

28-PELRB-2022

STATE OF NEW MEXICO PUBLIC EMPLOYEES LABOR RELATIONS BOARD

UNITED HEALTH PROFESSIONALS
OF NEW MEXICO, AFT, AFL-CIO,

Complainant,

v.

PELRB No. 111-22

UNIVERSITY OF NEW MEXICO SANDOVAL
REGIONAL MEDICAL CENTER,

Respondent.

ORDER

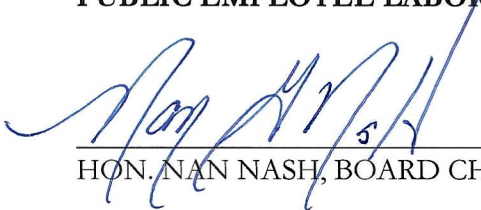
THIS MATTER came before the Public Employee Labor Relations Board (hereinafter the “Board”) at its open meeting on November 19, 2022 upon the appeal of University of New Mexico Sandoval Regional Medical Center (“Respondent”) from the Hearing Officer’s Report and Recommended Decision dated September 28, 2022. The Board heard oral argument on the matter and carefully reviewed the Recommended Decision, the request for review, and the response thereto. Pursuant to the Public Employee Bargaining Act (the “PEBA”), NMSA 1978, Sections 10-7E-1 to -25 (2003, as amended through 2020), and being otherwise sufficiently advised, the Board voted 3-0 to reject the portion of the Recommended Decision finding that Respondent violated Section 10-7E-19(B) of the PEBA while affirming the remainder of the Recommended Decision.

THEREFORE, the Hearing Officer’s Report and Recommended Decision dated September 28, 2022 is hereby **REJECTED IN PART**, as to its conclusion that Respondent violated Section 10-7E-19(B) of the PEBA, and **ADOPTED IN PART**, as the remaining conclusions finding that Respondent violated Sections 10-7E-19(D), (E), and (G) of the PEBA. Respondent is therefore ordered to cease and desist from all violations of the PEBA as found, including enforcing its social

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media policy against Complainant, its constituents or its officers, and post notice of its violation and assurances that it will comply with the law in the future in a form acceptable to the parties and this Board for a period of not less than thirty (30) days.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD



HON. NAN NASH, BOARD CHAIR



DATE

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

In re:

**UNITED HEALTH PROFESSIONALS
OF NEW MEXICO, AFT, AFL-CIO,
Complainant**

v.

PELRB No. 111-22

**UNIVERSITY OF NEW MEXICO
SANDOVAL REGIONAL MEDICAL
CENTER,
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 a Prohibited Practices Complaint filed on June 3, 2022 by the United Health Professionals of New Mexico, American Federation of Teachers, AFL-CIO (collectively, “the Union”), in which the Union claims that the Respondent, University of New Mexico Sandoval Regional Medical Center (“SRMC” or “the Hospital”), violated the following Sections of New Mexico’s Public Employee Bargaining Act (“PEBA” or the “Act”):

- a. Section 5(A)¹ (giving public employees the right to “form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion”);
- b. Section 5(B) (giving public employees the right to “engage in other concerted activities for mutual aid or benefit”);

¹ The Union’s reference to Sections 15(A) and 15(B) is plainly a typographical error given the substance of the quoted sections.

- c. Section 19(A) (making it a prohibited practice for a public employer to “discriminate against a public employee with regard to terms and conditions of employment because of the employee’s membership in a labor organization”);
- d. Section 19(B) (making it a prohibited practice for a public employer to “interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization”);
- e. Section 19(D) (making it a prohibited practice for a public employer 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”);
- f. Section 19(E) (making it a prohibited practice for a public employer to “discharge or otherwise discriminate against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization”); and
- g. Section 19(G) (making it a prohibited practice for a public employer to “refuse or fail to comply with a provision of the Public Employee Bargaining Act or board rule”).

The following specific acts or omissions are those that the Union alleged violated the aforementioned sections of the Act:

- a. During a Union organizing campaign, on approximately May 31, 2022, SRMC held a mandatory zoom meeting for Patient Care Technicians (PCT) employees for them to maintain their requirements under the Hospitals’ Clinical Advancement Program (CAP). During this

meeting, Medical Surgical Nursing Director, Nancy Santiesteban, conveyed to employees misleading and negative comments about the Union and allowed one employee at the meeting to also speak negatively about unions, while telling the participants that they could not speak about unions during work hours.

b. SRMC directed one of its employees, Adrienne Enghouse, to cease communicating with employees regarding the Union during work time and threatened her with discipline for such communications, an activity protected by the PEBA. SRMC has not directed Enghouse to cease communicating with employees regarding other non-work subjects during work time.

c. SRMC applies to its employees an “overbroad and unlawful anti-solicitation policy” and electronic communications policy that prohibit, or in the alternative, chill employees from engaging in concerted activities for mutual aid or benefit in violation of the PEBA.

The Hospital Answered the Complaint on June 29, 2022 acknowledging that Nancy Santiesteban and Gabby Borrego held a routine Patient Care Tech meeting on May 31, 2022. An approved agenda for the meeting listed the topics to be covered and makes no mention of unions or union activity. During the meeting, an employee said something along the lines of “Do you know that the unions will be taking your money? Are staff members aware that they have to pay dues?” Ms. Santiesteban responded that she was not familiar with unions and could not speak to that. Ms. Santiesteban then addressed the group and used new hire paperwork to discuss the importance of reading any document before signing it but made no mention of unions or signing authorization cards. The employee spoke up again and said she wanted to talk to the staff about the union but Ms. Santiesteban told the employee that she could not express her opinion – for or against the union – while at the nurse’s station and that she was free to provide her opinion in the breakroom or during non-working hours.

