STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,

Petitioner,

v.

PELRB No. 113-12

NEW MEXICO REGULATION AND LICENSING DEP'T.,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board on appeal by the Regulation and Licensing Department from the Hearing Officer's Second Amended Recommended Decision issued December 21, 2012 granting Summary Judgment in favor of the Union. Upon a 3-0 vote at the Board's February 12, 2013 meeting;

IT IS HEREBY ORDERED that the Second Amended Recommended Decision, including its Findings of Fact, Conclusions of Law and its Rationale shall be and hereby is adopted by the Board as its own for the reasons stated therein, with the result that :

1. The Respondent's Motion to Dismiss shall be, and is hereby, **DENIED**.
2. The Respondent has violated §10-7E-19(B) and (C) NMSA 1978 (2003) and with regard those sections of PEBA the union's Motion for Summary Judgment shall be, and is hereby, **GRANTED.**
3. The uncontested facts are insufficient to demonstrate that as a matter of law the Respondent has violated NMSA 1978 §10-7E-19(A) and (D) and with regard those two sections of PEBA the union's Motion for Summary Judgment should be **DENIED.** If the union elects to proceed to an evidentiary

hearing on whether the Department has violated NMSA 1978 §10-7E-19(A) and (D) it may request a scheduling conference to establish a hearing date and to set pre-hearing deadlines within ten days of this Order.

IT IS FURTHER ORDERED as follows:

4. The New Mexico Regulation and Licensing Department shall be, and is hereby, Ordered to cease and desist from violating §10-7E-19(B) and (C) NMSA 1978 (2003) which Order requires the Department to recognize Jason Davis as the union's designated steward in Albuquerque.
5. The New Mexico Regulation and Licensing Department shall post for sixty (60) days, notice of the violations in the form attached to this decision as Appendix A;
6. The New Mexico Regulation and Licensing Department shall reimburse Jason Davis for compensatory time used for his union steward activities other than training, and demonstrate compliance with this Order within 10 days to the Executive Director and the Union;
7. The New Mexico Regulation and Licensing Department shall remove the written reprimand at issue in this case from Jason Davis' file and demonstrate compliance with this Order within 10 days to the Executive Director and the Union.

Date: 2-21-13

Duff Westbrook, Chair,
Public Employee Labor Relations Board

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that the New Mexico Regulation
and Licensing Department violated the Public Employee Labor Relations Act and has ordered us to post and obey this notice.

You have the right under Public Employee Labor Relations Act NMSA 1978 §10-7E-5 (2003) to form, join or assist a labor organization without interference, restraint or coercion. Furthermore, NMSA 1978 §10-7E-19(B) (2003) prohibits a public employer from interfering with, restraining or coercing a public employee in the exercise of rights guaranteed under PEBA including your right to assist the union without restraint or coercion. On May 31, 2012 the Department refused to recognize Jason Davis' appointment as a union steward for your recognized collective bargaining representative AFSCME Council 18 and denied him leave to conduct union business and to represent an employee in his role as union steward. On July 3, 2012 the Respondent Department issued a letter of reprimand to Jason Davis for engaging in union activities without its approval.
The Department's refusal to recognize Jason Davis as AFSCME's designated steward, its refusal to grant his request for leave to attend union training and to represent an employee constitute and issuing a letter of reprimand violated Sections 5 and 19 (B) and (C) by interfering with, restraining or coercing a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act and by dominating or interfering in the administration of a labor organization.

We acknowledge the above-described rights and responsibilities and will not in any like manner interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act, nor will we in any like manner dominate or interfere in the administration of a labor organization.

_____

For the New Mexico Regulation and Licensing Department — Date

12-21-12

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 18,

Petitioner,

v. **PELRB No. 113-12**

NEW MEXICO REGULATION AND LICENSING DEP'T.,

Respondent.

SECOND AMENDED RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego, designated as the Hearing Officer in this case on the Board's direction following Respondent's oral presentation at the Board's meeting on November 8, 2012. At that meeting the Board remanded this matter to the Executive Director for further briefing on the question of how the Board should interpret what it called the "apparent internal inconsistencies" of the first and second sentences of Article 9 Section 1 of the applicable Collective Bargaining Agreement (CBA) after which, in his discretion, the Director could issue a Second Amended Decision.

Both parties timely submitted briefs on December 17, 2012 as permitted by the Board. I have reviewed those briefs, read the cases cited therein and a Second Amended Recommended Decision on Petitioner's Motion for Summary Judgment and Respondent's Motion to Dismiss is necessary. This constitutes that Second Amended Recommended Decision.

