STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CENTRAL CONSOLIDATED SCHOOL ASSOCIATION - CCEA,

27 - PELRB - 2013

Complainant,

v.

PELRB No. 101-13

CENTRAL CONSOLIDATED SCHOOL DISTRICT,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on the District's request for review of the Hearing Officer's Recommended Decision issued August 26, 2013.

Upon a 3-0 vote at the Board's October 8, 2013 meeting;

IT IS HEREBY ORDERED, the Hearing Officer's Recommended Decision, including its Findings of Fact, Conclusions of Law and its Rationale shall be and hereby is adopted by the Board as its own.

Date: 10-11-13

Duff Westbrook, Chair
Public Employee Labor Relations Board

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

CENTRAL CONSOLIDATED EDUCATION ASSOCIATION,

Complainant,

v. **PELRB No. 101-13**

CENTRAL CONSOLIDATED SCHOOL DISTRICT,

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 Complainant's allegations that the Respondent committed Prohibited Labor Practices as set forth in the Union's Third Amended Prohibited Practice Complaint filed March 7, 2013 and as discussed in a Status and Scheduling Conference held March 5, 2013. On May 2, 2013 the employer, the Central Consolidated School District, filed six separate alternative motions to dismiss or for summary judgment regarding each of the claims brought by the union in its Third Amended Complaint. The Motions were denied June 18, 2013. In the interim between denial of the Respondent Summary Motions and the Hearing on the Merits the parties were able to successfully settle several of the union's claims leaving the following claims to be adjudicated:

1. Whether the employer violated NMSA §10-7E-19(F) and (G) and Article 14 of the parties' Collective Bargaining Agreement (which if established would constitute a violation of PEBA §19(H)) by refusing to review grievances appealed to the school board pursuant to Step 4 of their negotiated grievance

procedure.

2. Whether the employer violated NMSA §§10-7E-5, 10-7E-17(A)(1) (which if established would constitute a violation of PEBA §19(H)) and 10-7E-19(B) and (F) when the District gave three bargaining unit employees additional work and paid them an additional "foreman" stipend without bargaining those changes with the union.
3. Whether the employer violated NMSA §§10-7E-5, 10-7E-19(B), (G) and (H) and Article 17 of the CBA by intentionally discriminating against three internal candidates on the basis of union activities or association during their competition with an outside candidate for a vacant Maintenance Foreman position in January of 2013.
4. Whether the employer violated NMSA §§10-7E-5, 10-7E-19(B) and (C), and Article 6 of the CBA (which if established would constitute a violation of PEBA §19(H))by the conduct of its agent during a Labor-Management Team meeting on January 17, 2013.
5. Whether the employer violated NMSA §§10-7E-5, 10-7E-19(B) and (C), and Article 6 of the CBA (which if established would constitute a violation of PEBA §19(H)) when the District's School Board President, posted negative comments about the union and its leadership on his Facebook page.

A hearing on the merits was held Wednesday July 17, 2013 at which more than 12 hours of testimony and documentary evidence was produced. The parties were afforded a full and fair opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence and rebuttal testimony and documents. Briefs

were submitted in lieu of oral argument by Complainant and Respondent August 8, 2013. Both briefs were duly considered. On the entire record in this case, from my observation of the witnesses and their demeanor and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, it is my recommended decision that the District committed prohibited labor practices as alleged in some of the union's charges such as the failure to hear grievance appeals at Step 4 of the parties negotiated grievance procedure. The evidence was insufficient to substantiate others of the union's charges such as charges of discrimination, threats, coercion and intimidation.

My recommended Decision is based on the following findings and conclusions:

FINDINGS OF FACT:

1. The parties have negotiated a Collective Bargaining Agreement in effect at all times material, which Agreement contains procedures for filing and processing grievances under Article 14 (Exhibit 13).

2. The negotiated grievance procedure in Article 14 provides for a five-step process:

> Step 1: Discussion Level in which a grievant meets with its immediate supervisor to discuss resolution of the issue before filing a formal written grievance.
>
> Step 2: Supervisor Level in which a written grievance on a form negotiated by the parties and appearing at page 25 of Exhibit 13 is submitted by the grievant.
>
> Step 3: Superintendent Level. If the grievant is not satisfied with the decision after Step 2, the Superintendent meets with the grievant and Supervisor to review the record and render a decision.

Step 4: Board Level in which, if the Association is not satisfied with the decision at Step 3 it "may appeal to the Board of Education through the Superintendent." The Board is required to "review the grievance" and has discretion to ask the Association to appear before it and the Superintendent to state its position and answer questions. The Association "shall be advised in writing of the decision of the Board within thirty (30) days of the Board's receipt of the request for review."

Step 5: Arbitration Level. If the Association is not satisfied with the disposition of the grievance at the Board Level the Association may submit the matter to an Arbitrator within 15 days.

3. In 2003, changes were made to the State's Public School Code through a measure generally referred to throughout this proceeding as HB 212. (District's Requested Finding 5).

4. One change made by HB 212 was that control over transfer, discharge and termination of a School District's employees was vested in each district's superintendents. (NMSA 1978, §§22-5-4 through 22-5-14(B). (District's Requested Finding 6 modified).

5. In June 2003 following the passage of HB 212 the Public Education Department (PED) and the Legislative Education Study Committee (LESC) published *HB 212 Public School Reform: Questions & Answers for School Districts and Constituents by Section* (Q&A Document) (Exhibit 2 and District's Answer to the Third Amended Complaint ¶4(e)).

6. The Q&A Document contains several rhetorical questions concerning how to apply the changes made to the law in 2003, among which were the following:

a. "What is the local school board's authority pursuant to the approval of expenditures, BARs, contracts and payroll signatures?"

The answer to that rhetorical question concerning Section 8 and

appearing at page 2 of the Q&A Document in relevant part stated:

"...Section 22-5-14, NMSA 1978, enacts a new section of the Public School Code establishing the powers and duties of the local superintendent. Included within these responsibilities is the responsibility to 'employ, fix the salaries of, assign, terminate or discharge all employees of the school district.' ...The local superintendent is therefore statutorily empowered to make employment decisions and determine salaries of employees, but employees are employees of the local school board. Employment contracts are properly signed by the superintendent on behalf of the local board. The local Board may retain the authority to sign checks or may delegate the authority to the superintendent to sign on behalf of the local board. Contracts other than employment contracts are within the authority of the local board, subject to the provisions of the Procurement Code...."

b. "What is the process for appeal for an aggrieved employee with regard to a hearing?"

The response to that rhetorical question dealing with Section

25 appears at page 13 of the Q&A Document and states:

"Section 22-5-14 of HB 212 is consistent with the procedures in the School Personnel Act that were not repealed and that specifically address termination and discharge of school employees. The Legislature intended for the superintendent, who is the chief executive officer of the school district, to have the exclusive duty to 'assign, terminate or discharge all employees of the of the school district.' In interpreting and carrying out the change in law, substitute the words 'local superintendent' wherever the words 'local school board' appear."
(Exhibit 2).