Adrienne Enghouse has never been “threatened” with discipline but has been put on notice at least three times for interfering with confidential employee issues during working hours. Moreover, two of the three times SRMC’s HR department communicated with Enghouse occurred at a time when SRMC was not a public employer subject to PEBA. The third occasion occurred on May 26, 2022, when HR Director, Correen Bales, sent Enghouse an email regarding the fact that Enghouse had been coming onto SRMC property on days she was not working to distribute literature during working hours and in working areas. The email made clear that Enghouse was free to solicit co-workers during meals and rest breaks and any other period of non-working time and noted that SRMC would not interfere with Enghouse’s rights under state and federal law.

Pursuant to a scheduling notice, the Hospital moved for Summary Judgment on July 22, 2022 arguing that the Complaint fails to state a claim. The Union’s Response to the Summary Judgment Motion was filed on July 29, 2022 and on August 2, 2022, I issued my Letter Decision denying the Motion because genuine issues of disputed material facts existed requiring resolution at a hearing on the merits.

The parties entered a Stipulated Pre-Hearing Order on August 25, 2022 for a Merits Hearing to take place on September 1, 2022. At the Merits Hearing all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. In lieu of oral closing arguments, both parties submitted written briefs on September 16, 2022, both of which were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following **FINDINGS OF**

FACT:

The following two facts have been stipulated by the parties in the Stipulated Pre-Hearing Order filed herein:

1. Petitioners are “labor organizations” as that term is defined in Section 4(K) of PEBA.
2. Pursuant to Senate Bill 41, Respondent is a “public employer” for the limited purposes of the PEBA and as that term is defined in Section 4(R) of PEBA.

I take Special Notice of the following facts:

3. SRMC is a “research park corporation” created under and in accordance with the University Research Park and Economic Development Act, NMSA 1978, §§ 21-28-1 to 25 (“URPEDA”).
4. The New Mexico Legislature amended URPEDA Section 21-28-7(B) by Senate Bill 41 such that, effective May 18, 2022, an URPEDA corporation that “owns, operates or manages a health care facility or employs individuals who work at a health care facility” shall be deemed a “public employer” solely for purposes of the Public Employee Bargaining Act, NMSA 1978, §§10-7E-1 to 25 (“PEBA”). As a result, effective May 18, 2022, SRMC is a “public employer” as that term is defined in the PEBA § 10-7E-4(R), subject to the Act.
5. SRMC has an antisolicitation policy effective May 20, 2022 that provides:

“Solicitation of UNM Sandoval Regional Medical Center’s (UNM SRMC) employees of any kind to include contributions or the purchase of commodities, services, tickets, etc. is expressly prohibited during work time. UNM Sandoval Regional Medical Center allows employees to solicit co-workers during meal and rest breaks and during any other period of non-working time so long as the employee being solicited is also on non-working time and such solicitation does not disrupt or interfere with patient care or ongoing UNM Sandoval Regional Medical Center operations. Distribution of literature is prohibited during working time and in working areas. Fundraising or sales relating to an employee’s personal or family events or activities are expressly prohibited at all locations and all times.”

6. SRMC has an electronic communications policy effective 01/01/2020 that provides in pertinent part:

“IMPLEMENTATION PROCEDURES

A. Use of Sandoval Regional Medical Center's computer system is authorized for research, education and other work-related purposes only. Use of the Internet for personal reasons is generally not permitted. Personal use includes, but is not limited to, obtaining financial updates, streaming audio/video, sports tickets, instant messages, on-line shopping, surfing the net, checking personal e-mail accounts, participating in chat rooms and blogging.

B. All information, in any format, stored by any means on Sandoval Regional Medical Center's electronic systems (voicemail, e-mail, computer network drives, hard disks, or individual diskettes) is the property of Sandoval Regional Medical Center, and subject to inspection at any time and without notice.

C. Employees should not assume that e-mail messages and their attachments are secure or private. Any communication by e-mail should be drafted with the same care as a formal memorandum, and should not contain informal remarks that might potentially be embarrassing to Sandoval Regional Medical Center, its employees or patients.

D. The copying of software by any employee not specifically authorized to do so is strictly prohibited. All employees must comply with all copyright and trademark laws while using software in the workplace.

E. E-mail messages must never contain defamatory, fraudulent, offensive or harassing language. This includes the display or transmission of offensive materials which shall include, but are not limited to, images, cartoons, jokes or messages that contain sexually explicit content or slurs or disparaging materials based on any person's ethnicity, race, religion, disability, sexual orientation or age. Employees must make every effort to stop unsolicited messages.

F. Extreme caution must be used when discussing confidential patient information. Sandoval Regional Medical Center's confidentiality policy applies to all communications on Sandoval Regional Medical Center's computer system in the same manner as it would any other communication.

G. Employees shall not use a computer account that he/she is not authorized to use or obtain a password for a computer account without consent of the account owner.

Employees are prohibited from using Sandoval Regional Medical Center's computers to gain unauthorized access to any computer systems or knowingly perform an act which will interfere with the normal operations of Sandoval Regional Medical Center's computers, terminals or networks."

7. SRMC has social media policy effective 01/01/2020 that provides in pertinent part:

“POLICY STATEMENT

Widespread use of social media (including, but not limited to blogs, Facebook, Twitter, Instagram, etc.) has increased the likelihood that sensitive or proprietary information could be released, misused, or misrepresented, whether purposefully or inadvertently. For example, the inadvertent release of sensitive or confidential information can very quickly reach a wide audience, very rapidly, given the viral and geometric nature of social networking. Such a release can have a very real and damaging effect to the safe provision of patient care or healthcare operations. In addition, because social networking communication is not limited to the workplace environment or equipment, individuals are able to participate in global communication on 24/7 platforms from any public or private locale, thereby increasing this risk.

In light of this, UNM Sandoval Regional Medical Center, (“SRMC”) has a responsibility to protect its patients, the organization, and its employees from risky online behavior and commentary. Moreover, this policy is intended to exemplify the established values at SRMC...