FINDINGS OF FACT:

I adopt the operative facts in this case as previously set forth in the First Amended Recommended Decision as modified below:

1. Jason Davis is employed as a Field Inspector in the Electrical Services Bureau of the Construction Industries Division of the Respondent Department (Affidavit of Jason Davis par. 2); and is assigned to what is called either the "Moriarty" work station (Attachment 3 to Respondent's Answer) or the "Moriarty/Torrance -2204" work location (Attachment 4 to Answer).

2. Petitioner is the duly elected exclusive bargaining representative for all State of New Mexico employees subject to the collective bargaining agreement (CBA) between the State of New Mexico and AFSCME Council 18. (Department's Answer to PPC ¶1). Accordingly, there is no dispute that Complainant is an "exclusive representative" as that term is defined in PEBA Section 4(I), that Jason Davis is a "public employee" as that term is defined in PEBA Section 4(R), and that the Respondent Department is a "public employer" as defined in PEBA Section 4(S) and Section 7.

3. Article 9, Section 1 of the parties' CBA provides as follows:

"Section 1. The Union shall have the right to select sufficient stewards to represent employees covered by this Agreement. The exact number and location of stewards shall be determined by agreement between the parties consistent with the principle set forth above."

(CBA, Article 9).

4. The "principle" referenced in the second sentence of Article 9 Section 1 refers to the Union's "...right to select sufficient stewards..." in the first sentence of Article 9 Section; neither party has advanced an argument that it refers to any other principle. (CBA, Article 9).

5. To meet the provisions of the second sentence of Article 9, Section 1 regarding agreement as to the exact number and location of stewards, the parties have executed a collateral agreement entitled "AFSCME Steward Listing" indicating that

Petitioner is entitled to 1 Steward and 1 Alternate in Albuquerque, 2 Stewards in Santa Fe, and1 Steward and 1 Alternate in Las Cruces. (Respondent's Affirmative Defense No. 1, Attachment 1 to Respondent's Answer, AFSCME Steward Agreement, February 2, 2010; Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss).

6. The locations listed in the agreement correspond to the Construction Industries Division of the RLD Regional Offices. (Affidavit of Jason Davis and Exhibit C to the Union's Motion for Summary Judgment.)

7. In addition to the foregoing, other relevant portions of the parties' CBA include:

a. Article 9 Union Rights

> **Section 2.** The Union shall provide the Employer with the following information about stewards, and union representatives (union representative refers to the paid staff of AFSCME Council 18): a written list of the names, addresses, telephone numbers and the agency to which they are employed who are authorized to act on behalf of the Union and the extent of their authority. The list shall be updated every calendar quarter or when additions and/or deletions have occurred. Stewards shall have full power on behalf of the Union to resolve all disputes and disagreements through Step 3 of the grievance procedure in the administration of this agreement as set forth in Article 14 of this Agreement.
> **Section 3.** The Employer shall allow employee union officials to attend on paid status (utilizing the union time code in the time and labor reporting system) meetings agreed to by the parties for purposes of administering this Agreement. Union officials, as defined in this section are: the Local Union Presidents, Local Vice-Presidents, and any other union official as designated by mutual agreement of the parties.
>
> The Employer shall allow employee union stewards, for the purposes of representing employees only within their respective agency at grievance meetings, disciplinary appeals based on suspension, demotion, or dismissal and cases to the PELRB, paid union time (utilizing the union time code in the time and labor reporting system). Union stewards may request up to two (2) hours of paid union time to prepare and investigate each grievance; up to a total of four (4) hours

to investigate and prepare each disciplinary appeal of a suspension, demotion or dismissal and up to a total of eight (8) hours to investigate and prepare and represent an employee in a matter before the PELRB...

The Employer recognizes the importance of having union officials available to represent employees should a steward be unavailable. In the event a steward is unavailable to represent an employee within the steward's respective agency at a grievance meeting, a SPB appeal and a case before the PELRB the Employer shall allow a union official paid union time, as if they were a steward, in order to provide representation to covered employees within the union official's local. As used in this section, unavailable means that the agency steward is on leave, there is a conflict where the steward has to recuse him/herself, operational reasons prevent the steward from leaving their post or where a steward vacancy exists that the Union has been unable to fill despite good faith efforts to do so.

Union time must be pre-approved and shall not be disapproved except for operational reasons...

