

STATE OF NEW MEXICO  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18  
and CHRIS VERDUZCO

Petitioners,

v.

PELRB 108-16

LUNA COUNTY,

Respondent

ORDER

**THIS MATTER** having come before the Board on appeal by Luna County from the Hearing Officer's Report and Recommended Decision issued August 26, 2016, the Board upon a 2-0 vote at the Board's September 13, 2016 meeting (Vice-Chair Bartosiewicz being absent) adopts as its Order the Hearing Officer's Report and Recommended Decision, including its Findings, Conclusions and rationale, as modified below. Furthermore, the Board finds and affirms that it can only accept those facts in the record from the Merits Hearing as the facts before them on appeal of a Hearing Officer's or Examiner's Report and Recommended Decision. Accordingly;

**IT IS HEREBY ORDERED** that Luna County shall cease and desist from the following violations of PEBA with regard to Mr. Verduzco:

- A. Discriminating against Mr. Verduzco with regard to terms and conditions of his employment because of his membership in a labor organization in violation of NMSA 1978, § 10-7E-19(A) (2003);

- B. Interfering with, restraining or coercing Mr. Verduzco in the exercise of his rights under the Public Employee Bargaining Act in violation of NMSA 1978, § 10-7E-19(B) (2003);
- C. Discriminating against Mr. Verduzco in regard to hiring, tenure or a term or condition of employment in order to discourage membership in a labor organization in violation of NMSA 1978, § 10-7E-19(D) (2003);
- D. Discharging or otherwise discriminating against Mr. Verduzco because he has given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because he formed, joined or chose to be represented by a labor organization in violation of NMSA 1978, § 10-7E-19(E) (2003).

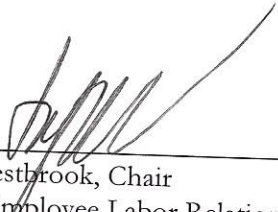
**IT IS FURTHER ORDERED** that Luna County shall immediately re-instate Chris Verduzco to his probationary position of Sergeant for the remainder of his probationary period and thereafter unless removed for other legitimate reasons and make Chris Verduzco whole by payment of back pay and benefits until the ordered reinstatement is accomplished. In the event the parties do not agree to a sum certain necessary to make Chris Verduzco whole, the amount necessary to enforce this Order shall be determined by this Board or its Hearing Officer upon request of any party.

**IT IS FURTHER ORDERED** that for its failure to cooperate in exchanging exhibits and witness lists, entry of a prehearing order and for its default at the Merits Hearing in this matter and not in the way of a sanction or punitive damages, the Board assesses costs of the merits hearing against Luna County and/or its counsel. Counsel for the Union shall present a statement of its costs to this Board and to the Respondent at its earliest convenience. In the event the parties do not agree to a sum representing the Petitioners' costs incurred for

the Merits Hearing, the amount necessary to enforce this Order shall be determined by this Board or its Hearing Officer upon request of any party.

**IT IS FURTHER ORDERED** that Luna County shall post and email a notice substantially conforming to that attached to the Hearing Officer's Report and Recommended Decision as Appendix A, for a period of 90 days at all places where public notices are commonly posted.

Date: 9/20/16

  
\_\_\_\_\_  
Duff Westbrook, Chair  
Public Employee Labor Relations Board

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

**AMERICAN FEDERATION OF STATE, COUNTY  
and MUNICIPAL EMPLOYEES, NEW MEXICO  
COUNCIL 18, AFL-CIO and CHRIS VERDUZCO,**

**Complainants,**

v.

**PELRB Case No. 108-16  
(Prohibited Practice Complaint)**

**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 Complainants' Prohibited Practices Complaint, filed on April 12, 2016 alleging that Luna County committed a prohibited practice pursuant to NMSA 1978, § 10-7E-19(A),(B), (D) & (E) (2003), when it demoted Chris Verduzco shortly after he was listed as a witness and appeared ready to testify at the representation hearing in PELRB Case No. 310-15. Luna County denies the allegations. The County did not comply with deadlines established at a scheduling conference in this matter to complete its portion a Pre-Hearing Order and exchange witness and exhibit lists, filing a stipulated order at least one week prior to the hearing on the merits. On August 18, 2016 the County filed an untimely Motion to Continue the Merits hearing scheduled for Wednesday, August 24, 2016. The Complainants' Responded to that Motion and I denied the motion on the same date. On August 22, 2016, The County filed what purports to be a "Notice of Non-Appearance" for the scheduled Merits Hearing. The Hearing took place as scheduled and noticed on Wednesday, August 24, 2016 with Complainants appearing by and through counsel and Luna County in default, not appearing. All parties hereto 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:**