7. The union timely filed a grievance over the District's failure to follow

Article 17 of the CBA regarding a vacant foreman position in the

Shiprock Maintenance Department. (Stipulation B-3 modified); Testimony of Ewa Krakowska, Tr. 4:39:00.

8. The District's school board refused to review the grievance over the District's failure to follow Article 17 because the union had filed a Prohibited Practices Complaint regarding the same issue. Answer to Third Amended Complaint. Para. 8.4.a (pg. 6); Respondent's Motion to Dismiss Claim 8. Sec. L pg.4; Exhibit G: Testimony of Ewa Krakowska, Tr. 4:43:45. (Stipulation B-4).

9. The union filed a grievance for bargaining unit member Marlena Sheppard alleging that the District did not comply with Article 17 of the CBA, which grievance was appealed through the procedural steps to the school board level. Although originally placed on a School Board meeting agenda the Board took no action on it and did not issue a written decision concerning the grievance to the union. (Testimony of Mel Sharp, Tr. 4:18:20, Tr. 4:18:45; Tr. 4:19:00, 4:20:55 and Tr. 4:34:00).

10. In the absence of any action by the School Board on the Marlena Sheppard appeal the union filed for arbitration and the grievance is set to be heard. (Testimony of Mel Sharpe, Tr. 4:21:40).

11. The District's Board has deferred the processing of grievances appealed to the School Board Level under Step 4 of the CBA's grievance procedure to the Superintendent. (Answer to Third Amended Complaint, ¶ 8(5) (g)).

12. On September 24, 2012, District School Board President Matthew Tso issued a letter to David Frieke, then the union President, in which Mr. Tso indicated that he would not place a certain appeal filed under Step 4 of the CBA's grievance procedure on the Board's agenda for review because in his opinion the subject of the grievance has no effect on the employees' contract, status or compensation. (Exhibit E, Testimony of David Fierke. Tr. 27:48:00; Testimony of Ewa Krakowska, Tr. 4:40:30).

13. The District gave three bargaining unit employees additional work involving transportation for additional pay. (Stipulation C-1).

14. The additional pay was in the form of a $4,000 "stipend" as a "Transportation Foreman". (Exhibit 8).

15. The additional duties performed in exchange for the stipend are different from those usually performed by bargaining unit transportation employees and would otherwise require overtime pay to be paid to the employees receiving the stipend. (Testimony of Mike Moss, Tr. 2:39:45).

16. The District initially listed the changes as new "foreman" positions, but no new positions were created. (Stipulation C-2).

17. Prior to these changes. the position of Transportation Foreman had not existed. (Exhibit 13, Article 26; Testimony of Mike Moss, Tr. 1:37:23 and 3:26:26).

18. The employees who were receiving the Transportation Foreman stipend are hourly employees within the bargaining unit. (Exhibit 8; Testimony of Ewa Krakowska. Tr. 4:47:10).

19. The Maintenance Foreman stipend is tied to additional duties and responsibilities which would otherwise require overtime to be paid. (Testimony of Mike Moss, Tr. 2:39:45).

20. The union became aware of the increased duties and increased pay and requested bargaining over the changes. (Stipulation C-3).

21. The District did not bargain over the changes. (Stipulation C-4).

22. The District pays stipends to other bargaining unit employees, some of which were negotiated and appear in the CBA such as under Article 26 or in the incorporated salary schedule, Exhibit N, and some of which were not bargained. (Testimony of Fierke Tr. 1:11:00; 2:27:48). A list of all employees whether in or out of the bargaining unit receiving stipends and the specific stipend received has been accepted into evidence as Exhibit 9.

23. The Union and the District entered into a Memorandum of Understanding appended to the Exhibit 13 creating a joint committee to review the requirements to be met for an individual's "increment, stipend, or activity allowance." The MOU does not limit discussion to stipends for activity club sponsors only. (Exhibit 13).

24. The union did not request and the District had not provided the union with a list of the stipends paid nor did it provide any other notice of

the stipends paid to bargaining unit members prior to the filing of this case. (Testimony of Ewa Krakowska, Tr. 4:59:30 and Tr. 5:01:30).

25. In January 2013 a Maintenance Foreman position became vacant. (Stipulation E-1).

26. The position was posted internally and externally. (Stipulation E-2).

27. Mike Moss was a member of the committee appointed to interview candidates for the vacant Maintenance Foreman position and testified that a number of candidates, both internal and external, were interviewed for the position. (Testimony of Mike Moss, Tr. 1:52:15; 153:50 - 1:57:50).

28. The CBA provides in Article 17 (C) (3) that in case of a vacancy, when employees meet the educational purpose and requirements, selection will be made from the best qualified employee applicant or volunteer or external applicant who best meets the District's educational or operational needs. Article 17(E) (3) regarding voluntary transfers provides in part that when an in-building or facility vacancy occurs, unit employees within the facility or within a specific job classification shall be considered before the position is posted. (Exhibit 13).

29. Three internal candidates applied. (Stipulation E-3).

30. The three internal candidates were in the bargaining unit and were also members of CCEA. (Stipulation E-4).

31. After a committee reviewed applicants, an external candidate was selected for the position. (Stipulation E-5).

32. The external candidate had previously held the position. (Stipulation E-6).

33. By contract the parties established a Labor-Management Team (LMT) for the purpose of resolving workplace issues during the life of the CBA. (Exhibit 13, page 8). Members of the LMT included both District management and union leadership. (Stipulation F-2).

34. The LMT met on January 17, 2013. (Stipulation F-1 modified).

35. During the January 17, 2013 LMT meeting District Administrator George Schumpelt stated he had the ultimate authority to decide where people are needed and to assign them to the necessary positions. (Answer to Third Amended Complaint, ¶ F (1)(b)).

36. Transfer policy was a topic of discussion during the January 17, 2013 LMT meeting (Exhibits K and L) and after a union representative expressed encouragement because the parties were able to resolve a disputed transfer, Schumpelt emphasized the District's authority by stating words to the effect of "Don't be encouraged. I control all areas of transfer. We know we can transfer summer and Christmas but I always control the transfer.... [The CBA] says that only the receiving admin has to agree to the transfer. If they do then I will just transfer them back. We don't need to go there right now - I have the power and I am the only [one] who says who can do anything [regarding transfers]" (Exhibit K. Testimony of Jackie Reddy, Tr. 3:48:54: Testimony of Mel Shape. Tr. 4:24:00).

37. Union representatives present at the LMT meeting regarded the above words as threatening. (Exhibit L; Testimony of David Fierke, Tr. 1:19:00; Testimony of Mike Moss. Tr. 3:03:00).

