3-PELRB-2018

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

**In re:**

**NEW MEXICO COALITION OF PUBLIC SAFETY OFFICERS,**

**Petitioner,**

**v.** **PELRB CASE NO. 118-17**

**SANTA FE COUNTY,**
**Respondent.**

## ORDER

**THIS MATTER** comes before the Public Employee Labor Relations Board by Director Griego to inform the Board of his Summary Judgment Decision dismissing the case. Parties were present and Petitioner stated to the Board, at its regularly scheduled meeting on January 9, 2018, that the Petitioner had no objections to the Director's dismissal of the case. The Board being sufficiently advised finds by a vote of 3-0 the following:

**A.** There is sufficient evidence demonstrating that Director Griego did not err in finding that the complaint failed to state a claim.

**THEREFORE THE BOARD** adopts and ratifies Director Griego's Summary Judgement Decision dismissing the complaint.

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

1-17-18
DATE

DUFF WESTBROOK, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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THOMAS J. GRIEGO
Executive Director

November 30, 2017

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Attn: Dina Holcomb, Esq.

Re: ***N. M. Coalition of Public Safety Officers v. Santa Fe County; PELRB 118-17***

Dear Ms. Holcomb and Mr. Terry:

On October 12, 2017 Santa Fe County filed an Alternative Motion to Dismiss or for Summary Judgment in this case. The Union timely responded to the Motion on October 24, 2017, relying upon the allegations of and exhibits to its Amended PPC. No further documentation or counter-affidavits to support its response to the County's Alternative Motion to Dismiss or for Summary Judgment were tendered. Oral argument on the Motion was heard November 21, 2017. What follows is my decision granting the County's Motion.

## STANDARD OF REVIEW:

When deciding Motions to Dismiss the PELRB has historically applied the standard found in New Mexico Rule of Civil Procedure 1-012(B)(6), whereby the Hearing Officer accepts all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. See *Herrera v. Quality Pontiac*, 2003 NMSC 18, ¶ 2, 134 N.M. 43, 46. Dismissal on 12(B)(6) grounds is appropriate only if the Complainant is not entitled to recover under any theory of the facts alleged in their complaint. *Callahan v. N.M. Fed'n of Teachers-TVI*, 139 N.M. 201, 131 P.3d 51 (2006). A motion to dismiss is predicated upon there being no question of law or fact. *Park Univ. Enter's., Inc. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). Granting a motion to dismiss is an extreme remedy that is infrequently used. *Town of Mesilla v. City of Las Cruces*, 120 N.M. 69, 898 P.2d 121, 1995-NMCA-058, ¶ 4.

When deciding a motion for summary judgment the PELRB has long followed New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Department of Labor*, 01-PELRB-2007 (Oct. 15, 2007). Applying that rule, the movant shall set out a concise statement of all material facts about which it is contended there is no genuine dispute. The facts set out shall be numbered and the motion shall refer with particularity to those portions of the record upon which

the party relies. See N.M. Rul. Civ. Pro. Rule 1-056. Summary Judgment will be granted only when there are no issues of material fact with the facts viewed in the light most favorable to the non-moving party. The movant has the burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." If that threshold burden is met by the Movant, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.* 150 N.M. 123, 257 P.3d 943, (N.M. 2011); *Smith v. Durden*, 2012-NMSC-010, No. 32,594; *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). See also, *Bartlett v. Mirabal*, 2000-NMCA-36, 917, 128 N.M. 810, 999 P.2d 1062, quoting *Eoff v. Forest*, 109 N.M. 695, 701, 789 P.2d 1262 (1990); *Gardner-Zemeke*, 1990 NMSC 034, ¶ 11. The non-moving party "cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contentions to defeat the Motion once a prima facie showing has been made:" *Ochswald v. Cristie*, 1980 NMSC 136, ¶ 6, 95 N.M. 251, 620 P.24:1 1276. As non-movant, Petitioner's response must contain specific facts showing that there is an actual issue to be tried. *Livingston v. Begay*, 1982 NMSC 121, 98 N.M. 712, 717 P.2d 734.