IMPLEMENTATION PROCEDURES

A. Follow SRMC’s Code of Conduct that is intended to provide a safe and encouraging workplace. Specifically, actions online when perceived as representing SRMC, should not be discourteous, abusive, threatening or abrasive to patients, fellow employees, supervisors, physicians, volunteers or other members of the public. Postings, including pictures or comments should not infringe on another individual’s privacy or hold them up to ridicule. Likewise, online actions should not include defamatory, racial or other offensive material. Employees’ online representations may have a direct harm to SRMC, its personnel, and its patients. Whether in the actual world or a virtual one, employees should strive to consider whether their interactions and discourse could be viewed as disrespectful, especially when representing themselves as SRMC employees.

An employee’s virtual acts or behavior when associating themselves with SRMC may give viewers a negative impression of SRMC, which may in turn result in patients losing faith in SRMC’s ability to provide professional, world-class healthcare.

B. Protect patient privacy through compliance with all applicable regulations and policies regarding patient information. Employees/student/volunteers shall not share patient photographs, films, x-rays or diagnostic information on any social media or other non SRMC sanctioned or controlled online resource. In addition, employees/students/staff shall not disclose any of the following patient identifiers:

1. Name
2. Geographical subdivisions smaller than a state, including street address, city, county, precinct, or zip code.

3. Dates related to the individual, e.g., date of birth, admission date, discharge date, date of death, any age elements that can be aggregated into a category, i.e., over 70 years of age.
4. Telephone numbers
5. Fax numbers
6. Electronic mail address
7. Social Security number
8. Medical Record number
9. Health plan beneficiary numbers
10. Account numbers
11. Certificate/license number
12. Vehicle identifiers and serial numbers, license plate numbers
13. Device identifiers and serial numbers
14. Personal or professional Web addresses, also referred to as Universal Resource Locators (URLs)
15. Internet Protocol (IP) address numbers
16. Biometric identifiers, including finger prints and voice prints
17. Full face photographic images and comparable images
18. Any other unique identifier (number, characteristic, code or data)

C. Protect confidential or proprietary SRMC and UNM Health System information. Confidential or proprietary information shall not be posted online. Confidential and/or proprietary information includes, but is not limited to all SRMC plans, reports or internal operations, information regarding hospital clients, partners, vendors, consultants or customers. If there is a necessary business objective to share these certain types of information, then this should only be done after obtaining permission from SRMC's Leadership Team.

D. Respect scheduled work time and resources. Internet access at SRMC is a privilege and must be used in a manner consistent with SRMC's Code of Conduct. SRMC recognizes that social networking has become a common method of professional and personal communication, much like the telephone-mail or personal electronic devices. However, social networking should be utilized at a minimum during scheduled work time, and if it is found that social networking use becomes excessive or interferes with job responsibilities, then that employee may be subject to disciplinary action up to and including termination. Therefore, because of the amount of time and resources required, blogging is not allowed during work hours unless the individual is acting in an approved, official capacity as an SRMC spokesperson.

E. Regarding media contact. If contacted by the news media, whether by person or social media means, concerning SRMC patients, employees, programs and facilities are to be directed immediately to the SRMC House Supervisor and the SRMC Administrator, both of which can be reached at via AMION: <http://www.amion.com/>. Additionally, the UNM HSC Office of Public Affairs needs to be contacted immediately at: (505) 272- 3322.

1. After-hours calls from news media representatives should be immediately directed to the SRMC House Supervisor, the SRMC Administrator On Call and the Public Affairs on-call representative, who can be reached through the schedule posted in AMION <http://www.amion.com/>.

2. The Director of Public Affairs is responsible for ensuring that media and individual requests for sensitive information are discussed with the appropriate UNM HSC authority, which may include certain UNM HSC executive leadership, but not limited to, the UNM Chancellor for Health Sciences, UNM Health System Executive Physician-in-Chief, UNM Health System Chief Clinical Affairs Officer, UNM School of Medicine executive leadership, and HSC Office of University Counsel.

F. When representing themselves as employees of SRMC, be open, honest, respectful and transparent if discussing professional topics online. One should not create a false identity; write about competitors in a negative way; “pick fights,” or engage in impolite online dialogue, no matter how rude or provocative others may be. In addition, one should seek to add value to online conversations in ways that support the health of communities that SRMC serves and are consistent with the established values.

G. Recognize their Responsibilities. Though some sites have a restricted-content feature, individuals must assume that all online content is viewable by anyone on the Internet, especially because digital information can be easily shared and altered. Employees are responsible for ensuring the appropriateness of all SRMC related content posted by them, regardless of where it is posted to or from, or when it is posted. Individuals are solely responsible for all communication, comments, activity, and postings from his or her account, even if they did not personally post those matters in question. SRMC shall, in its sole discretion, determine whether this policy has been violated and/or issue disciplinary action for violations of this policy.

H. Obtain appropriate authorization. Content owners are responsible for obtaining the consent of all involved parties for the right to distribution or publication of recordings, photos, images, videos, text, slideshow presentation, artwork and advertisements, whether those rights are purchased or obtained with or without compensation.

I. Adhere to monitoring protocols. Content owners are solely responsible for monitoring postings and comments to SRMC social media sites, and for moderating and/or deleting postings that do not adhere to SRMC’s policies.

J. Obtain approval before setting up any social networking groups, fan pages, or names utilizing the brand name “SRMC” or “Sandoval Regional Medical Center” or any variation thereof, in any endeavor that affiliates that activity or function with SRMC. Please contact SRMC Marketing, which reviews and approves additions and expansions to our official presence on social media sites, to obtain such approval. The SRMC logo or the logo of its affiliates or

joint ventures may not be used online without permission from SRMC Marketing.

K. Ensure that personal blogs have clear disclaimers. underscoring that the views expressed by the author in the blog are those of the author alone and do not represent the views of SRMC. Unauthorized communications shall not be made, or appear to be made, on behalf of SRMC or any related entities of the UNM HSC or UNM Health Systems.

L. Respect copyright laws. Please reference or cite all sources appropriately. Do not plagiarize; this applies online, as well as offline. When an employee leaves SRMC, material created during their employment is still considered SRMC property and is subject to the same policies.