38. Throughout the LMT meeting Schumpelt repeated his position regarding transfer at least four different times in a manner the union describes as "forcefully and directly in a harsh tone" saying words to the effect "Just remember that I have the ultimate power to put people where I want." (Exhibits K & L; Testimony of Mel Sharp Tr. 4:25:50). At one of the four points referenced by the union it alleges he "stood up, took off his jacket, looked down at CCEA Leadership and reminded the group several times that he was the ultimate power regarding transfers." (Testimony of Jackie Reddy, Tr.3:52:00). At another point he made a "sweeping motion" with his hand toward the union members while repeating that he had ultimate authority to transfer employees, which the union representatives interpreted to be a threat. (Testimony of Jackie Reddy, Tr.3:53:00).

39. During the January 17, 2013 LMT meeting while discussing a possible PPC being filed Schumpelt responded "If you are going to file PPC's then we will respond in kind." (Exhibit L; Testimony of Fierke Tr. 1:24:05). At the same meeting during the District raised a complaint that union representatives were performing union business during working hours. Schumpelt explained that the complaint was prompted by Jackie Reddy having "solicited grievances" when she

asked a fellow employee at work whether she needed union assistance with a workplace dispute. Schumpelt considered that to be improperly conducting union business during work hours. (Answer to Third Amended Complaint ¶F(1)(c); Exhibit J; Testimony of Reddy, Tr. 3:55:00); Exhibit L Testimony of Fierke Tr. 1:28:00).

40. Jackie Reddy testified that during her lunch break she approached a teacher and asked her if she needed union assistance with a pending issue. (Testimony of Jackie Reddy, Tr. 3:55:30).

41. Matthew Tso is the Board President for the District school board. (Stipulation F-4).

42. Mr. Tso posted negative comments about the union and its leadership on his Facebook page in January and February 2013 in proximity to a contested school board election. (Stipulations F-5 and E-6; Testimony of Ewa Krakowska Tr. 5:11:00. 5:13:15).

43. The comments that the union alleges violate PEBA may be summarized as follows:

a. "I've pretty much stayed out of this election until knowing who was backing and funding these candidates. The NEA leadership has basically been encouraging employees to be insubordinate, refuse to implement Common Core curriculum content guides. (Exhibit O).

b. "And Donovan, when this information was revealed after NMPED were done on the 'D and F' schools, every board member was present except for Hoskie. Had he been there he would have known

the crap the NEA leadership was pulling and could have rebutted ..." (Exhibit O).

c. "In the Kirtland Area, the main battle for the Board comes down to Randy Manning incumbent v. Fred Hatachlie for District 1 and Christina Aspaas (incumbent) v. Irene Blueeyes-Claw for District 4. Hatachlie and Irene Claw are the NEA teacher's union backed candidates. Aspaas is the only one who isn't controlled by an [sic] special interest group and is running as her own candidate which is how it should be: (Exhibit O).

d. "Apparently, the decisions of our present administration and board (except one board member) drove those improvements. Electing the rookie NEA-backed candidates (Irene B. Claw) would mean going backwards and undoing those changes." (Exhibit O).

e. "Electing new rookie NEA union backed candidates like Irene Claw are going to really mess things up and take us backwards."(Exhibit O).

REASONING AND CONCLUSIONS OF LAW:

A. The District committed prohibited practices pursuant to NMSA §10-7E-19 (G) and (H) by refusing to review grievances appealed to the school board pursuant to Step 4 of their negotiated grievance procedure found in Article 14 of the CBA.

The District does not dispute that at some point within six months preceding the filing of this PPC it changed the way it previously handled appeals from grievance decisions at Step 4 of the CBA by refusing to take any action that might alter that taken by the Board's Superintendent at the preceding Step 3. The District justifies

that change in two ways:

1. The Board complied with Article 14 of the CBA because all that it requires is "review" of grievances. The fact that it routinely refers the appeals at Step 4 back to the Superintendent without further action satisfies the review requirement.

2. The District's school board is required by HB 212's changes to the Public School Code to relinquish all authority over employment matters to its superintendent and therefore has adopted a blanket policy of deferral to him. As stated in its closing brief at page 5, "In conformance with the statutory division of authority between the Board and Superintendent, the Board has decided after reviewing such grievances to refer such matters to the Superintendent."

As I see the District's position, it is to pay lip service to its appellate review obligation while performing no real review at all. Whether its position is taken as the result of its contractual construction of Article 14 or its statutory construction of §22-5-14 NMSA (2003) doesn't matter because both are incorrect interpretations.

CBA Construed:

The District's claim that its actions constitute substantial compliance with the CBA's review requirement suffers from an obvious fundamental flaw – some of the appeals received no review at all. In one instance the Board's president, refused to place a filed appeal on the Board's agenda for review summarily dismissing it himself apparently without the remaining board members being informed of its filing. (Exhibit E). The District's school board also refused to review an appeal over the District's failure to follow Article 17 because the union had filed a Prohibited Practices Complaint regarding the same issue and in another instance an appeal originally placed on a School Board agenda was not heard; the Board took no action on it and did not issue a written decision concerning the grievance appeal. These facts are consistent with the position taken by the District in its Answer to the Third

Amended Complaint that it adopted a blanket policy of deferral of all filed grievance appeals to the Superintendent. Conversely they are inconsistent with the position taken in its closing brief that its deferral constitutes good faith compliance with Step 4 of the CBA's grievance process.

Having negotiated Step 4 of the grievance procedure the District agreed that if the Association is not satisfied with a grievance decision at the Superintendent Level, Step 3 it "may ***appeal*** to the Board of Education through the Superintendent." Article 14 (L)(4)(a) (Emphasis added). The Board is then required to "***review the grievance***" and has discretion to ask the Association to appear before it and the Superintendent to state its position and answer questions. Article 14 (L)(4)(b) (Emphasis added). The plain language of the CBA shows three related aspects of Step 4: (1) appeal and (2) review, culminating in (3) a decision. The Merriam-Webster online dictionary defines the noun "appeal" as "a legal proceeding by which a case is brought before a higher court for review of the decision of a lower court", or as "an application (as to a recognized authority) for corroboration, vindication, or decision". The verb form of "appeal" includes in its definition both "to take a lower court's decision to a higher court for review" as well as "to call upon another for corroboration, vindication, or decision." Similarly, the transitive verb form of the word "review" such as is used in the CBA at issue includes "to examine or study again; *especially* **:** to reexamine judicially...to go over or examine critically or deliberately". Consistent with the definitions of its precedent "appeal" and "review" the resulting "decision" required of the board under Step 4 is defined as "a determination arrived at after consideration". The "common" understanding of

these terms comports with their legal definitions. The NOLO on-line plain language law dictionary defines them similarly. In order to render a decision required of the board under Step 4 it must act collaboratively to "decide" an issue presented to it on appeal. To "decide" something, according to the NOLO on-line plain language law dictionary is to "reach a determination of who is right and wrong in a legal matter, after looking at the facts and the law."