## MATERIAL FACTS NOT IN DISPUTE:

1. David Jaramillo is an employee of the County and a member of and currently the President of, the recognized collective bargaining unit representative, New Mexico Coalition of Public Safety Officers ("Union"). Salazar Affidavit ¶ 6; Amended Complaint ¶¶ 1-5 and the County's Answers thereto.
2. The Union is a labor organization and the County is a Public Employer subject to the PEBA. Amended Complaint ¶¶ 2-4 and the County's Answers thereto.
3. At all times relevant hereto, the County and the Union were parties to a Collective Bargaining Agreement (CBA) with an effective term of January 26, 2016 to December 31, 2019. Amended Complaint ¶4 and the County's Answers thereto; CBA Exhibit B to County's Motion.
4. The CBA has been amended three times; the third and most recent amendment adding a new Section 57 to provide for a grievance procedure addressing alleged violations of the CBA required by Section 10-7E-17 of the Public employee Bargaining Act. Salazar Affidavit
5. On or about December 28, 2016 Detective David Jaramillo told his Commanding Officer, Sergeant James Yeager, that while refueling his county vehicle at a County station that day he observed one detective was driving another's vehicle, and that he did not know whether that was inappropriate. Amended Complaint ¶¶ 6-10; Exhibit 2 to the Amended Complaint; Administrative inquiry Memorandum, Exhibit 7.
6. Jaramillo's "report" to Sergeant Yeager was not a complaint alleging violation of Department SOP or County rules of conduct but was "just making conversation" according to an investigative report in which Jaramillo also stated "he was not offended by the action, but wasn't sure if it was appropriate." Recommendation for Disciplinary Action, Exhibit 3 to the Amended Complaint ¶ 14.
7. In early February 2017 Lt. Diego Lucero conducted an "administrative inquiry" into alleged harassment by David Jaramillo against a fellow officer by ridiculing his manner of

dress in front of others during a briefing session, the result of which was a recommendation that Jaramillo serve a one day suspension. See Exhibit 7 to the Amended Complaint.

8. The CBA addresses the procedure for conducting an administrative inquiry in Section 28.
9. After hearing Detective Jaramillo's side of the story, the Sheriff but rescinded the proposed suspension. Salazar Affidavit in support of the County's Motion. ¶¶ 18 and 20.
10. As a result of the complaint of harassment, Detective Jaramillo was transferred from the Criminal Investigations Division to the Patrol Division effective February 11, 2017. Amended Complaint ¶¶ 38 and 39 and the County's Answers thereto; Exhibit 5 to the Amended Complaint.
11. The Sheriff's stated reason for the transfer was "a complaint involving" Jaramillo, which complaint is that investigated by Lt. Diego Lucero in February 2017. Exhibit 5 to the Amended Complaint.
12. The Santa Fe County Human Resources Handbook, Section 7 defines discipline as oral reprimand, written reprimand, suspension, demotion or dismissal. Exhibit A to Complainant's supplemental submission.
13. The parties' CBA does not define the term "discipline", but does provide in Section 29 (E) that discipline includes "verbal or written reprimand or warning" and in Section 30 that the CBA's disciplinary grievance process is available only for cases of suspension, demotion or termination. Exhibits K and N to the County's Motion; CBA, unmarked exhibit to Amended Complaint.
14. Section 10(F) of the parties' CBA specifically states, in relevant part: "Specialized job assignments and additional duty assignments are not considered a promotion, and transfers from a specialized assignment shall not be considered a demotion." Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶ 15; CBA Section 10, Exhibit 6 to the affidavit.
15. The County could not accept and process a grievance filed by Jaramillo objecting to his transfer back to the patrol division because by application of Section 10 of the parties' CBA the transfer is not disciplinary action, and therefore not a proper subject for the then-existing grievance procedure. Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶ 15; CBA Section 10, Exhibit 6 to the affidavit.
16. As a result of his transfer from the Criminal Investigations Division to the Patrol Division Jaramillo lost $310.00 per month "Specialty Pay" paid to Detectives pursuant to Section 40 of the CBA appended as an unmarked exhibit to the Amended Complaint.
17. The CBA's Section 30 grievance process did not apply to Jaramillo's transfer from the Criminal Investigations Division to the Patrol Division because it is not a suspension, demotion or dismissal. CBA § 30, attached to Motion as Exhibit K.
18. Because Jaramillo's transfer and attendant loss of specialty pay is not discipline, Section 29 of the CBA is not applicable. CBA, unmarked exhibit to Amended Complaint.
19. None of the SOP's or CBA provisions referenced by the Union in its Amended Complaint and Brief in opposition to the Alternative Motion prohibit one detective from driving

another detective's vehicle, although SOP 5-3 does state that the "responsibility for the care and maintenance of the vehicles rest with the deputy assigned to that vehicle".