1. AFSCME is a “labor organization” as that term is defined in Section 4(L) of the PEBA, NMSA 1978, § 10-7E-4(L) (2003). (Proposed Stipulation submitted by Complainants and not contested by the County.)
2. Chris Verduzco is a “public employee” as that term is defined in Section 4(R) of the PEBA, NMSA 1978, § 10-7E-4(R) (2003). (Proposed Stipulation submitted by Complainants and not contested by the County.)
3. Respondent is a “public employer” as that term is defined in Section 4(S) of the PEBA, NMSA 1978, § 10-7E-4(S) (2003). (Proposed Stipulation submitted by Complainants and not contested by the County.)
4. AFSCME filed a Petition for Certification, given PELRB Case No. 310-15. Respondent initially claimed that the sergeants and lieutenants, sought to be included in the bargaining unit, should be excluded. Accordingly, a representation hearing was held on February 22, 2016. (Proposed Stipulation submitted by Complainants and not contested by the County.)
5. Complainant Chris Verduzco was listed as a witness by the Union to testify at the February 22, 2016 hearing on its behalf. (Proposed Stipulation submitted by Complainants and not contested by the County, modified.)
6. Complainant Chris Verduzco, an employee of the Luna County Detention Center, was promoted to Sergeant on September 22, 2015 and placed on a six-month probation period, in connection with that promotion. (Testimony of Chris Verduzco).

7. Chris Verduzco's pay rate of \$14.75 per hour before his promotion was raised to \$16.25 per hour after that promotion. (Testimony of Chris Verduzco).
8. The Detention Center's Administrative Director, Matthew Elwell, was present at the PELRB Hearing held February 22, 2016 and although he ultimately was not called as a witness, Mr. Elwell was aware that Chris Verduzco was present to testify on behalf of the Union. (Testimony of Chris Verduzco).
9. Prior to his appearance at the Hearing held February 22, 2016 Chris Verduzco had no prior discipline or negative performance evaluations. (Testimony of Chris Verduzco).
10. Approximately one month after his appearance at the PELRB Hearing, on March 19, 2016, the County, through Verduzco's direct supervisor, Lt. Sammy Griego, documented a verbal warning issued to Chris Verduzco, ostensibly for failing to attend training on February 19, 2016. (Testimony of Chris Verduzco; Exhibit D).
11. The same day that he received the reprimand, March 19, 2016, Verduzco rebutted it stating that he did attend the referenced training from 0800 hrs. to 1000 hrs. but left earlier than planned due to illness. He attempted to contact Mr. Elwell to inform him that he was leaving early but was not successful. Thereafter he informed Mr. Elwell that he had to leave early due to illness and Mr. Elwell replied to the effect, "Ok, that's fine as long as you attended the DWI class so you can operate the County vehicles." (Testimony of Chris Verduzco; Exhibit E).
12. Chris Verduzco attended the DWI portion of the training. (Testimony of Chris Verduzco).
13. Chris Verduzco witnessed another supervisor leave the training as soon as the DWI portion of the training ended. (Testimony of Chris Verduzco; Exhibit E).