To accept the District's understanding of its board's role under Article 14 of the CBA would be to accept a construct under which its obligation to engage in appellate review is satisfied by no review at all. I decline to engage in the sort of "doublethink"[1] such a construction would require. To the contrary I resolve the issue of what is meant by the Step 4 review by reference solely to the plain language of the CBA applying traditional rules of grammar and punctuation and the conduct of the parties after its execution and ratification. *See, J.R. Hale Contracting Co., Inc. v. Union Pacific Railroad*, 143 N.M. 574, 179 P.3d 579 (Ct. App. 2007). The contract is clear and unambiguous on its face that the school board is required upon submission of an appeal under Step 4 to meet and examine the evidence critically and deliberately, followed by a written determination arrived at after consideration as a body. That decision may result in the modification or reversal of the Superintendent's decision as the board in its collective judgment deems best. That understanding of what is required of the board in rendering a "decision" comports

[1] George Orwell coined the word "doublethink" in his novel Nineteen Eighty-Four (1949). Doublethink is the act of simultaneously accepting two mutually contradictory beliefs as correct. Somewhat related but almost the opposite is cognitive dissonance, where contradictory beliefs cause conflict in one's mind. Doublethink is notable due to a lack of cognitive dissonance — thus the person is completely unaware of any conflict or contradiction.

with the District's understanding of the use of the same term in the same Article of the CBA when it comes to a "decision" rendered by the Superintendent at Step 3 of the grievance process which it considers to be sacrosanct. There are no conflicting reasonable inferences to be drawn from events or circumstances existing before, during or after negotiation of the contract that would alter this conclusion, including the implementation of changes under HB 212 for the reasons explained more fully below.

Statutes construed:

My guiding principle here is to give effect to the intent of the Legislature with regard to both the PEBA and the Public School Act. I first look to the plain language of the statutes, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended, then to the purpose to be achieved and the wrong to be remedied. *See, Hovet v. Allstate Ins. Co.,* 135 N.M. 397, 89 P.3d 69 (2004). Further,

> "[w]hen construing statutes related to the same subject matter, the provisions of a statute must be read together with other statutes in *pari materia* under the presumption that the [L]egislature acted with full knowledge of relevant statutory and common law. Thus, two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals."

Att'y Gen. v. N.M. Pub. Regulation Comm'n, 150 N.M. 174, 258 P.3d 453(2011) ¶ 10 (internal quotation marks and citation omitted)

The District misconstrues HB 212 as it pertains to its obligations under the CBA. The fact that the Superintendent as the chief financial officer of the district is vested with authority to "employ, fix the salaries of, assign, terminate or discharge all employees

of the school district"[2] in the first instance says nothing about the Board's authority to act as an appellate body to affirm, reverse or modify to the Superintendent's decisions pursuant to a negotiated CBA. This is so because it is in the very nature of appellate review that it be undertaken from a decision below that is otherwise final and binding. The District is simply wrong to say as it does at page 6 of its closing brief that the legislature "took away the power of school boards to interfere in personnel matters". At most, the plain meaning of the statute gives the Superintendent authority over hiring, setting salaries, transferring, terminating and discharging employees and that is all. It would be a gross overgeneralization to say that the Superintendent therefore has authority over all "personnel matters". There is a universe of subjects that could come within the definition of "personnel matters" that do not involve hiring, setting salaries, transferring, terminating and discharging employees, including the grievances at issue in this case. I say this because the grievances at issue are not challenges to the Superintendent's statutory authority to employ, set salaries, transfer, terminate or discharge employees, *per se* but rather, are challenges to actions alleged to be a "violation, misinterpretation, or misapplication of a specific provision of the CBA." *See* Exhibit 13, Article 14 (B) Definitions. The parties' CBA contains twenty-seven articles and 4 appendices covering such "personnel matters" as payroll deductions, workdays, work hours, leave, evaluations, reassignment, etc. If taken to its logical extension the District's

[2] NM Stat. 22-5-14 (2011 Edition) provides in relevant part that:
"A. The local superintendent is the chief executive officer of the school district.
B. The local superintendent shall:
(1) carry out the educational policies and rules of the state board [department] and local school board;
(2) administer and supervise the school district;
(3) employ, fix the salaries of, assign, terminate or discharge all employees of the school district..."

position that the School Board may not interfere with its Superintendent's decisions regarding all personnel matters, would result in the Superintendent having *carte blanche* to ignore or modify the parties CBA with impunity; a result that cannot be allowed.

Therefore, I can find no conflict between the Board's appellate function pursuant to a CBA validly executed under the PEBA and the authority vested in superintendents generally by HB 212. For that reason and because the Q&A document, Exhibit 2 does not purport to, and apparently did not, consider the effect of the PEBA on a District operating under a collective bargaining agreement in its analysis, I give Exhibit 2 little weight. Furthermore, the District's reliance on a decision by New Mexico's Public Education Department *In the Matter of The Board of Education of the Questa Independent School District* (12-17-12) is misplaced. In that case the local school board was found to have encroached upon the authority of the Superintendent by its interference in the "day-to-day" operations of the District, by "bullying and intimidating behavior" undertaken in order to influence the superintendent before his final decision was made in the first instance. *See, Questa School Board Hearing on Suspension*, pp. 2-3, Exhibit 1. The School Board in the *Questa* case was not acting in an appellate capacity pursuant to a negotiated grievance procedure. While the PED's conclusions in that case support the proposition that board members, acting in a variety of irresponsible and unprofessional ways, should refrain from involvement in delegated administrative functions in the first instance (a proposition with which this decision agrees). The

Questa decision says nothing about a local board acting in an appellate capacity pursuant to a duly executed and ratified CBA.

The PEBA guarantees "public employees", which includes the employees of the District, the right to organize and bargain collectively with their employers. NMSA 1978 §10-7E-2 (2003). In the case of educational employees the PEBA also provides for an addition to the usual scope of bargaining specific to educational employers including as a mandatory subject of bargaining the impact of professional and instructional decisions made by the employer. NMSA 1978 §10-7E-17 (D) (2003). The District has entered into such a contract here and in accord with NMSA 1978 §10-7E-17 (F) has negotiated grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters, which procedure provides for a final and binding determination as required by law. It is the school board as the policy making body, not the superintendent, that is vested with bargaining and contracting authority under the PEBA. *Compare* NMSA 1978 §10-7E-7 defining the "appropriate governing body" of a public employer and NMSA 1978 §22-5-4 (A), (C), (I), (J) and (K) of the Public School Code setting forth powers of the local school boards germane to collective bargaining.