20. I take administrative notice of the fact that absent a rule or policy prohibiting it, one detective driving another's vehicle does not constitute misuse of County property and that absent intent to deprive the County of the vehicle it cannot reasonably be considered to be conversion.
21. The ability of the Sheriff to transfer employees in the best interests of the County is a reserved management right under Section 2 of the parties' CBA as long as it comports with the requirement of Section 10 (F) of the CBA that a reason for the transfer is provided. CBA, unmarked exhibit to Amended Complaint.
22. The record contains no evidence that the County changed the application of its SOPs, the administrative investigation or transfer processes in any way.
23. The Peace Officer's Employer-Employee Relations Act, NMSA 1978, §§ 29-14-1 to 11, ("POEERA) is expressly incorporated into Section 28(L) of the parties' CBA, unmarked exhibit to Amended Complaint.
24. The PEBA, NMSA 1978 § 10-7E-17(F) (2003), requires *inter alia* that a CBA to include a grievance procedure "to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters."
25. Because Section 30 of the parties' CBA did not appear to meet the requirements of the PEBA § 17 because it limited grievances to disciplinary matters, the HR Director for the County proposed amending the CBA to permit the filing of grievances over employment terms and conditions and related personnel matters that are alleged to violate the CBA and to retroactively permit application of the amendment to Jaramillo's transfer from the Criminal Investigations Division to the Patrol Division. Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶¶ 20 and 21; Exhibit 10 to the affidavit.
26. On July 7, 2017, Mr. Jaramillo filed a new grievance pursuant to the amendment Section 57(E); however, the grievance was facially deficient as it did not contain the minimum requirements of a grievance as set forth in Section 57(E). Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶22; Exhibit 5 to the affidavit.
27. Despite rejection of the grievance for facial inadequacy, Ms. Salazar met with Mr. Jaramillo and Mr. Griffith on August 3, 2017, "to hear and better understand their concerns." Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶23.
28. Rejection of Jaramillo's grievance without a written response was not an impediment to him pursuing the next level of the grievance process by appealing to the County Manager because Section 57(E) provides: "Should either party fail to respond to a grievance within the time limits expressed herein, the grievant may appeal to the next level of the grievance procedure within the time limits set forth as if a timely response has occurred." Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶24; Exhibit 5 to the affidavit.
29. Mr. Jaramillo did not appeal to the County Manager, thus forfeiting his right to further appeal. Affidavit of Bernadette Salazar in support of the County's Alternative Motion, ¶25; Exhibit 5 to the affidavit.

## ANALYSIS AND CONCLUSIONS:

I. **Interference with, restraint or coercion of a public employee in the exercise of a right guaranteed by the Public Employee Bargaining Act - § 19(B).** In paragraph 81 of its Amended PPC the Union alleges that by the various breaches of contract and substantive law alleged in preceding paragraphs, the County interfered with, restrained or coerced David Jaramillo in the exercise of his right guaranteed by the Public Employee Bargaining Act. At oral argument the Union clarified that the PEBA right at issue in this § 19 (B) is that found in § 5 to form, join or assist the employees' chosen labor organization. See NMSA 1978 §10-7E-5 (2003).

The record is devoid of any connection between the events alleged in the Amended PPC and Jaramillo's status as a union member or officer. It is devoid of any facts that would support a conclusion that his rights to form, join or assist NMCPSO have been impaired or interfered with in any way. A claim brought under § 19 (B) is generally brought for claims of retaliation for or interference with an employee union representative's conducting union business. This Board has previously held that § 19(B) and §19(D) of PEBA are intended for those kinds of claims. See *AFSCME v. Department of Corrections*, Hearing Examiner's Report at 2-3, 16 (Feb. 6, 2008). By application of the standard set forth in N.M. Rul. Civ. Pro. Rule 1-056 Summary Judgment in favor of the County is appropriate with regard to the § 19 (B) claims because there are no issues of material fact even when viewed in the light most favorable to the non-moving party. NMCPSO has not met its burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted" and the § 19(B) claim is therefore dismissed.