Section 5.
A. The Employer shall approve reasonable written request for annual leave, accrued comp time, and/or leave without pay [hereinafter referred to as "LWOP"] for up to fourteen (14) calendar days, if requested by steward/union officials, in order to participate in union executive board meetings, union conventions, and employment as union staff.

B. The Employer shall approve reasonable written request for annual leave, accrued comp time, and/or LWOP in excess of fourteen (14) calendar days and less than twelve (12) months for the above purposes and shall ensure a right of return to a position of like status and pay ...

Section 8: Except as limited by law or" this Agreement, each employee shall have the right to join and assist the Union freely or to refrain from doing so, without fear of penalty or reprisal, or refrain from doing so, and the Employer and the Union shall assure that each employee shall be protected in the exercise of such right. Allegations concerning violations of these rights shall be filed with the PELRB...

Section 10. Union officials and/or stewards are authorized to make reasonable use of copiers, FAX machines, computers (including email) and other office equipment for purposes of investigating and processing grievances and communicating with the Employer and

> other union representatives regarding official labor-management business provided, such use does not interfere with official State business...

(CBA, Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss).

8. The Hearing Officer takes Administrative Notice of Rob Trombley's status as an AFSCME Council 18 Staff Representative for Locals 802, 1211, 1894, 2499, 3422, which area of responsibility includes the employees at issue in this dispute.

9. On May 23, 2012 Rob Trombley sent an e-mail message to Tony Barajas, Malanie Otero, Mary Kay Root from Respondent RLD, to Sandy Martinez from the State Personnel Office and to Ken Long, President of AFSCME Local 1211, designating Jason Davis as a union steward "for RLD" and claiming for him "all protections, rights and privileges bargained in the CBA and [afforded under] PEBA". (Exhibit 2 to Jason Davis Affidavit.)

10. The day following the e-mail designating him as a union steward, Jason Davis submitted a request for leave to attend Union Steward training on June 1, 2012. The request for leave was denied by Mr. Davis' immediate supervisor, Kelly Hunt, Chief Electrical Inspector on May 30, 2012 and Mr. Davis was referred in the e-mailed denial to Leslie Garcia, RLD HR Administrator "for further clarification". Leslie Garcia sent an e-mail message on May 31, 2012 to Jason Davis re: Disapproved Leave request for union steward training, in which is written:

> "The Regulation and Licensing Department will not recognize you as a union steward as the current steward agreement has been negotiated

to reflect stewards in Albuquerque, Santa Fe and Las Cruces. Therefore you will NOT be recognized as a steward in the Moriarty area."

(Emphasis in the original).

The e-mail string indicates Mr. Davis then submitted a second request for leave to attend steward training, this time requesting Compensatory time which leave was approved with the following message from James Hunt at RLD:

"I have approved your Comp Time leave request for tomorrow. How you use your personal time off is your business, but understand in no uncertain terms that I am not endorsing nor enabling any formal compensation for "Union Steward training".

(Exhibit 2 to Jason Davis Affidavit.)

11. On July 3, 2012 the Respondent Department issued a letter of reprimand to Jason Davis (Exhibit 1 to Petitioner's Complaint) which states that the Department conducted an investigation "regarding alleged improper activities" and at paragraphs 3 and 4 of the reprimand, the Respondent Agency asserts that Davis had been told on numerous occasions that he is not recognized as, nor is he to act in the capacity of a union representative. The letter of reprimand found violations of RLD-100 (II) (A), Insubordination and RLD-3000 (Exhibit A) (9), Prohibited Internet Use arising out of e-mail generated by Davis dated May 24, 2012 and June 28, 2012 in which Davis was acting in a union capacity and requesting to be compensated as a representative of the union. (Exhibit 1 to PPC).

STANDARD OF REVIEW:

With regard to the State's Motion to Dismiss the standard to be applied is that found in New Mexico Rule of Civil Procedure Rule 1-012(B)(6) wherein the Hearing Officer accepts

all well-pleaded factual allegations as true and resolves all doubts in favor of sufficiency of the complaint. Dismissal on 12(B) (6) grounds is appropriate 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). In this case the Union also filed a Summary Judgment Motion. This Board will apply the standard of review for cases decided under Rule 1-056 NMRA in deciding that Motion. 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.* (N.M., 2011) Docket No. 32,202, April 12; *Smith v. Durden (N.M. App., 2010)* No. 28, 896, August 23, 2010; *Blauwkamp v. Univ. of N.M. Hosp.,* 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992).