M. Avoid using SRMC logos and trademarks without written consent from SRMC Marketing.

N. Understand that SRMC reserves its right to monitor Internet communications to the extent necessary to protect its rights or property and to protect against breach of confidential patient health information, which may be subject to legal proceedings and/or criminal charges.

O. Understand that everyone is responsible for their actions online, whether constructed as entries, comments or replies, and whether posting as an individual or anonymously. Use common sense and act in the best interests of SRMC and its affiliates at all times while online.

P. This policy is a policy of general applicability and therefore applies to all officers, agents, employees, students, and volunteers of SRMC. If SRMC, in its sole discretion, has determined that this policy has been violated, such violation(s) may constitute grounds for disciplinary action up to and including termination and may be grounds criminal or professional sanctions in accordance with UNM Health System and its affiliates' policies and personnel rules and regulations. Failure to comply with this procedure could result in personal legal liability.”

8. This Board’s records contain a Petition filed by the Union on May 18, 2022, *United Health Professionals of New Mexico, AFT & UNM Sandoval Regional Medical Center*, PELRB 304-22, seeking to represent a group of workers employed by the University of New Mexico Sandoval Regional Medical Center at its acute care hospital and supported by authorization cards obtained during the period November 20, 2021 to July 26, 2022, approximately.

From the pleadings I further find:

9. The PERLB has subject matter jurisdiction over this dispute and personal jurisdiction over the parties. (Respondent's Answer at ¶ 3).
10. Nancy Santiesteban and Gabby Borrego held a meeting with their staff on or about May 31, 2022. (Respondent's Answer at ¶ 8).
11. Nancy Santiesteban is currently the Medical Surgical Nursing Director for the 3rd, 4th and 5th floors at SRMC. (Exhibit 5 to Respondent's Motion for Summary Judgment, Declaration of Nancy Santiesteban ¶ 2).
12. On May 31, 2022, Nancy Santiesteban and Gabby Borrego held a routine Patient Care Tech ("PCT") meeting. (Exhibit 5 to Respondent's Motion for Summary Judgment, Declaration of Nancy Santiesteban ¶ 5).
13. The approved Agenda for the Patient Care Tech Meeting for May 31, 2022 does not mention any discussion of unions or unions activity. (Exhibit 6 to Respondent's Motion for Summary Judgment).
14. During the meeting, Ms. Santiesteban responded to questions and comments about the unions and/or their organizing campaign. (Exhibit 5 to Respondent's Motion for Summary Judgment, Declaration of Nancy Santiesteban).
15. Correen Bales is currently the Human Resources Administrator at SRMC. (Exhibit 7 to Respondent's Motion for Summary Judgment, Declaration of Correen Bales at ¶ 2).
16. Adrienne Enghouse is a PRN resource nurse who works average of 13 hours per week (between February 18, 2022 and May 18, 2022), as needed at SRMC. (Exhibit 7 to Respondent's Motion for Summary Judgment, Declaration of Correen Bales at ¶ 5).
17. Adrienne Enghouse has been put on notice regarding what SRMC calls "her interference into confidential employee issues". (Respondent's Answer at ¶ 9).

Based on the testimony and documentary submissions admitted at the Hearing on the Merits I further find:

19. After the effective date of the amendment to UPERRA making SRMC subject to the PEBA, i.e. on May 26, 2022, Ms. Bales put Ms. Enghouse “on notice” concerning what SRMC alleges is her “interference into confidential employee issues during working hours” by sending her an email reminding her that she had been informed on several prior occasions that SRMC’s antisolicitation policy prohibits her distribution of union related materials or literature during work hours. The e-mail also addressed alleged “coercion of employees to sign union cards.” (Exhibit 7 to Respondent’s Motion for Summary Judgment, Declaration of Correen Bales at ¶¶ 10 and 11; Exhibit J2; Testimony of Correen Bales, Audio Record Part 6 at 00:15:00 – 00:15:15.)
20. Sometime during the meeting of May 31, 2022 Ms. Santiesteban reminded those attending not to discuss Union business during work hours in work areas. (Testimony of Nina Rocha, Audio Record Part 1 at 00:38:50 – 00:39:58; Exhibit 5 to Respondent’s Motion for Summary Judgment, Declaration of Nancy Santiesteban at ¶ 7; Testimony of Nancy Santiesteban, Audio Record Part 4 at 00:23:00 – 00:59:00.)
21. At the end of the meeting SRMC employee Araceli Segura asked whether employees were required to sign authorization cards and where the process stood for the Union. (Testimony of Nina Rocha, Audio Record Part 1 at 00:15:00 – 00:15:40.)
22. In response to Ms. Segura’s questions, Ms. Santiesteban warned employees not to sign things they have not read and not to put their date of birth or Social Security number on documents. (Testimony of Nina Rocha, Audio Record Part 1 at 00:15:40 – 00:16:30).
23. Ms. Santiesteban’s warnings about being careful what you sign were in the context of an unnamed fifth floor PCT who allegedly expressed concern after having signed an