It cannot be as the District argues that the board's power to effect a superintendent's personnel decisions was taken away by HB 212 because those changes maintained the same kind of appellate review by school boards that previously existed and which has been agreed to by the District in the CBA. I refer to the board's statutory authority to review a superintendent's decision to terminate

an employee found in NMSA 1978 §22-10A-24 (F) (2011), entitled "Termination decisions; local school board; governing authority of a state agency; procedures." Under that section of the Public School Code a district employee may appeal a superintendent's termination decision to the local board if the decision to terminate him was made without just cause. The local school board then must meet to hear the employee's statement, rebuttal testimony or such evidence as it considers reliable, after which it must render a decision in writing within five working days from the conclusion of the meeting.

That was the procedure apparently followed in the post-HB 212 cases *Larsen v. Board of Education of Farmington Municipal Schools,* 2010-NMCA-093, 148 N.M. 920, 242 P.3d 487 (2010) and *Aguilera v. Board of Educ. of Hatch Valley,* 139 N.M. 330, 132 P.3d 587 (2006) cited by the union in its closing brief. In both those cases, (at least one of which, *Larsen*, clearly involved an employee under a collective bargaining agreement) our appellate courts had no problem with the local boards serving in an appellate capacity over a superintendent's decision to terminate an employee.

If, in a post-HB 212 world, the board's power to review an employee's termination or discharge is recognized in an appeal under § 22-10A-28(D), how can it reasonably be said that the same power of review is denied the board simply because the right to appeal arises out of a collective bargaining agreement? Both involve the same delegation of authority to the superintendent of authority under §22-5-14 (B). The ready answer is that it cannot and the District's assertion that it relies on the effects of HB 212 to justify it refusal or failure to hear the union's

grievances must be seen as an after-the-fact prevarication to achieve by fiat that which it tried but could not achieve at the bargaining table. To force grievances to arbitration by eliminating Step 4 has a serious financial impact on employees due to the cost of arbitration that consequently would have a chilling effect on an employees' ability to resolve grievances. To achieve its end the District posits a conflict between PEBA and the Public School Act that does not exist. To entertain that imagined conflict is to risk rendering all collective bargaining in public schools a nullity since under the Superintendent's power as imagined by the District he could simply negate any aspect of a contract that fell under the broad purview of "personnel" or "employment matters". That result is not consistent with legislative intent.

Whether or not the union has proceeded to arbitration, in any of the grievance appeals is not relevant because the issues in this case relate, not to the merits underlying offenses alleged in the grievances, but to whether PEBA was violated by the school board not hearing appeals. As to that issue, the union is not obligated to seek arbitration first. NMAC 11.21.3.22 provides for deferral of a PPC to grievance-arbitration, if the PPC requires contract interpretation, involves the same issues as the grievance, and the parties will waive any procedural impediments in writing. *See also, Collyer Insulated Wire*, 192 NLRB 837 (1971). Those criteria are not met here.

In any event deferral would not be appropriate in a case involving employer obstruction of the grievance-arbitration process, break down of collective bargaining relationship; or the PPC's allege discrimination, interference with PEBA

rights, or violation of another PEBA right that is independent of the contract such as we have here. *See, AFSCME v. Dep't. of Health*, 06 PELRB 2007 (Dec. 3, 2007); *see also, Developing Labor Law* 6th Ed. at 1599-1601, and citations therein. Additionally, where, as here, the contract language at issue is not ambiguous and does not, therefore, require an arbitrator's special expertise to interpret it there is no need to defer to arbitration. *See AFSCME v. State*, 04 PELRB 2008 (March 20, 2008) PELRB Case No. 143-07, Hearing Examiner's letter decision on Motion to Defer (Jan. 15, 2008); *see also Caritas Good Samaritan Medical Center*, 340 NLRB 61, 62-63 (2003) (where the terms of the CBA are "clear and ambiguous ... the expertise of an arbitrator was not required to interpret the language to establish whether the Respondent violated the Act"); *Grane Health Care, Inc.*, 337 NLRB 432, 436 (2002) (where the terms of the CBA are "clear and unambiguous," the matter did not "turn on contract interpretation," and "therefore the special interpretation skills of an arbitrator would not be helpful"); and *Struthers Wells Corp.*, 245 NLRB 1170, 1171 n. 4 (1979) (that a claim should not be deferred where the CBA "provision is on its face clear and ambiguous," such that the issue "does not involve contract interpretation").

I therefore conclude that the District committed a prohibited labor practice by refusing or failing to comply with PEBA §§ 2, 6, 7 and 17 in violation of NMSA §10-7E-19(G). I further conclude that the District committed a prohibited labor practice by refusing or failing to comply with Article 14 of the parties' Collective Bargaining Agreement in violation of PEBA §19(H). I can find no evidence to support a conclusion that the District's refusal to hear grievance appeals constitutes a refusal

to bargain collectively in good faith in violation of PEBA §19(F) under the facts presented.

B. The District violated PEBA §10-7E-17(A)(1) when the District gave three bargaining unit employees additional work and paid them an additional "foreman" stipend without bargaining those changes with the union and therefore committed a prohibited labor practice pursuant to PEBA §19(F) and (G). By changing the duties of, and extending benefits to the three bargaining unit members without bargaining, the District also violated PEBA §19(C), interfering with the existence or administration of a labor organization. There is insufficient evidence to support a conclusion that the District's conduct violated PEBA §19(B).

PEBA imposes affirmative and reciprocal duties on exclusive representatives and public employers to "bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties." *See* § 17(A)(1); *See also* § 19(F) and § 20(C). A violation of the duty to bargain in good faith can be either a *per se* violation, in which actual intent or subjective good faith is irrelevant, or based on a pattern of bad faith negotiation, in which an intent to frustrate bargaining can be inferred from conduct. *See NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 465 (2d Cir. 1973); *See, NLRB v. Katz*, 369 U.S. 736 (1962).

The change made by the District to three bargaining unit employees' duties, hours and pay by designating them "Transportation Foreman" clearly implicates mandatory subjects of bargaining under PEBA §17 and the failure to negotiate those changes without bargaining with the exclusive representative constitutes a *per se* violation of that Section and §2. As the NLRB has observed, once a union is certified as exclusive representative, it "is the one with whom [the employer] must deal in conducting bargaining negotiations," and the employer "can no longer bargain

directly or indirectly with the employees." *See General Elec. Co.*, 150 NLRB 192, 194 (1964), *enf'd*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). Direct dealing constitutes a *per se* violation of the duty to bargain in good faith because "direct dealing, by its very nature, improperly affects the bargaining relationship." *Americare Pine Lodge Nursing & Rehab. Ctr.*, 325 NLRB 98, 99 (1997).

Further, by dealing directly with the three bargaining unit members at issue concerning mandatory subjects of bargaining, the District necessarily interfered with the collective bargaining relationship in violation of PEBA § 15(A). An employer violates § 19 (C) and (G) when it interferes with the union's status as exclusive representative under § 15(A).