II. **Domination of or interference in the formation, existence or administration of a labor organization - § 19(C) claim.** A provision of the National Labor Relations Act that is essentially identical to the PEBA § 19(C) claim has been held to address a very narrow type and limited number of activities, such as establishment of a "company union; infiltration of unions by lower-level supervisors; or failing to maintain neutrality between competing unions. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (6th Ed.) at 448-449. Unions frequently cite this PEBA section incorrectly, claiming violations of § 19(C) when an employer limits a union's access to employees, disciplines union stewards for union activity, engages in direct dealing or for other claims involving interference with *employees'* PEBA rights as contrasted with the rights of the union itself. As was made clear during oral argument and review of the amended PPC, the factual basis for this claim is the same as that for the alleged failure to bargain in good faith discussed more fully under the section dealing with § 19(F), *infra.* Setting aside for the moment whether the same acts that give rise to a claim under § 19 (F) may also state a separate charge under § 19(C), as with the § 19 (B) claim discussed above, the record is similarly devoid of any connection between the events alleged in the Amended PPC and any formation, existence or administration of NMCPSO. By application of the standard set forth in N.M. Rul. Civ. Pro. Rule 1-056 Summary Judgment in favor of the County is appropriate with regard to the § 19 (B) claims because there are no issues of material fact even when viewed in the light most favorable to the non-moving party, NMCPSO has not met its burden of producing "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted."

**III. Discrimination against Jaramillo for information or testimony given pursuant to the provisions of the Public Employee Bargaining Act - § 19(E) claim.** For its § 19 (E) claim the union looks to alleged violations of County rules requiring the reporting of employee misconduct and required notices pursuant to the Peace Officer's Employer-Employee Relations Act, (POEERA), incorporated into the parties' CBA and the "acts alleged in this complaint", which are the same acts that are the basis for its breach of contract and failure to bargain claims. See ¶ 85 of the Amended PPC. The relevant portions of the Amended PPC laying out the claim appear at ¶¶ 71-74, in which the Union alleges Jaramillo's entitlement to POEERA protections expressly incorporated into the parties' CBA, Section 28(L). Apparently the "information or testimony given pursuant to the provisions of the Public Employee Bargaining Act" is statements by Jaramillo in connection with two separate administrative investigations into workplace complaints; one on January 4, 2017 wherein Detective Martinez complained of action taken by his supervisor, Sergeant Yeager and the second on February 17, 2017 wherein Detective Lawrence Martinez complained of Jaramillo sending a text to a co-worker mocking Martinez' mode of dress.

The Union relies on that portion of the February complaint in which Martinez states that "On/about the first week of January 2017, I filed a formal complaint against Det. David Jaramillo and Sgt. James Yeager alleging that the two were engaging in gossip about myself [sic] and Det. Amber Marez" for the proposition that Jaramillo was, in fact, the target of the January investigation See Exhibit 4 to the Amended PPC. That reliance is misplaced. Martinez' statement is not determinative of who was or was not the target of the Department's investigation. It is the employer generally and the investigator specifically who determines who the target of an investigation is at the time the investigation is conducted.

It is factually incorrect that Jaramillo was the target of the January 4 investigation. The target of that investigation was Sergeant Yeager and discipline was administered to the Sergeant as a result. On that point I rely on the complaint by Detective Martinez, Exhibit 1 to the Amended PPC and Exhibit 3, the investigative report resulting from the complaint. Both documents could not be clearer that the target of the investigation was Sgt. Yeager. According to the investigative memorandum regarding the second complaint, Jaramillo acknowledges that the investigator in that case told him that he was *not* the target of the investigation and that *no disciplinary action* would be taken against him. See Exhibit 7 to the Amended PPC. Consequently, the Union's remaining "facts" supporting the claim are all immaterial, because one who is not the target of an investigation is not entitled to the POEERA notice requirements on which the union's claim is based.