- authorization card on which he disclosed his Social Security number and now could not retract it. (Testimony of Nina Rocha, Audio Record Part 1 at 00:17:30 – 00:19:30; Testimony of Araceli Segura, Audio Record Part 3 at 00:12:30 – 00:13:05; 00:14:25 - 00:14:45; 00:23:25 - 00:23:59; Testimony of Nancy Santiesteban, Audio Record Part 4 at 00:16:45 – 00:19:40; 00:21:10 – 00:22:25; 00:36:35 – 00:37:05; Testimony of Gabriella Borrego, Audio Record Part 5 at 00:07:45 – 00:08:15.)
24. Review of the authorization cards submitted in support of PELRB 304-22, of which I have taken special notice, indicates that the cards do not request disclosure of the signer’s Social Security number.
25. Ms. Santiesteban also referred to an unnamed PCT being “pushed” into signing an authorization card, told the group that once signed, authorization cards cannot be retracted and that employees signing authorization cards would have to pay dues, which could be difficult to afford. (Testimony of Nina Rocha, Audio Record Part 1 at 00:17:30 – 00:19:00; 00:19:30 – 00:20:30; Testimony of Araceli Segura, Audio Record Part 3 at 00:11:10 – 00:12:06).
26. Ms. Segura was allowed to speak uninterrupted, discouraging the signing of authorization cards, because she had bad past experiences with unions. (Testimony of Nina Rocha, Audio Record Part 1 at 00:20:35 – 00:21:15; Testimony of Nancy Santiesteban, Audio Record Part 4 at 00:35:45 – 00:36:03; Testimony of Gabriella Borrego, Audio Record Part 5 at 00:09:55 – 00:10:25.
27. The meeting lasted approximately 40 minutes based on Zoom software limitations at the time, and ended abruptly when the Zoom session expired, so there was no opportunity for anyone to offer counter-information in opposition to the statements by Ms. Santiesteban or Ms. Segura. (Testimony of Nina Rocha, Audio Record Part 1 at 00:23:20 – 00:24:40.)

28. Ms. Santiesteban claimed in the meeting that the fifth-floor tech to whom she referred had been “bombarded” with requests to sign an authorization card. (Testimony of Nina Rocha, Audio Record Part 1 at 00:18:30 – 00:20:00; Testimony of Gabriella Borrego, Audio Record Part 5 at 00:9:10 – 00:09:55.)
29. Ms. Borrego testified that several employees complained to her about Adrienne Enghouse’s “continuous” efforts to get them to sign authorization cards and that the employees “felt very pressured and uncomfortable” because of those efforts. Testimony of Gabriella Borrego, Audio Record Part 5 at 00:17:20 – 00:18:10.)
30. Ms. Enghouse is subject to discipline up to termination for the policy violations she has been “put on notice” of having committed by SRMC. (Testimony of Correen Bales, Audio Record Part 6 at 00:03:50 – 00:04:01; 00:29:50 – 00:29:59.)
31. Ms. Enghouse considered the email, Exhibit J-2 reminding her of prior warnings about violating SRMC’s solicitation policy to be a threat of termination, particularly because it was coming from the head of Human Resources, not from the HR person usually dealt with. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 00:17:00 – 00:17:25; 00:40:40 – 00:43:10.)
32. Ms. Enghouse denies ever coercing any employee into signing an authorization card, the employer never followed up with her about any investigation into alleged coercion and as of the Hearing on the Merits no employee claiming to have been coerced has been identified. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 00:17:25 – 00:17:30; 00:35:50 – 00:35:59.)
33. Examples of solicitation common in the workplace, include employees selling cookies for Girl Scouts and popcorn for baseball teams, for which no one was ever disciplined or

threatened with discipline. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 00:31:55 – 00:32:25.)

34. Examples of non-work topics regularly discussed during the workday at SRMC include family matters, marriage and sports like baseball. (Testimony of Adrienne Enghouse, Audio Record Part 2 at 00:22:00 – 00:22:50.)

REASONING AND CONCLUSIONS OF LAW: According to my interpretation of the Stipulated Pre-Hearing Order entered herein, the following issues are to be determined:

1. Whether Nancy Santiesteban violated the PEBA during a mandatory Zoom meeting with staff on May 31, 2022 when, in the context of questions by an employee whether employees were required to sign authorization cards and where the process stood for the Union, she warned employees not to sign things they have not read, not to put their date of birth or Social Security number on documents and told employees that they could not speak about unions during work hours.
2. Whether SRMC’s Human Resources Director’s email to Ms. Enghouse, Joint Exhibit 2, constitutes a threat of discipline up to and including termination and whether the email directing her to cease communicating with employees regarding the union during work time violated the PEBA.
3. Whether SRMC’s social-media policy violates the PEBA.

I address each in order.

I. THE PREPONDERANCE OF THE EVIDENCE ESTABLISHED THAT NANCY SANTIESTEBAN’S COMMENTS DURING A MANDATORY MEETING WITH STAFF ON MAY 31, 2022, HER FAILURE TO INTERRUPT OR CORRECT ANTI-UNION COMMENTS BY ANOTHER EMPLOYEE AT THAT MEETING AND TELLING EMPLOYEES THAT THEY COULD NOT SPEAK ABOUT UNIONS DURING WORK HOURS, CONSTITUTES A PROHIBITED LABOR PRACTICE PURSUANT TO SECTIONS 19(B), 19(D), 19(E) AND 19(G).

A. Analysis of the Union’s Section 19(B) claims.

Section 19(B) of the Act provides that a public employer or the public employer's representative shall not:

“interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization; provided, however, that this subsection does not apply to activities performed or expenses incurred:

- (1) addressing a grievance or negotiating or administering a collective bargaining agreement;
- (2) allowing a labor organization or its representatives access to the public employer's facilities or properties;
- (3) performing an activity required by federal or state law or by a collective bargaining agreement;
- (4) negotiating, entering into or carrying out an agreement with a labor organization;
- (5) paying wages to a represented employee while the employee is performing duties if the payment is permitted under a collective bargaining agreement; or
- (6) representing the public employer in a proceeding before the board or a local board or in a judicial review of that proceeding;”.

In 2020 the New Mexico Legislature amended § 19(B) of the PEBA to add a provision regarding the use of public funds. Therefore, in order to prevail on its claim under § 19(B) in this case, the Union has the burden of proving either that SRMC's Medical Services Director, Nancy Santiesteban, interfered with, restrained or coerced a public employee in the exercise of a right protected by the Act by her comments during a mandatory meeting with her staff or, by failing to interrupt or correct anti-union comments by another employee at that meeting and telling employees that they could not speak about unions during work hours, *or* whether those same acts or omissions represent SRMC's use of public funds to influence the decision of its employees regarding whether to support or oppose a Union seeking to represent a group of SRMC employees, or to influence their decisions whether to become a member of the Union. Therefore, the Union may also prevail on its claim under §

19(B) if it proves that SRMC's Human Resources Director's email to Ms. Enghouse, Joint Exhibit 2, constitutes SRMC's use of public funds to influence the decision of its employees regarding whether to support or oppose the Union.