The District claims that there is a history of the union acquiescing in management unilaterally establishing stipends and to whom they will be paid and therefore it has waived any objections based on the failure to bargain the stipends in this case. The facts negate the District's claim of waiver. For example, Exhibit 9 establishes that most of the stipends to which the District refers are paid to employees outside of the Petitioner's bargaining unit. Acquiescence in the establishment and award of those stipends is not evidence that the union waived bargaining stipends for its members. As for those stipends on Exhibit 9 that are paid to bargaining unit members, three are at issue in this case, some were negotiated and appear in the CBA such as under Article 26 or in the incorporated salary schedule, Exhibit N, and some of which were not bargained. Concerning those bargaining unit members being paid stipends that were not bargained, there is no evidence to support the proposition that the union was made aware of the payment of those stipends and given an opportunity to

bargain them, a pre-requisite to waiver. To the contrary, the union and the District entered into a Memorandum of Understanding appended to the Exhibit 13 creating a joint committee to review the requirements to be met for an individual's "increment, stipend, or activity allowance." The MOU does not limit discussion to stipends for activity club sponsors only, as claimed by the District.

The PELRB has adopted NLRB precedent and court decisions interpreting the NLRA concerning waiver by a union of its statutory right to bargain over changes in terms and conditions of employment. *See, CWA, Local 7076 v. N.M. Public Education Dep't,* 76 PELRB 2012. (Nov. 26, 2012). National labor policy disfavors waivers of statutory rights by a union, thus a Union's intent to waive a right must be clear and unmistakable before a waiver will be enforced. The NLRB has construed the waiver doctrine narrowly and has been reluctant to infer a waiver in the absence of clear and unmistakable language. *See, e.g., Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 n.12 (1983); *United Techs. Corp.,* 274 N.L.R.B. 504, 507 (1985). The NLRB decisions are consistent with New Mexico law on the doctrine of waiver generally. For example, *Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984) defined "waiver" as the intentional relinquishment or abandonment of a known right.

For the above reasons and despite the fact that the union did not brief this issue I conclude that the union did not waive bargaining and District committed a prohibited labor practice when in violation of PEBA §10-7E-17(A)(1) the District gave three bargaining unit employees additional work paying them an additional "foreman" stipend without bargaining those changes with the union. I conclude that

such conduct constitutes a prohibited labor practice pursuant to PEBA §19(F) and (G). The same conduct also violated PEBA §19(C), interfering with the existence or administration of a labor organization. There is insufficient evidence to support a conclusion that the District's conduct violated PEBA §19(B), interfering with, restraining or coercing a public employee in the exercise of a right guaranteed by the PEBA.

C. The quantum of proof was insufficient to show that the employer intentionally discriminated against three internal candidates on the basis of union activities or association in connection with their competition with an outside candidate for a vacant Maintenance Foreman position in January of 2013.

As the Complainant in a prohibited practices complaint the union bears the burden of proof and the burden of going forward with the evidence needed to prove the complaint. *See,* NMAC 11.21.3.16. With regard to its allegations that the District discriminated against union members when it filled a vacant Maintenance Foreman position with the same person who has held the position before the vacancy constituted discrimination the union must demonstrate that anti-union animus was a motivating factor in the decision. *See, Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998). That the three unsuccessful internal candidates were union members and the CBA's procedures were not followed in connection with the interview process is not sufficient evidence of animus. While animus can be inferred from circumstantial evidence I conclude that the evidence was insufficient to support a reasonable inference that the preference shown the successful candidate had anything to do with the unsuccessful candidates' union affiliation or activities. I conclude that the union has not made a *prima facie* case of discrimination. Even if

they had done, I would conclude under the *Wright Line* cases' shifting burden standard[3], and relying principally on Dr. Bekis' testimony the employer established that the same action would have taken place even in the absence of the protected conduct (assuming I could find any) if for no other reason that they gave the job back to the same person who had held it previously. *See, In re: Wright Line,* 251 NLRB 1083, 1980 WL 12312 (N.L.R.B.) at 1089, *aff'd National Labor Relations Board v. Wright Line*, 662 F.2d 899

(1st Cir. 1981); *see also NRLB v. Transportation Management Corp.*, 462 U.S. 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989).

I am not persuaded that any favoritism the employer may have shown the successful candidate throughout the selection process to the detriment of union members was motivated by anti-union animus.

The CBA provides in Article 17 (C) (3) that in case of a vacancy, when employees meet the educational purpose and requirements, selection will be made from the best qualified employee applicant or volunteer or external applicant who best meets the District's educational or operational needs. The union argues that management's discretion to hire the best candidate whether internal or external regarding the Maintenance Foreman position at issue in this case is limited by Article 17(E) (3) regarding voluntary transfers within a building or facility. (Exhibit 13). Article

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[3] Although the evidentiary burdens shift back and forth under this framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *See Gonzales v. New Mexico Dep't of Health, Las Vegas Med. Ctr.*, 2000-NMSC-029, ¶ 21, quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2106 (2000), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (all discussing a federal employment discrimination claim, which utilizes a similar burden shifting framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973)); see also *CWA v. Dept. of Health*, PELRB Case No. 108-08, Hearing Examiner's Report (Jul. 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).

17(E) (3) provides, in part, that when an in-building or facility vacancy occurs, unit employees within the facility or within a specific job classification shall be considered before the position is posted. The union argues that by operation of Article 17 (E) (3) the District was required to complete the interview and assessment process as to the internal candidates for the vacant Maintenance Foreman position before the position was opened to external candidates. It appears to be undisputed that the position was posted internally and externally at the same time and all candidates were interviewed and processed together. To the extent the proper process per contract was not followed I concur that the employer violated the CBA which states a claim for a prohibited labor practice under PEBA §19 (H). However, in light of Article 17 (C) (3) of the CBA the District ultimately retained the discretion to select whichever applicant, whether internal or external, it considered to have best met the District's educational or operational needs. As the employer is the best judge in this case of which candidate meets its operational needs I defer to its judgment in that regard and decline to re-weigh the candidate's respective qualifications in the absence of more evidence of anti-union animus than we have in this case.

Based on the foregoing and because the union did not brief this issue I conclude that the union's evidence was inadequate to support conclusion that employer violated NMSA §§10-7E-5, 10-7E-19(B) and (G) but do find it sufficient to establish a violation of Article 17 of the CBA and consequently a prohibited practice under PEBA §19(H). However, I can discern no harm that stems from the District's failure

to follow the contract because it retained discretion to make the choice ultimately made.

D. The quantum of proof was insufficient to show that the employer violated NMSA §§10-7E-5, 10-7E-19(B) and (C), and Article 6 of the CBA (which if established would constitute a violation of PEBA §19(H) by the conduct of its agent during a Labor-Management Team meeting on January 17, 2013.