Accordingly, the union's allegations that Jaramillo was discriminated against because he did not receive or review a copy of Detective Martinez's January 4, 2017 complaint; was not notified that he was a target of that investigation or that disciplinary action could result the investigation; that he was not notified of the outcome or conclusion of the investigation; was never notified that Detective Martinez believed that he was engaged in gossiping or rumoring, as required by POEERA, are not factually supported because he was not the target of that investigation. At oral argument the union

did not identify any other contractual obligation to perform any of the omissions complained when a Deputy is not the target of the investigation tacitly admitting that POEERA notice requirements apply only when the employee *is* a target of the investigation. My own review of the CBA, including its incorporated policies, procedures and statutes reveal no such notice requirements unless an employee is a target. Despite the absence of a contractual obligation to give Jaramillo the various notices outlined above, the Union argues that the County nevertheless violated notice provisions in POEERA because the February 17 investigative report, in which Jaramillo *was* the target, referred to the January 4 investigation. By that argument the Union seeks to import after the fact legal and contract protections intended for the targets of investigations into non-target questioning where they plainly do not apply. It is of further interest to note that any reference to the fuel pump incident investigated in the January 4 report was initiated by Jaramillo, not by the investigator. After allowing Jaramillo to review the complaint against him the investigator asked him to "…explain to me *what occurred in briefing*. Det. Jaramillo stated that he would have to start with the first complaint which was filed by Det. Martinez approximately one month prior." See Exhibit 7 to the Amended Complaint. (Emphasis added). Rather than limit his response to the question posed by the investigator, Jaramillo chose to expand the scope of the investigation to include a separate investigation in which he gave a non-target witness statement a month earlier. It is disingenuous to complain now that the February investigation referred to that earlier investigation when Jaramillo introduced it into the investigation in the first place.

The record is devoid of any evidence that Jaramillo has been discriminated against in any fashion as a result of his statements in either investigation. The union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Because there are no issues of material fact even when viewed in the light most favorable to the non-moving party, NMCPSO's claim under § 19 (E) of the PEBA should be summarily dismissed.

**IV. Failure to Bargain in Good Faith - § 19(F) Claims.** The Union alleges multiple failures to bargain in good faith all of which arise from similar allegations. To wit:

a. The County made unilateral changes in the implementation and administration of its misconduct reporting rules, complaint investigation rules and other unspecified "established Employer policies and the CBA" (¶¶ 75 and 76 of the Amended Complaint).

b. The County made unilateral changes in the implementation and administration of its requirements for compliance with Sheriff's regulations, presumably requirements for reporting misconduct. (¶ 77 of the Amended Complaint).

c. The County made unilateral changes to the implementation and administration of its administrative investigations, including notice and reporting requirements, in violation of established Employer policies, the CBA, and POEERA. (¶ 78 of the Amended Complaint).

d. The County made unilateral changes to the implementation and administration of its progressive discipline rule. (¶ 79 of the Amended Complaint).

e. The County unilaterally changed the interpretation of "gossiping" or spreading "rumors" in the context of disciplinary proceedings by departing from the common and ordinary definitions of those terms. (¶ 80 of the Amended Complaint).

With respect to these claims the Union conflates the concept of *breach* of a duty with a *change* to policies and contract giving rise to the duty. While reasonable minds may differ as to whether the County breached its obligations as outlined in the foregoing referenced paragraphs, the record is devoid of any evidence whatsoever that the County unilaterally changed them without bargaining. The Union and the County entered into the CBA effective January 26, 2016, to December 31, 2019 and subsequently bargained three amendments to that CBA. Without any evidence that the County made material, substantial and significant unilateral changes to the CBA or policy language regarding complaint investigation procedures or progressive discipline rule failure to bargain claims based on those allegations fail to state a claim. With regard to the allegation that the County unilaterally changed the interpretation of "gossiping" or spreading "rumors" in the context of disciplinary proceedings by departing from the common and ordinary definitions of those terms, that claim rests on the false assumption that Jaramillo's speculation about the relationship between two fellow detectives was communicated only to his supervisor Sergeant Yeager. Putting aside for the sake of argument whether that communication alone was sufficient to constitute "publication", the assumption overlooks the fact the Jaramillo also communicated his speculation to a third party, Detective Arndt, according to the investigative report by Lt. Diego Lucero. The union has much to say about Jaramillo's obligations under Department SOPs and the CBA itself to report possible misconduct to a commanding officer; however, in his statement to Lt. Diego Lucero during the January investigation into a complaint against Sergeant Yeager, Jaramillo's denied he was making a report of any alleged violation of department SOP or County rules of conduct but was "just making conversation." Accordingly, it cannot be said that the County unilaterally changed the interpretation of "gossiping" or spreading "rumors" in the context of disciplinary proceedings by departing from the common and ordinary definitions of those terms based on a reporting requirement that does not apply here. Ascribing Jaramillo's comments as a required report is clearly an after-the-fact construct insufficient to support NMCPSO' § 19(F) claim.