National Labor Relations Board and Federal Court precedent are appropriate sources of law for interpretation of the New Mexico Public Employee Bargaining Act (PEBA). *Las Cruces Professional Fire Fighters and International Association of Fire Fighters, Local No.* 2362 v. *City of Las Cruces,* 123 N.M. 239 (1997); *The Regents of the University of New Mexico* v. *New Mexico Federation of Teachers,* 125 N.M. 401, 408 (1998).

DISCUSSION AND CONCLUSIONS:

A. On remand I have been tasked with reconciling "apparent internal inconsistencies" in the first and second sentences of Article 9 Section 1 of the applicable Collective Bargaining Agreement (CBA). Both the Complainant and the Respondent argue that there

are no inconsistencies in the first and second sentences of Article 9 Section 1. I agree and find that the terms of Article 9 Section 1 are clear and the intent of the contract is to be ascertained from the language used. See, *Brown v. American Bank of Commerce*, 79 N.M. 222, 441 P.2d 751 at 755 (N.M. 1968). Because the terms of the CBA at issue are clear and unambiguous, the expertise of an arbitrator is not required to interpret the language to establish whether the Respondent violated the contract or otherwise violated rights guaranteed under the PEBA. The PPC before me for consideration alleges that the Respondent Department improperly refuses to recognize a duly appointed union steward and imposed discipline for his having engaged in protected union activities. As such, the Union seeks to vindicate rights that arise under the PEBA. The PELRB alone is charged with the duty and the power to enforce the PEBA and it has the power to do so "through the imposition of appropriate administrative remedies". See NMSA §10-7E-9(F).

B. I turn now to my analysis of the contract and the motions before me. The first sentence of Article 9 Section 1 provides: "The Union shall have the right to select sufficient stewards to represent employees covered by this Agreement." The second sentence provides: "The exact number and location of stewards shall be determined by agreement between the parties consistent with the principle set forth above." The phrase "consistent with the principle set forth above" refers to that part of the first sentence of Article 9 Section 1 regarding the Union's right to select union stewards sufficient to administer the contract. The second sentence is entirely consistent with the first if it is read, as I do here, as preserving the Union's right to select sufficient stewards as well as the employees' statutory right under PEBA to assist a labor organization by being as a steward. See, §10-7E-5 NMSA (2003) and Article 9 section 8 of the parties' CBA.

The "agreement" called for in the second sentence of Article 9 Section 1 is designated by the parties as a "Steward Listing". (Attachment 1 to Respondent's Answer, and Exhibit 1 to its Supplemental Brief; AFSCME Steward Agreement, February 2, 2010; Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss). That "agreement" recognizes the Union's right to designate 1 steward and 1 alternate in Albuquerque, 2 stewards in Santa Fe and 1 steward and 1 alternate in Las Cruces, thereby fulfilling the requirement of the second sentence of Article 9 Section 1 by setting forth the exact number and location of stewards. The "agreement" also contemplates some amount of travel associated with designated stewards serving the listed locations because it provides that "Stewards travel and per diem rule recognition is approved by management" which is consistent with the understanding of the contract set forth in this Recommended Decision. This understanding does not render the second sentence of Article 9 Section "meaningless" as argued by the RLD because it results in the mutually acceptable limitations on the number of stewards and their geographic areas of responsibility reflected in the Steward Listing.

What the agreement does *not* do is set forth a requirement that employees serving as stewards must have an office in or work primarily out of those locations designated in the Steward Listing. If additional support is needed beyond a plain reading of the agreement for the conclusion that no such requirement exists, Section 9 also requires the RLD to allow union stewards paid time for the purposes of representing employees "***within their respective agency***", as distinguished from their designated work location or work station. See Article 9 Section 3. (Emphasis added).

To justify its refusal to recognize the Union's designated Steward, the RLD relies heavily on a list of Union Stewards revised on 7/23/12, Exhibit 2 to its supplemental brief. Not only does this document have no relevance to the issues in this case (as explained more fully below) but reliance upon it clouds those issues by conflating the requirement in Article 9 Section 1 for the parties to reach an "agreement" as to the number and locations of stewards, with the separate requirement in Article 9 Section 2 that the union provide the Employer with a list of its stewards ***where no agreement is required***. Conflating the two sections results in the kind of convoluted argument expressed by the RLD in the "Conclusion" of its Supplemental Brief:

> "...it remains the case that there was not, and is not, any 'agreement between the parties consistent with the principles set forth above' in Article 9, Section 1 that mutually recognized the nomination and designation of Regulation and Licensing Department, Construction Industries Division, employee Jason Davis as a steward, as in the Steward Agreement on the steward listing, through the current date..."