The common thread that runs throughout PEBA §§5, 19(B) and (C), and Article 6 of the CBA is the right of public employees to engage in union activities without interference, restraint or coercion. The PELRB relies upon NLRB precedent in this area of the law. An employer violates the right to form, join or assist a union without interference when it threatens employees with economic reprisals such as layoffs or termination for engaging in protected activity. *See, NLRB v. Gissell Packing Co.*, 395 U.S. 575, 616-618 (1969). An employer also commits an unfair labor practice when it threatens employees that supporting the union will result in a loss of existing benefits while the parties bargain. *See, e.g., NLRB v. General Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000). However, statements about the employer's economic situation that are based on objective fact are not prohibited. *Gissell* at 618. Similarly, "[i]n evaluating comments concerning 'bargaining from scratch,' the Board cases draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back." *See, So-Lo Foods, Inc.*, 303 NLRB 749, 750 (1991).

In this case the union alleges that the District's Human Resources Director, George Schumpelt, threatened or intimidated or harassed the union members of the Labor

Management Team during a meeting on January 17, 2013 by the conduct including the following:

a. After a union representative expressed encouragement because the parties were able to resolve a disputed transfer, Schumpelt emphasized the District's authority by stating words to the effect of "Don't be encouraged. I control all areas of transfer. We know we can transfer summer and Christmas but I always control the transfer.... [The CBA] says that only the receiving admin has to agree to the transfer. If they do then I will just transfer them back. We don't need to go there right now - I have the power and I am the only [one] who says who can do anything [regarding transfers]".

b. Throughout the LMT meeting Schumpelt repeated his position regarding transfer at least four different times in a manner the union describes as "forcefully and directly in a harsh tone" saying words to the effect "Just remember that I have the ultimate power to put people where I want." At one of the four points referenced by the union it alleges he "stood up, took off his jacket, looked down at CCEA Leadership and reminded the group several times that he was the ultimate power regarding transfers." At another point he made a "sweeping motion" with his hand toward the union members while repeating that he had ultimate authority to transfer employees, which the union representatives interpreted to be a threat.

In his testimony Schumpelt denied he threatened anyone and the union did not produce evidence that involuntary transfers of any of the LMT union members were

made or attempted after the alleged threats. The union did produce evidence that more than one union member of the LMT felt threatened by Schumpelt' s hard-line comments and body language concerning his transfer authority and that one union member of the LMT suffered what she described as a "panic attack" the next day[4]. The subjective perceptions of those present are less important than the objective deductions and inferences by a neutral trier of fact arrived at dispassionately. In the sometimes "rough-and-tumble" world of labor-management relations, a stress-free environment cannot be assured; perhaps not even expected. It is in the nature of that world that one must sometimes deal with difficult, even rude, obnoxious or officious persons in order to accomplish one's goals. I conclude that Schumpelt's actions in the LMT meeting did not rise to the level of a prohibited labor practice. My review of the CBA convinces me that he was stating an objective truth concerning his level of authority over transfers as long as he can demonstrate that his authority is being exercised in the best interests of the District and in light of the fact that management had apparently made a concession to the union on a specific transfer at issue, it does not seem unusual for management to follow that concession by asserting and re-asserting its rights as it perceives them. For this reason I conclude that Schumpelt' s statements, even in light of his accompanying behaviors, were more like the kind of statements about the employer's economic situation that are based on objective fact found in *Gissell* that are not prohibited.

The union's complaint also alleges that Schumpelt' s statement to the effect of "If you are going to file PPC's then we will respond in kind" is a threat constituting a

[4] There was no medical evidence introduced.

prohibited labor practice. The right to file PPC's is not the exclusive province of the union. NMSA 1978 §10-7E-20 lists those action that are prohibited to unions and a union or individual violating one or more of those provisions subjects itself to the possibility of a charge being levied by the employer. Schumpelt' s statement here is nothing more than a statement of the District's intent to do that which it is legally entitled to do. It is no more of an illegal threat than the union's initial "threat" of a PPC that prompted Schumpelt' s response would be.

This leads me to the third contention by the union of an illegal threat, intimidation or coercion: that during the same LMT meeting discussed above the District raised a complaint that a union representative was performing union business during working hours. Schumpelt explained that the complaint was prompted by union representative Jackie Reddy having "solicited grievances" when she asked a fellow employee at work whether she needed union assistance with a workplace dispute. Schumpelt considered that to be improperly conducting union business during work hours. There are two aspects of this part of the charge that need to be addressed. Obviously I must determine whether substantially, taken as a whole and in context, the statement may reasonably be construed as a threat, intimidation or coercion or otherwise interfering with the union or any of its members in performing their business. Part of that analysis requires that I consider the legality of the underlying proposition – that Reddy's action constitutes "union business" that may be restricted by the employer.

If Jackie Reddy had been engaged in union organizing or expressing her views in support of the union or distributing union materials I would have little doubt that

the District had a legitimate concern over making sure that employees' work time is not disrupted by those kinds of activities commonly understood to be "conducting union business". I would then have to weigh whether her so-called "solicitation of grievances" occurred during a break time when employees' time is theirs to use as they wish without unreasonable restraint. *See generally Developing Labor Law*, 6th Edition at 131-139; *See also, Las Cruces Professional Fire Fighters v. City of Las Cruces*, 1997 NMCA 31, 123 NM 239 (Ct. App. 1996) (Firefighters II).

But Reddy was not doing any of things commonly understood to be "union business". She was engaged in protecting employee rights guaranteed under PEBA and enforcing the CBA as it pertains to those protected rights by asking a member of the bargaining unit whether union assistance was needed. That is not "union business" but the mutual obligation of both the District and the union. The union is obliged by NMSA 1978 §10-7E-15 to "...be the exclusive representative of all public employees in the appropriate bargaining unit. The exclusive representative shall act for all public employees in the appropriate bargaining unit and negotiate a collective bargaining agreement covering all public employees in the appropriate bargaining unit. The exclusive representative shall represent the interests of all public employees in the appropriate bargaining unit without discrimination or regard to membership in the labor organization." *See,* NMSA 1978 §10-7E-15(A). There are few things more essential to protecting employee rights under PEBA and essential to enforcement of its contract than for union stewards to be free to ascertain the truth and viability of rumored workplace grievances and that in turn requires the ability to talk to co-workers about potential or actual grievances in the workplace.

That principle is embodied in Article 6 of the CBA. If the District imposes a work rule (which it does not seem to have yet done) that interferes with employees' rights under PEBA, rather than for legitimate business purposes, for example, imposing limits on general fraternization during work time, it risks violating several subparagraphs of §19. *See Horton Automatics*, 289 NLRB 405, 409 (1988); *Capitol EMI Music, Inc.*, 311 NLRB 997, 997 n. 4 and 1006 (1993). *See also, Michaels v. Anglo Am. Auto Auctions*, 117 NM 91, 94 (1994) (Circulation of a petition concerning leave usage, overtime, and safety was protected concerted activity for mutual aid and protection, because it was peaceful and concerned improvement of employees' conditions of employment. *See, also* Developing Labor Law, 6th Edition at 239-240 regarding processing grievances.