Furthermore, the parties' CBA belies the notion that the County has failed to bargain the mandatory subjects alleged. Misconduct reporting rules, complaint investigation rules have been bargained as appears by Sections 2A, 2C3, 28, 29 and 30. Requirements for compliance with Sheriff's regulations appear in Section 2. Administration of Sheriff's Department administrative investigations, including notice and reporting requirements and POEERA application have all been bargained as appears by Sections 2A, 2C3, 28, 29F and 30. The imposition of discipline, including whether progressive discipline principles apply was bargained in Section 29 when the parties agreed that the County reserves the right "… to discipline the bargaining unit employee as it determines to be necessary." In Section 1, the Preamble to the CBA the parties agreed that "The Sheriff's Office Standard Operating Procedures, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through the authority of the Sheriff shall govern any issues not agreed to [in the CBA]". Those incorporated policies would include issues of "gossiping" or spreading "rumors" in the context of disciplinary proceedings and have therefore been fully bargained. In light of the foregoing it is apparent that each matter underlying the union's claim of failure to bargain in violation of Section 19(F) has been bargained by the parties and each is currently part of their CBA. Each is therefore "covered" by the CBA. See *CWA v. PED*, PELRB No. 131-11, Hearing Officer's Report and Recommended Decision (October 12, 2012) re: contract coverage

theory. Under the contract coverage doctrine the County need not establish that is has correctly interpreted the CBA (that question pertains to whether the County breached the CBA in violation of Section 19(H), not whether there was a failure to bargain), but only that the matter in dispute is "covered by" the CBA.

A PPC over failure to bargain unilateral changes should be reserved for situations where the contract does not speak to the specific issues in dispute and there was no bargaining or where a clear term of the contract was modified in violation of the duty to bargain in good faith. Neither of those situations exists here. With regard to the claims that the County failed to bargain in good faith concerning the issues before me there are no issues of material fact with the facts viewed in the light most favorable to the union that would prevent Summary Judgment unless rebutted. The union has not demonstrated the existence of specific evidentiary facts that would require trial on the merits. Because a party opposing Summary Judgment may not rest on mere allegations of the complaint but must produce counter affidavits or other evidence to demonstrate a triable issue, I conclude that the union's claim that the County violated § 19 (F) of the PEBA by refusing to bargain collectively in good faith over implementation and administration of its misconduct reporting rules, complaint investigation rules, other unspecified "established Employer policies and the CBA", Sheriff's regulations, administrative investigations procedures, notice and reporting requirements, POEERA requirements, progressive discipline rule or the interpretation of "gossiping" or spreading "rumors" rules, fails to state a claim. Additionally, the union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Accordingly, the § 19(F) claim is dismissed. All other reasons posited by the County for dismissal of § 19(F) claims are specifically rejected.

**V. Refusal or Failure to Comply with a provision of the Public Employee Bargaining Act or Board rule - § 19 (G) Claim.** This claim rests upon the Union's allegations that the Employer failed to bargain the application of its reporting rules contrary to §§ 5, 15(A), and 17(A) of PEBA. See ¶¶ 56, 57, 75, 76, 77 and 78 of the Amended PPC.