14. Approximately one month after appearing at the PELRB hearing and within two days of having received the above-referenced oral reprimand, Verduzco was summoned by the Detention Center Administrative Secretary on his day off, March 21, 2016, to receive notice that he was demoted to Detention Officer for failure to “satisfactorily meet the requirements of the promotion to Sergeant while on probation.” (Testimony of Chris Verduzco; Exhibit A).
15. According to Exhibit A, Verduzco’s rate of pay was reduced from \$16.25 to \$14.75 per hour effective March 21, 2016. (Testimony of Chris Verduzco; Exhibit A).
16. During his meeting with the Detention Center Administrative Secretary to receive notice of his demotion, no grounds for the demotion were communicated to him other than that stated in the notice, i.e. that he “failed to satisfactorily meet the requirements of the promotion to Sergeant while on probation.” (Testimony of Chris Verduzco; Exhibit A).
17. Following his demotion Verduzco reviewed his personnel file where he found a copy of an email from the County Manager approving his demotion and memorializing a message sent from Matthew Elwell on March 21, 2016 stating that his request for approval of demotion was based on two incidents: (1) Verduzco was “written up” for not attending training, and; (2) Verduzco was “investigated for fraternization.” He also discovered a copy of an “Informational Report”, Exhibit F, placed in his personnel file. (Testimony of Chris Verduzco; Exhibits C and F).
18. In Exhibit C Matthew Elwell wrote in reference to the investigation for fraternization that “we could not tie the knot but we continue to monitor” which Verduzco took to mean that the County could not substantiate that any violation of law or policy occurred. (Testimony of Chris Verduzco; Exhibit C).

19. The Investigative Report, Exhibit F, was dated January 7, 2016 and no action taken against Verduzco based on that report until after the PELRB Hearing in February 2016. (Testimony of Chris Verduzco; Exhibit F).
20. Verduzco testified that he had a conversation with Mr. Elwell in January 2016 in which Elwell asked about a letter concerning Verduzco (never sent to him) found in the possession of a female Detention Center inmate. In that conversation Verduzco admitted being friends with the subject for years. Elwell stated that he was not going to “worry about” the letter and that he believed Verduzco “would not jeopardize his position” by engaging in an improper relationship with an inmate. (Testimony of Chris Verduzco).
19. Discovering the email, Exhibit C, and the Informational Report, Exhibit F, in his personnel file was the first time he learned of an investigation into fraternization having been conducted and had not been informed that the email was being placed in his personnel file. (Testimony of Chris Verduzco).
20. Exhibit C is inaccurate in stating that Chris Verduzco was “written up” for missing training because Exhibit D establishes that he received a verbal warning for missing the training in question, not a written reprimand. I take Administrative notice of Luna County Ordinance 23 and the distinction it draws at Section 7.2 – Progressive Discipline – paragraphs A and B between verbal reprimands and written reprimands. (Testimony of Chris Verduzco; Exhibit C and Luna County Ordinance 23.)
21. Lt. Sammy Griego was within Chris Verdugo’s chain of command during the time Verduzco was a probationary Sergeant and in his capacity of Lieutenant monitored Verduzco’s performance. He testified that Verduzco’ exhibited no performance problems during his probationary period and that he received no complaints or concerned from upper management at Luna County concerning Verduzco’s performance while on probation until



directed by Elwell to administer the oral reprimand, Exhibit D. (Testimony of Sammy Griego).

22. Lt. Sammy Griego testified that, had it been left to his discretion, he would not have given Chris Verduzco the oral reprimand under the circumstances, that his performance as a Sergeant was "exceptional" and that he was not informed of Verduzco's demotion until after it was administered, which he considered to be unusual as he was his immediate superior officer. He also testified that the oral reprimand was not warranted because the facts did not warrant it and because others who acted similarly were not similarly disciplined. (Testimony of Sammy Griego, Exhibit B).

23. Matthew Elwell has no direct knowledge of Verduzco's performance as a Sergeant because, as the facility Administrator, he works during the day, while Verduzco worked the graveyard shift. (Testimony of Sammy Griego).

24. When Sammy Griego asked Mr. Elwell about the demotion after the fact, Elwell stated that Verduzco "was not cutting it as a supervisor." No other grounds for the demotion were related to Lt. Griego. (Testimony of Sammy Griego).

25. Andy Gilmore, formerly a Lieutenant with the Detention Center with 16 years of experience and who is currently awaiting reinstatement to his position under an Order from the PELRB, testified that in his experience nothing goes into a personnel file unless the employee has been given an opportunity to review and respond and that an employee under investigation is usually notified of that fact. (Testimony of Andy Gilmore).

26. All Luna County employees who testified on behalf of the union at the February 22, 2016 PELRB have either had some kind of discipline imposed or have been placed under investigation within months after the hearing. (Testimony of Andy Gilmore).