I conclude that the Union has proven that the Hospital's actions or inactions during its mandatory meeting with staff on May 31, 2022, constitute violations of both clauses of § 19(B).

As concerns § 19(B)'s prohibition against a public employer's interference with, restraint or coercion of a public employee in the exercise of a right guaranteed by the Act, it is undisputed that SRMC is a public employer. As a consequence, its employees are public employees as that term is used in § 19(B).²

The protected right at issue here is that in NMSA 1978 § 10-7E-5 (2020), whereby public employees, other than management and confidential employees³, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion as well as the right to refuse those activities. Additionally, Section 5 protects public employees' right to engage in "other concerted activities for mutual aid or benefit".⁴

In this case, on May 31, 2022, two management level SRMC employees, Nancy Santiesteban, Medical Surgical Nursing Director for the 3rd, 4th and 5th floors at SRMC, and Gabrielle Borrego conducted a routine mandatory meeting with their staff, required to be conducted

² I incorporate the reasoning and rationale in *LAMAW & UNM-SRMC*, PELRB 303-22, regarding SRMC employees' status as public employees notwithstanding being employed "at-will".

³ Although "supervisors" are omitted from the class of employees excluded from the PEBA's coverage in § 10-7E-5, their exclusion appears in § 10-7E-13(A). The PELRB has determined their absence from § 5 is a clerical error. See *Santa Fe Police Officers' Association v. City of Santa Fe*, 02-PELRB-2007 (Oct. 14, 2007).

⁴ Section 19(B)'s prohibition against interference, restraint or coercion regarding the exercise of § 5 rights or the use public funds to influence the labor relations decisions of employees is consistent with the obligation to maintain "laboratory conditions" during the period between the filing of a petition for recognition as an exclusive bargaining representative and certification of the bargaining unit, sometimes referred to as the "campaign" or "election period". See *General Shoe Corporation*, 77 NLRB 124, 126 (1948).

regularly by the employer. There is no reasonable doubt that during the meeting, Santiesteban was acting in an executive or management capacity on behalf of SRMC, effectuating SRMC's policy. It is immaterial that the agenda for the mandatory meeting contains no reference to the union or its activities because in the context of that mandatory meeting, Ms. Santiesteban chose to respond to an employee's questions about the union and its activities and those responses may reasonably be construed as reflecting SRMC management policy.

Those answers included a warning to employees not to sign things they have not read and not to put their date of birth or Social Security number on documents that in the context of a question concerning the Union and its organizing activities, may reasonably be interpreted as a warning against signing an authorization card. At a minimum her answer serves as a disincentive to or interference with signing an authorization card. Included in her response, Ms. Santiesteban referred to an unnamed fifth floor PCT who allegedly expressed concern after having signed an authorization card on which he disclosed his Social Security number and now could not retract it. That any such employee exists is doubtful. No such employee was called to testify at the hearing on the merits, no complaint of the kind alleged or request to withdraw a submitted authorization card was received by this agency or by the union and review of the authorization cards submitted in support of PELRB 304-22, of which I have taken special notice, indicates that the cards do not request disclosure of the signer's Social Security number. Regardless of the accuracy of the employee's alleged complaint to Ms. Santiesteban, she told employees in the meeting that the employee complained of being pressured into signing an authorization card, told the group that once signed, cards cannot be retracted and that employees signing cards would have to pay dues, which could be difficult to afford. Each of those statements, separately and together, may reasonably be

interpreted as a dis-incentive to or interference with signing an authorization card and were inaccurate. There is no evidence that either contention is true and the Union disputed them. Although at the Hearing on the Merits Ms. Santiesteban professed ignorance of the specifics of the union organizing process, she expressed no compunction about expressing as matters of fact, things that were not true, but which reflected negatively on the Union and its organizing effort.

In addition to her own statements, Ms. Santiesteban and Ms. Borrego, who were conducting the meeting, permitted Araceli Segura to speak uninterrupted about her past negative experiences with unions, discouraging the signing of authorization cards. Because Ms. Segura's negative comments were made toward the end of the time allotted for the Zoom call, they went un rebutted because the meeting abruptly ended in an anti-Union atmosphere. Therefore, both by her comments during the meeting and by the failure of either Ms. Santiesteban or Ms. Borrego, who were acting in their capacities as SRMC management personnel advancing SRMC policy interests, to interrupt or correct anti-union statements by another employee in the meeting they called and controlled, a reasonable inference may be drawn that their actions or inaction had the effect of discouraging membership in a labor organization, in violation of Section 19(B). That it did so is supported by one identified employee responding to the false claim that dues would be required of all employees by saying, "Oh, I didn't know that!" (Testimony of Araceli Segura, Audio Record Part 3 at 00:14:00 – 00:14:25.)

For the reasons stated in the Union's brief, I do not credit Ms. Segura's claim to have seen employee union activist Adrienne Enghouse pressuring another employee into signing an authorization card. That employee had already signed an authorization card before Ms. Segura began working at SRMC, lending credence to the inference that with her questions at

the May 31st meeting she displayed an anti-union bias for which the employer provided a forum without correction. That all involved in the meeting were on paid time using employer computer equipment to attend a meeting mandated by the employer to advance the employer's interests, demonstrates that SRMC used public funds to influence the decision of its employees whether to support or oppose the Union, which is seeking to represent those employees or whether to become a member of the Union. Therefore, the preponderance of the evidence established that the Hospital, by the aforementioned acts or omissions, committed a prohibited labor practice in violation of § 19(B).