NMSA 1978, § 10-7E-5 is that provision in the PEBA that protects the fundamental right of employees to engage in, or refrain from, collective bargaining as they may choose:

> "Public employees, other than management employees and confidential employees, may form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and shall have the right to refuse any such activities."

As demonstrated by the analysis of NMCPSO's claims under the PEBA §§ 19(B), 19(C), 19(E) and 19(F) analyzed above, there is no connection between the events impacting Jaramillo and the fundamental right of employees to engage in, or refrain from, collective bargaining in § 5. The union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Because there are no issues of material fact even when viewed in the light most favorable to the non-moving party with regard to whether the County violated NMSA 1978, § 10-7E-5, NMCPSO's

allegations that the County violated that section of the Act cannot form the basis of its claim that the County failed to comply with a provision of the Public Employee Bargaining Act or Board rule in violation of § 19(G).

NMSA 1978, § 10-7E-15(A) provides:

> "A labor organization that has been certified by the board or local board as representing the public employees in the appropriate bargaining unit shall 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."

For the same reasons as discussed in my analysis of § 10-7E-5 above, the union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Because there are no issues of material fact even when viewed in the light most favorable to the non-moving party with regard to whether the County violated NMSA 1978, § 10-7E-15 (A), NMCPSO's allegations that the County violated that section of the Act cannot form the basis of its claim that it failed to comply with a provision of the Public Employee Bargaining Act or Board rule in violation of § 19(G).

Similarly, I can find no evidence to support the union's claim that the County violated the duty to bargain in good faith found in NMSA 1978, § 10-7E-17(A). § 17(A) provides:

> Except for retirement programs provided pursuant to the Public Employees Retirement Act [10-11-1 NMSA 1978] or the Educational Retirement Act [22-11-1 NMSA 1978], public employers and exclusive representatives:
> (1) shall bargain in good faith on wages, hours and all other terms and conditions of employment and other issues agreed to by the parties. However, neither the public employer nor the exclusive representative shall be required to agree to a proposal or to make a concession…"

For the same reasons as discussed in my analysis of § 10-7E-5 above, the union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Because there are no issues of material fact even when viewed in the light most favorable to the non-moving party with regard to whether the County violated NMSA 1978, § 10-7E-17 (A), NMCPSO's allegations that the County violated that section of the Act cannot form the basis of its claim that it failed to comply with a provision of the Public Employee Bargaining Act or Board rule in violation of § 19(G). Having determined that there is no evidence to support allegations that the County violated the specific provisions of the Public Employee Bargaining Act or Board rules alleged, a legal and factual basis for the § 19(G) claim does not exist. For that reason the union's claim that the County violated

§ 19(G) fails to state a claim are should be dismissed. Additionally, the union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Accordingly, the § 19(G) claim is dismissed.

**VI. Refusal or Failure to Comply with a CBA - § 19 (H) Claims.** Contrary to the County's argument, dismissing the union's Section 19 (F) claim does not necessarily mean that all of the Union's claims must fail as a matter of law simply because it is bound by the CBA. Neither does it mean that the County in no way breached the CBA. Therefore, I turn my attention to the union's various claims of breach. The union claims generally in ¶ 87 of its Amended PPC that "Respondent's conduct, as alleged in this complaint, constitutes a refusal or failure to comply with a collective bargaining agreement. See NMSA 1978, § 10-7E-19(H)." Based on oral argument the following constitute the conduct that the union claims constitute breaches of the CBA:

1. Jaramillo did not receive or review a copy of Detective Martinez's January 4, 2017 complaint against Sgt. Yeager when investigated about a text message sent by Detective Jaramillo to Detective Brandle at a February 9, 2017 briefing;
2. Jaramillo was not notified that he was a target of the January 4, 2017 investigation or that disciplinary action could result therefrom;
3. He was directed by a commanding officer to avoid contact with parties to the January 4, 2017 investigation;
4. He was not notified of the outcome or conclusion of the January 4, 2017 investigation;
5. He was never notified prior to the investigation of the February 9 texting incident that Detective Martinez believed that he was engaged in gossiping or rumoring, whether related to his report of the fueling station incident or otherwise.

Each of these acts or omissions is alleged to have violated CBA, Section 28(A)(2) governing Internal Affairs investigations, which includes as one of its stated purposes, "to identify and notify employees who have committed misconduct so that they may be retrained and corrected…" See (Amended PPC ¶¶ 47-48.)