**REASONING AND CONCLUSIONS OF LAW:**

The preponderance of the evidence supports a conclusion that Chris Verduzco was doing well in his career at the Luna County Detention Center and had an unblemished work record until he appeared at a PELRB hearing on behalf of the complainant union on February 22, 2016. A few weeks after that hearing he was given a reprimand on grounds that prior to the hearing had been acceptable to the employer. That reprimand, mischaracterized as a “write up”, was cited as one of two bases in the decision to demote him. The second basis, an allegedly compromising letter written about him in the possession of an inmate, was also no big deal to the employer until after the PELRB hearing. After the hearing, however, the County’s investigation of alleged “fraternization” was the second of two reasons given to the County Manager for demoting Chris Verduzco, despite the fact that the County “could not tie the knot” on that allegation because its own investigation showed that no improper fraternization occurred.

The County’s rationale for Chris Verduzco’s demotion has changed over time. The initial explanation given to Mr. Verduzco was performance-based. In several communications immediately following the demotion as well as on the Reinstatement to Detention Officer document, Exhibit A, the County repeatedly stated that the decision was made because Verduzco had not satisfactorily met the requirements of promotion to Sergeant while on probation. However, Director Elwell justified the demotion to County Manager Charles “Tink” Jackson on the basis that Verduzco had been “written up” (two days prior to the demotion even though the incident occurred a month earlier and despite the fact that he was verbally reprimanded as distinguished from a written reprimand) and the fact that he was investigated for fraternization, notwithstanding the investigation did not sustain a violation. Later, through a Motion for Summary Judgment, the County alleges as a basis for the demotion that that the so-called “fraternization” that was not substantiated is an alleged

potential violation of the Prison Rape Elimination Act. This shifting rationale, which increases in the severity of its consequences as Verduzco continues to assert his rights under the PEBA is evidence of pretext suggesting an illegal motive.

Under the NLRB's *Wright Line* test, a *prima facie* case of discrimination is made where there is evidence of (1) protected activity, (2) employer knowledge of that activity, and (3) evidence of union animus. See, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1978). From that, an unlawful motive is inferred, and the burden then shifts to the employer to show that the employment action would have been taken anyway for a legitimate business reason. A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon. *Limestone Apparel Corp.*, 225 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6<sup>th</sup> Cir. 1982). A finding of pretext also serves to establish anti-union animus as part of the *prima facie* case. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995), *enfd.* 312 NLRB 155 (1993). "If the proffered reason for a discharge is false, one may infer that there is another reason (an unlawful reason) for the discharge that the employer wishes to hide, where the surrounding facts tend to reinforce that inference." *Active Transp.*, 296 NLRB 431, 432 n.8 (1989); see also *Lucky Cab Co.*, 350 NLRB No. 43, at 4 (Feb. 20, 2014) ("Persuasive evidence that the Respondent's reasons for the discharges were pretextual further supports our finding of animus.")

The preponderance of the evidence supports a conclusion that the reason for the demotion is a pretext. First, when Mr. Elwell first discussed Verduzco's relationship with an inmate with him, (prior to the PELRB hearing) he said he was "not going to worry about it" because he didn't believe Verduzco would compromise his position. Had the County believed at that time, prior to Mr. Verduzco's appearance at the PELRB hearing, that he potentially violated federal law, Mr. Elwell's reaction would not have been so mild.



Moreover, Mr. Elwell had received the memorandum from Lt. Brookhouser, Exhibit F. That memorandum described the minimal nature of the relationship, and asserted that nothing unprofessional had occurred while the inmate was incarcerated. Perhaps for these reasons, Chris Verduzco was never notified that he was the subject of an internal affairs investigation or disciplinary proceedings. Following his appearance on behalf of the union at a PELRB hearing however, the situation changed dramatically. The two bases for his demotion, which at the time of their occurrence were dismissed by Mr. Elwell as insignificant, suddenly were sufficient to constitute a failure to “satisfactorily meet the requirements of the promotion to Sergeant while on probation”.

Based on the foregoing I conclude that the reasons given for Verduzco’s failure to satisfactorily meet the requirements of the promotion to Sergeant while on probation are a pretext for discrimination against him in retaliation for his participation in a protected union activity – participation in the PELRB Hearing on February 22, 2016 and for his support of the union generally.