B. Analysis of the Union's Section 19(D) claims.

Section 19(D) of the Act provides that a public employer or the public employer's representative shall not:

“discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization;”

In this case, Adrienne Enghouse, a PRN resource nurse has been “put on notice” regarding what SRMC calls “her interference into confidential employee issues”. That “interference” comprises her activities in the workplace on behalf of the Union both with regard to soliciting authorization cards and advocating for the Union generally in the workplace during the workday. By being “put on notice” Ms. Enghouse is subject to discipline up to termination and reasonably believes the threat of termination is imminent unless she ceases her Union activities, or at least curtails them in a way that satisfies her employer's perception of what she is permitted to do, because of prior warnings about violating SRMC's solicitation policy and because the email putting her on notice, Exhibit J-2, came from the Director of Human Resources, not from the HR person usually dealt with. Even implied threats of discipline can violate employees' rights to engage in concerted activity in the workplace. See, generally, *2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1828 (2011).

It is noteworthy that those warnings prior to May 26, 2022 dealt with distribution of union related materials or literature during work hours, not with soliciting authorization cards and the antisolicitation policy was only recently amended after the effective date of the PEBA's application to SRMC, to include a prohibition against distributing literature. See, Exhibit 3 to the Declaration of Dennis Tafoya submitted in support of the Hospital's Motion for Summary Judgment. The e-mail also addressed alleged "coercion of employees to sign union cards" without reference to whether the alleged "coercion" took place on company time or interfered in the conduct of the employer's business.

The evidence demonstrates that the Hospital errs by conflating two distinct issues – solicitation of authorization cards during worktime and discussing the union in the workplace during worktime. The Hospital applies its policies to prohibit both. For example, in her Declaration submitted in support of SRMC's Motion for Summary Judgment in this case, Ms. Santiesteban stated that she told Araceli Segura in the May 31, 2022 meeting that she "could not express her opinion for or against the union while at the nurse's stations." Exhibit 5 to MSJ at ¶ 7. During that meeting Ms. Santiesteban reminded all of those attending not to discuss Union business during work hours while at work. This restriction stands in marked contrast to other non-union related solicitations and topics of discussion accommodated by SRMC, such as selling cookies for Girl Scouts and popcorn for baseball teams, non-union related, non-work-related topics regularly discussed during the workday at SRMC including family matters, marriage and sports for which no one was ever disciplined or threatened with discipline. The preponderance of the evidence demonstrates that SRMC has generally sought to chill any discussions of the Union in the workplace during work hours by singling out any discussion of the Union as being uniquely prohibited. Such prohibition constitutes interference with restraint or coercion of those public employees trying to make an informed decision about whether or not to choose representation by the Union in general, and the

rights of public employee Adrienne Enghouse in particular, guaranteed by § 5 of the Act to join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion.

To the extent SRMC relies on its policies to restrict the distribution of union literature to a break room in off hours only and to restrict talking about the Union altogether, I agree with the Union's closing brief that such policies can be deemed invalid and improper if they inhibit protected solicitations by Union organizers and such policies may not discriminate against union solicitations. See John E. Higgins, *The Developing Labor Law*, §§ 6.II.B.1.a (6th Ed. 2012). The NLRB has found a violation when a supervisor told a nurse that she could not talk about an impending union meeting while at a nurses' station. *Id.* citing *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006). Because the Hospital has conflated solicitation and discussions, its application of its policies to the facts of this case is fundamentally flawed. As stated in *Scripps Memorial Hospital Encinitas* at 1254, such conversations do not constitute solicitation but rather involve "simply engaging in talk about the union." To the extent any of the Hospital's policies impinge upon employee rights secured by §5 of the Act, those policies would be unenforceable as discussed under the heading below concerning the Hospital's social-media policy. Accordingly, I conclude that the preponderance of the evidence established that SRMC discriminated against putative bargaining unit employees generally and Adrienne Enghouse particularly, in regard to tenure or a terms or conditions of employment in order to encourage or discourage membership in a labor organization through its application of its policies to restrict discussion of the union in the workplace as it has done and by putting Adrienne Enghouse on notice on May 26, 2022. Those acts by the Employer constitute a prohibited labor practice under § 19(D) of the Act.

C. Analysis of the Union’s Section 19(E) claims.

Section 19(E) of the Act makes it a prohibited practice for a public employer to “discharge or otherwise discriminate against a public employee because the employee has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization”.

The Hospital at least implicitly has acknowledged that Adrienne Enghouse has been active in the Union organizing effort and has been generally vocal about supporting the Union. For example, she has been confronted and/or chastised by management for those efforts as appears from the May 26, 2022 email from the Director of Human Resources, Correen Bales, Exhibit J2. In consideration of her union activities, together with the facts and arguments discussed in the analysis of the Union’s Section 19(D) claims above, the Union has prevailed on its claim that SRMC otherwise discriminated against a public employee, Adrienne Enghouse, because she is forming, joining or choosing to be represented by a labor organization, in violation of Section 19(E) of the Act.

C. Analysis of the Union’s Section 19(G) claims.

Section 10-7E-19(G) is sometimes referred to as a “catch-all provision” for violations of any substantive PEBA rights other than those specifically enumerated in §§ 10-7E-19 to 22. One should not consider a claim under § 19(G) as an opportunity for a Complainant to establish multiple violations for the same offense. Otherwise, substantiating a claim under § 19(G) “would result in duplicative liability, and it is unlikely the Legislature intended every violation of a subsection of §19 to result in two separate counts of liability”. See *AFSCME v. Department of Corrections*, PELRB Case No. 150-07 Hearing Examiner’s Report at 3 (Feb. 6, 2008).

Neither the Complainant’s PPC, the Stipulated Pre-Hearing Order or its closing brief make clear which of the several acts by the Hospital which the Union complains about, are intended to state a

claim under § 19(G)'s prohibition against violating the Act or the Board's rule. While it is possible that Complainant intended the alleged violations of representative rights pursuant to the *Weingarten* case to be the sort of substantive right that may be vindicated under § 19(G), the reader should note that I do not base this decision on anything other than the employer's activities occurring after the date the Hospital became subject to the PEBA. To the extent testimony or exhibits were admitted and considered, I did so solely for the historic context they lent to those events occurring after May 18, 2022. Accordingly, I do not consider the Union's well-researched and well-argued brief concerning an alleged *Weingarten* violation that occurred in March of 2022.