6. In addition to the foregoing, NMCPSO argues that County Human Resources Rules, Section 7.2 requires progressive discipline that was not followed. See (Amended PPC ¶ 49.) Although the union did not plead that the County's progressive discipline policy is incorporated into the CBA so that a violation of that policy would constitute a basis for its claim that the County refused or failed to comply with a CBA in violation of the PEBA § 19 (H), I conclude that it is so, based on Section 1: Preamble, page 3 of the CBA which states in pertinent part:

> "The Sheriff's Office Standard Operating Procedure, the Santa Fe County Human Resources Handbook or other policies and procedures promulgated through authority of the Sheriff, shall govern any issues not agreed to herein."

Therefore, I read the Amended PPC to allege that the recommended one day suspension of Jaramillo for sending a text message that mocked another Detective's attire, was inconsistent with is a breach of the CBA in violation of PEBA § 19(H).

7. The Union alleges at ¶52 that the employer failed to schedule any hearings to determine or adjust a grievance filed February 13, 2017 objecting to Jaramillo's transfer from his position as Detective to the Patrol Division. (Exhibit 6 to the Amended PPC.) While the Amended PPC does not specify what provisions of the CBA are alleged to have been violated by such conduct, at oral argument the union specified 28 (E)(2) regarding discipline and 28 (B) (5) regarding Internal Affairs Investigations. I also note that Section 30 of the CBA pertaining to the disciplinary Grievance Procedure may also be pertinent.

The allegations that Jaramillo did not receive or review a copy of Detective Martinez's January 4, 2017 complaint; that he was not notified that he was a target of the investigation or that disciplinary action could result therefrom; that he was not notified of the outcome or conclusion of the investigation; was never notified that Detective Martinez believed that he was engaged in gossiping or rumoring, are all immaterial, because the complaint was against Sgt. James Yeager, not Jaramillo. See Administrative Inquiry Memorandum, Exhibit 7 to the Amended PPC. As previously stated the Union seeks to import after-the-fact legal and contract protections intended for the targets of investigations into non-target questioning where they plainly do not apply. Consequently, no breach may be premised on failure to give notice that is not required.

It is factually incorrect that the County failed or refused to schedule grievance hearings in this matter. To the contrary, it was the County that took the initiative in conforming it grievance process with the PEBA. Jaramillo failed chose not to appeal rejection of his grievance to the County Manager as was his right under the new Section 57 grievance process, but filed this PPC instead. I conclude therefore that Detective Jaramillo forfeited his right to grieve over this issue and the County bears no responsibility for breaching Section 57 of the CBA.

To the extent the union relies on CBA Section 28(E)(2) for the proposition that serious...misconduct by bargaining unit employees" must be reported, I note that Section 28 also specifies that only "serious...misconduct by bargaining unit employees" such as "[a]lleged or suspected serious violations of the law, rules and regulations". Having determined that there does not exist any policy, rule or regulation that may reasonably be construed to prohibit one Detective from driving another's vehicle and that the employer's policies limiting personal relationships within a supervisor/subordinate relationship do not apply here, it follows that the union has not met the shifting burden of proof under N.M. Rul. Civ. Pro. Rule 1-056 to establish that material facts requiring a trial remain.

Based on the foregoing, the union's claim that the County violated Section 19(H) of the PEBA by refusing or failing to comply with the parties' CBA, including notice and reporting requirements,

POEERA requirements, the progressive discipline rule or the interpretation of "gossiping" or spreading "rumors" in the context of disciplinary proceedings, fails to state a claim is hereby dismissed. Additionally, the union has not met its burden under N.M. Rul. Civ. Pro. Rule 1-056 to produce "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." Accordingly, the § 19(H) claim is dismissed. All other reasons posited by the County for dismissal of Section 19 (H) claims are specifically rejected.

**CONCLUSION**

For the reasons set forth herein the County's Alternative Motion for Dismissal or for Summary Judgment is well-taken and is hereby **GRANTED.** The PPC herein shall be, and is hereby **DISMISSED** and the relief requested is **DENIED.**

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director