The fact that Chris Verduzco was listed as a Union witness, subpoenaed for the hearing, and appeared to testify is sufficient to show protected activity even if he ultimately did not testify. Mr. Elwell saw him at the hearing and was aware that he was there to testify on behalf of the union. That his demotion was so close in time to that event is further evidence of an improper motive. “The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity... may raise an inference of animus and unlawful motive.” *Lucky Cab Co.*, 350 NLRB No. 43, at 4 (Feb. 20, 2014). That a demotion is not an adverse employment action because the employee was on probation has been implicitly rejected by the Court of Appeals in *N.N.M Fed of Educ. Employee v. Northern New Mexico College*, 2016-NMCA-036. In that case, the Union alleged that certain teachers (who



operate on annual contracts) were discharged in retaliation for the union activity. The local labor board dismissed the charge, however, finding that a non-renewal of a contract did not constitute a termination. The Court of Appeals concluded "...that we need not decide whether non-renewal constitutes a discharge or termination under the CBA because the non-renewal of the contracts—if undertaken with the retaliatory impetus alleged by the Union—would be in conflict with the [Labor Management Relations] Resolution...." *Id.* ¶ 12; see also *Id.* ¶ 18 ("It follows that if the College decided not to renew Employees' contracts as a means of discriminating against them for their union activities, that decision would violate the prohibited practices section of the Resolution.")

I see no reason why Luna County should be allowed to accomplish an adverse demotion with invidious intent merely because the employee is on probation when that same action would be impermissible if the employee was not on probation. The Employer should not be allowed to use the employee's probationary status to accomplish the illegal end of retaliation in violation of the PEBA.

I further conclude that the County's actions as established herein not only adversely affected Chris Verduzco's employment, but have a "chilling effect" on other public employees who may want to exercise rights under the PEBA or may want to provide information to the PELRB that is relevant and necessary for the PELRB's statutory duties, such as Verduzco was prepared to provide at the February 22, 2016 hearing. We must do what we can to prevent that chilling effect from being widespread or long-lasting.

**DECISION:**

By the foregoing, Respondent has violated the following sections of PEBA within the six months preceding the filing of the PPC herein:

- a. Section 19(A) (NMSA 1978, § 10-7E-19(A) (2003) (making it a prohibited practice to “discriminate against a public employee with regards to terms and conditions of employment because of the employee’s membership in a labor organization”);
- b. Section 19(B) (making it a prohibited practice to “interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]”);
- c. Section 19(D) (making it a prohibited practice to “discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization”);
- d. Section 19(E) (making 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”).

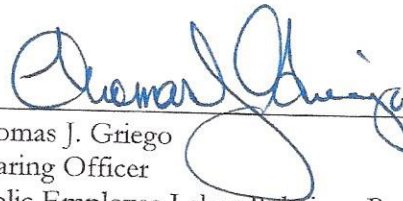
Luna County should be ordered to cease and desist from these violations of PEBA both with regard to Mr. Verduzco and with regard to any other employees who appeared on behalf of the union at any proceeding in which rights under the PEBA were being presented or adjudicated.

This Board should further order Luna County to immediately re-instate Chris Verduzco to his probationary position of Sergeant for the balance of his probation and thereafter unless removed for other legitimate reasons and order Respondent to make Chris Verduzco whole by payment of back pay and benefits in an amount to be determined by the Board until the ordered reinstatement is accomplished.

For its failure to cooperate in exchanging exhibits and witness lists prehearing and for its default in this matter and not in the way of a sanction or punitive damages, the Board should assess costs of the merits hearing against Luna County and/or its counsel in an amount to be determined by this Board after submission of a costs bill by the Complainant.

Finally, Luna County should be ordered to post and email a notice substantially conforming to that attached to this Report and Recommended Decision as Appendix A, for a period of 90 days at all places where public notices are commonly posted.

Issued, Friday, August 26, 2016.



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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). Approximately one month after his appearance at a PELRB Hearing, on March 19, 2016, the County took adverse employment action against Chris Verduzco the reasons for which have been found to be a pretext for antiunion discrimination and retaliation in violation of § 10-7E-19(D) and demoted or otherwise discriminated against him because he participated in protected union activities in violation of § 10-7E-19(E).

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.

\_\_\_\_\_  
Ira Pearson, Luna County Manager

Date: \_\_\_\_\_