That the employer may have been wrong in its assessment of the parties' mutual obligations does not, I believe, under the totality of the circumstances here, make it necessary to conclude that it acted in bad faith or levied a threat by discussing the issue in an LMT meeting. Among the enumerated expectations of the LMT meetings is that they will provide a "safe haven" where frustration with the system can be discussed. Exhibit 13 Article 8(B)(3). That "safe haven" concept is consistent with the principles of Interest Based Bargaining expressly incorporated into Article 8 of the parties' CBA. It is not possible to become joint problem solvers and address disputes by consensus unless both parties are free to express their views in an LMT meeting, even if they are wrong.

For the foregoing reasons and because the evidence supports a conclusion that the so-called "solicitation of grievances" occurred during a lunch break and no action

was taken by the employer in response to the union's actions and the union did not brief this issue I conclude that the evidence is insufficient to support a claim that the employer violated PEBA §§5, 19(B), (C) or (H) or Article 6 of the CBA.

E. The quantum of evidence is insufficient to prove that the employer violated NMSA §§10-7E-5, 10-7E-19(B) and (C), and Article 6 of the CBA (which if established would constitute a violation of PEBA §19(H) by the District's School Board President, posting negative comments about the union and its leadership on his Facebook page.

The Facebook postings about which the union complains relate to a school board election, not a representation election, contract ratification election or an election of union officers that would come under the purview of rights protected by PEBA. As such, the union's interest in the school board election is no greater and no less than that of any other citizen competing for attention in the free marketplace of ideas. Generally making disparaging or belittling comments about bargaining unit employees, the union or union representatives will not reasonably tend to interfere with the free exercise of employee rights under PEBA, unless such statements are coupled with, or otherwise evidence some prohibited conduct. The union presents no authority to the contrary and I can find no prohibited conduct in connection with Tso's disparaging comments. The union's support of a candidate in a contested election does not constitute protected union activity to the extent that the PEBA may be invoked to quell any publicly held political view other than the union's. This matter may be disposed of solely by application of PEBA and the parties' CBA without implicating First Amendment concerns and I find nothing in either PEBA or the CBA that was violated by Mr. Tso's postings. Any other recourse that may be

available to the union in the nature of defamation or related torts is a matter for the District Court, not the PELRB.

Based on the foregoing and because the union did not brief this issue I conclude that the union's evidence was inadequate to support conclusion that employer violated NMSA §§10-7E-5, 10-7E-19(B), (C) or (H).

DECISION: Based on the foregoing it is my Recommended Decision that the Board adopt my findings, legal analysis of HB 212 and conclusions, sufficient to establish that the District committed Prohibited Labor Practices and the union's Complaint should be **SUSTAINED** as to the following:

1) Violation of NMSA §10-7E-19 (G) and (H) by refusing to review grievances appealed to the school board pursuant to Step 4 of their negotiated grievance procedure.
2) Violation of NMSA §10-7E-17(A)(1) by giving three bargaining unit employees additional work and paying them an additional "foreman" stipend without bargaining those changes with the union which constitutes a prohibited labor practice pursuant to PEBA §19(F) and (G).
3) Violation of PEBA §19(C) by interfering with the existence or administration of a labor organization when it circumvented the union's role as the exclusive representative, bargaining directly with employees when it gave three bargaining unit employees additional work and paid them an additional "foreman" stipend.
4) Violation of PEBA §19(H) by failing to follow Article 17 of the CBA in hiring a Maintenance Foreman at the Shiprock facility.

As a remedy for the above prohibited practices, the District should be ordered to:

a) Post at its main facility and at any of the facilities where the prohibited practices occurred, copies of the attached notice marked "Appendix A", after being signed by the District's Superintendent. The notice shall be posted by the District immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the District to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Executive Director in writing within 20 days from the date of the Board's Order what steps the District has taken to comply. The union has not requested rescission of the stipends and new duties but has specifically requested that they not be rescinded. In light of that request and the ongoing negotiations over stipends that are taking place under an MOU appended to the parties CBA, I recommend that no rescission be ordered. No rescission is recommended for the failure to follow Article 17 of the CBA because of the substantial likelihood that the end result would have been the same.

It is further my Recommended Decision that there is insufficient evidence to support a conclusion that the District's conduct violated PEBA with respect to the remainder of the union's claims and the following should be **DISMISSED**:

a) The union's claim that the District violated PEBA §19(B) when it gave three bargaining unit employees additional work and paid them an additional "foreman" stipend.

b) The union's claim that the District violated PEBA §19(F) by the District's

refusal to hear grievance appeals.

c) The union's claim that the District violated NMSA §§10-7E-5, 10-7E-19(B) and (G) in hiring the Maintenance Foreman at its Shiprock Facility.

d) The union's claim for violation of PEBA §§5, 19(B), (C) or (H) or Article 6 of the CBA arising out of the District's claim that a union representative was soliciting grievances and other threatening, coercive or intimidating conduct.

e) The union's claimed violation of PEBA §§5, 19(B), (C) or (H) arising out of the school board Chair's Facebook postings.

Issued this 26th day of August, 2013

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Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, NM87120

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 has found that we violated the Public Employee Bargaining Act and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act §10-7E-17(A)(1), to bargain collectively with the Central Consolidated School District in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties.

As defined by the Public Employee Bargaining Act, §10-7E-4(I) the Central Consolidated Education Association, having been recognized as an exclusive representative, has the right to represent employees of the District covered under the parties' Collective Bargaining Agreement (CBA) now in effect. That CBA includes a procedure for adjudicating workplace grievances culminating in binding arbitration, Article Fourteen.

By failing to schedule and hear grievance appeals at Step 4 of the grievance procedure we did not comply with Article 14 of the CBA in violation of NMSA §10-7E-19(G) and (H). Also, by failing to negotiate with the Central Consolidated Education Association, prior to changing the work duties of three bargaining unit employees and extending them additional pay without fulfilling our obligation to bargain those changes in good faith with the union we committed a Prohibited Labor Practice in violation of NMSA §10-7E-19(G) and (H).

Additionally, we failed to follow the transfer procedures agreed to in Article 17 of the CBA in the course of filling a vacant Maintenance Foreman position at the Shiprock facility and consequently a prohibited practice under PEBA §19(H).

We acknowledge the above-described rights and responsibilities and will not in any like manner refuse to bargain with the Central Consolidated Education Association, and honor our commitments under the CBA including the former practice of hearing and deciding grievance appeals at Step 4 of the process.

_____ Date:_____

Don Levinski, Superintendent