I do find, however, that the Hospital's application of its rules to the Union and its organizers also concern substantive rights under the Act that § 19(G) was intended to redress.

With regard to the Hospital's social-media policy, I adopt the Union's argument in its closing brief that it offends substantive rights protected under the PEBA, including those by which the employer purports to investigate Ms. Enghouse for pressuring employees to sign authorization cards. The Hospital's social-media policy, like its anti-solicitation policy, inhibits protected rights to engage in concerted activity, and discriminates against unions, their members and supporters. As the Union pointed out, the NLRB has found that the mere maintenance of such overbroad work rules as these can violate the protections of Section 8(a)(1) of the NLRA. *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978). When evaluating a facially neutral rule or policy "the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing Co.*, 365 NLRB No. 154 (2017). Previously, the NLRB had held that a rule is unlawful if it explicitly restricts activities protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

As concerns the employer's allegations that its employees were somehow coerced into signing authorization cards, I conclude such inferences to be without basis. The NLRB in *Flamingo Hilton-*

Laughlin, 330 NLRB 287, 295 (1999), held that that propaganda during a union campaign is protected and does not lose the protection of the Act even when it includes “intemperate, abusive and inaccurate statements”, which the facts here would not support. Such union propaganda, including the distribution of literature, may only be prohibited when it is “libelous, defamatory, scurrilous, abusive or insulting or [is] literature which would tend to disrupt order, discipline or production within the plant”. No facts exist in this case that would support a conclusion that the union organizing campaign engaged in libelous, defamatory, scurrilous, abusive or insulting conduct, or that its literature would tend to disrupt order, discipline or production within the Hospital. The Union cites to *Linn v. United Plant Guards*, 383 U.S. 53 (1966); and *Great Lakes Steel*, 236 NLRB 1033, 1036-1037 (1978) for that proposition.

In this case, the Hospital’s social-media policy includes the following provisions:

1. Employees must not be “disrespectful ... when representing themselves as SRMC employees.” Exhibit J1 at 1-2(A).
2. Employees may not give “a negative impression of SRMC.” Id. at 2(A).
3. Social-media activity must be limited during work time. Id. at 3(D).
4. When contacted by the news media regarding any issue involving employees, those inquiries must be redirected to SRMC management. Id. at 3(E).
5. Employees may not “engage in impolite online dialogue.” Id. at 3(F).
6. Online posts must be “appropriate.” Id. at 3(G).
7. SRMC maintains sole discretion to determine whether the policy has been violated. Id.
8. Violations of the policy could lead to discipline up to and including termination. Id. at 3(D).

All of the above activities limited by the employer's policy are integral to Union organizing and maintaining a bargaining unit, as well as negotiating, monitoring and enforcing a collective bargaining agreement once one is reached. Because the policy is so broad neither the Union nor its members would be able to criticize SRMC in any way without risking being "disrespectful", giving a negative impression of SRMC or being judged to be impolite or otherwise inappropriate, whatever those terms might mean at any given time to the employer. The employer reserves to itself the sole prerogative of determining whether the policy has been violated. Even the most mild, mundane or routine of Union postings online raising workplace concerns risks termination of the poster's employment under this policy. Accordingly, SRMC's Social Media Policy falls into the category of unlawfully restrictive company policies that chill or inhibit rights protected under the NLRA and their counterparts under the PEBA. SRMC's social-media policy is therefore unenforceable as to the Union, its members and officers and members of the putative bargaining unit.

DECISION: The Respondent violated the prohibitions of NMSA 1978 § 10-7E-19(B) (2020), making it a prohibited practice for a "public employer or his representative" to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]"; or use public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization, with certain exceptions that do not apply here. That violation occurred on May 31, 2022 when SRMC's Medical Surgical Nursing Director, Nancy Santiesteban, conveyed to employees during a mandatory meeting misleading and negative comments about the Union, and further, allowed one employee at the meeting to speak negatively about unions, while telling the participants that they could not speak about unions during work hours.

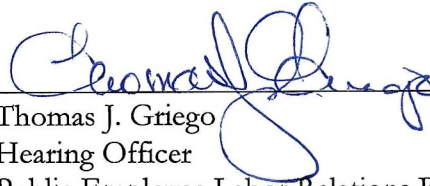
I further conclude that SRMC discriminated against putative bargaining unit employees generally and Adrienne Enghouse particularly, in regard to tenure or a terms or conditions of employment in order to encourage or discourage membership in a labor organization through its application of its policies to restrict discussion of the union in the workplace as it has done and by putting Adrienne Enghouse on notice on May 26, 2022. Those acts by the Employer constitute a prohibited labor practice under § 19(D) of the Act.

The Union has also met its burden of proving by a preponderance of the evidence that SRMC otherwise discriminated against a public employee, Adrienne Enghouse, because she is forming, joining or choosing to be represented by a labor organization, in violation of Section 19(E) of the Act.

With regard to its claim that SRMC violated NMSA 1978 § 10-7E-19(G) (2020) prohibiting a public employer's refusal or failure to comply with a provision of the Public Employee Bargaining Act or board rule, I conclude that SRMC's Social Media Policy falls into the category of unlawfully restrictive company policies that chill or inhibit rights protected under § 5(A) of the PEBA guaranteeing public employees the right to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and § 5(B) guaranteeing those employees the right to engage in other concerted activities for mutual aid or benefit.

WHEREFORE, Respondent should be Ordered to: (1) cease and desist from all violations of the PEBA as found, including enforcing its social media policy against the Union, its constituents or its officers; and (2) post notice of its violation of PEBA as found herein in a form acceptable to the parties and this Board for a period of 30 days and assurances that it will comply with the law in the future.

Issued, Wednesday, September 28, 2022.

A handwritten signature in blue ink, appearing to read "Thomas J. Griego", is written over a horizontal line.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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