent reinstates him to his previous position.

(3) Order Respondent to cease and desist from these violations of PEBA;

(4) Order Respondent to post in all locations where notices to employees are commonly posted and on the County's website, for a period of no less than 30 days, a notice of the above violations in a form substantially conforming to the attached Appendix A.

Issued, Wednesday, July 13, 2016.



Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS
BOARD**

An Agency of the State of New Mexico

The Public Employee Labor Relations Board (PELRB) has found that Luna County violated the Public Employee Bargaining Act and has ordered it to post and obey this notice.

You have the right under Public Employee Bargaining Act §10-7E-17(A), to organize and bargain collectively with the County in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. Furthermore, pursuant to § 10-7E-19(A) you are free to exercise those rights without fear of discrimination because of your membership in a labor organization. Similarly, Luna County shall not interfere with, restrain or coerce you in the exercise of your rights to provide support and assistance to a labor union. To do so violates § 10-7E-19(B). In addition to these violations the PELRB has determined that when Luna County reassigned and eventually terminated Andrew Gilmore's employment, it discriminated against him with regard to his tenure or terms of employment in order to discourage membership in a labor organization in violation of § 10-7E-19(D) and discharged or otherwise discriminated against him because he gave information or testimony pursuant to the provisions of the PEBA or because he is forming, joining or choosing to be represented by a labor organization in violation of § 10-7E-19(E). The facts giving rise to the violations are these:

In preparation for a representation hearing before the PELRB's Hearing Officer, Andrew Gilmore provided AFSCME Council 18's Attorney with a copy of Luna County Detention Facility Post Orders, which were introduced into evidence at a February 22, 2016, hearing without objection. During the hearing, Mr. Gilmore testified for the Union. Counsel for the County cross-examined Mr. Gilmore concerning his acquisition of the Post Orders and shortly thereafter the County placed him and other members of his shift under investigation for potential discipline, removed him from his typical duties, and placed him in the maintenance unit. On March 8, 2016, the County notified Andrew Gilmore of its intent to terminate his employment primarily for providing the post orders for use at the hearing, despite the County's stipulation that they were admissible and relevant to those proceedings. On March 16, 2016, the County issued an amended notice alleging that Mr. Gilmore's termination was as a result of his providing the Post Orders for the PELRB hearing and for being "untruthful during the internal investigation." The PELRB determined that Mr. Gilmore was not intentionally untruthful and that its evidence in support of his discharge included his testimony at PELRB Hearing on February 22, 2016 and that our conduct in this matter violated the Public Employee Bargaining Act as outlined herein.

We acknowledge the above-described rights and responsibilities and will not in any like manner discriminate, retaliate or coerce Luna County employee for the exercise of their rights under the PEBA.

_____ Date: _____
Matthew Elwell, Interim County Manager