Of course there is no such agreement, because it is plain that the Union is not required to seek and obtain concurrence of the Employer as to *whom* it will appoint as its stewards. Concurrence is required only as to the *number* of stewards and their *areas of geographical responsibility*, which it has done by creating the Steward Listing. (Attachment 1 to Respondent's Answer, and Exhibit 1 to its Supplemental Brief; AFSCME Steward Agreement, February 2, 2010; Exhibit A to Petitioner's Motion for Summary Judgment and Exhibit B to Respondent's Motion to Dismiss).

The list of Union Stewards revised on 7/23/12 advanced by the RLD is irrelevant for at least three reasons: First, on its face it purports to have been created 7/23/12, a date *after* the events and discipline giving rise to the PPC. Consequently, the Employer cannot be said to have had knowledge of it or relied upon it for decisions it made prior to its creation.

Second, it is a document created pursuant to Article 9 Section 2 of the CBA which requires AFSCME Council 18 to provide the Employer a written list of the names, address, telephone numbers of Union officials who are authorized to act on behalf of the Union and the extent of their authority including the union's stewards and the agency in which its designated stewards are employed. There is nothing in this section that gives the Employer the right to veto the Union's designation of a steward and the RLD provides no reasonable explanation why a requirement for agreement over a document created under one section of the Article 9 should be applied to a different document created under a separate section of Article 9. This brings us to the third reason why the document is irrelevant: the Employer does not argue that an ambiguity existed by virtue of Mr. Davis' name being absent from the quarterly listing such as might excuse its conduct toward him, at least until his status was clarified. Rather, it would have taken the same action regardless of the quarterly listing because the Respondent does not recognize the appointment even if Davis' name had been added to the list. RLD's stated justification for its actions is summarized in paragraph 4 of its Answer:

> "If the negotiated AFSCME Steward Listing pertaining to the Regulation and Licensing Department and permitting 1 Steward and 1 Alternate in Albuquerque has meaning, it must be given its effect that does not permit, authorize or contemplate an RLD Steward outside of Albuquerque, Santa Fe or Las Cruces work location areas."

Thus, whether or not Davis' name appears on a list is irrelevant to the reason given for refusing to honor his appointment. As outlined above, the "negotiated AFSCME Steward Listing" referenced by the Department is a product of Article 9, Section 1 of the parties' CBA. The Employer has not demonstrated any nexus between the Listing required thereunder and the separate list generated pursuant to Article 9, *Section 2* that would tend

to prove or disprove the truth of its purported justification for its actions that the Steward Listing required under Section1 "does not permit, authorize or contemplate an RLD Steward outside of Albuquerque, Santa Fe or Las Cruces work location areas."

For similar reasons, the Employer's argument that the union is being inconsistent when it filed a grievance on behalf of Jason Davis and other Field Inspectors is not only without merit, but irrelevant to the issues in this case. The grievance, objecting to the Department's unilateral expansion of territory to be covered by Field Inspectors in what the union alleges is in violation of the CBA's provisions regarding transfers has nothing to do with the issues in this case because Mr. Davis' "post of duty" is irrelevant to the question whether he may serve as the designated union Steward for the Albuquerque area.

C. For all of the above reasons I reiterate my conclusion in the First Amended Recommended Decision that Respondent misconstrues Article 9 of the parties' CBA to mean that only employees assigned to the Employer's Albuquerque, Santa Fe or Las Cruces work locations may serve as union stewards. Because RLD misconstrues Article 9, its submitted affidavit in support of its argument that Jason Davis is not assigned to the Albuquerque work area proves nothing dispositive in this case because he is not required to be assigned to the Albuquerque area as a condition of his appointment by the union to serve as steward for that area, nor is the union required to obtain RLD's concurrence in his appointment.

Article 9 Section 2 does not require that an agreement to be reached as to whose name will appear on the list generated thereunder nor does it provide any separate ground for the employer to refuse to recognize a designated union steward. To the contrary, Article 9 Section 2 requires the union to provide RLD with quarterly updated written list of the

names, addresses, telephone numbers of its stewards, and union representatives "***...who are authorized to act on behalf of the Union and the extent of their authority.***" Because the Union's authorization of an employee to act as a steward on its behalf precedes the creation of the quarterly steward list required by Article 9 section 2 it cannot reasonably be claimed that the list controls who may be a steward. Nor can it reasonably be argued that the RLD may refuse to recognize someone not on that list where, as here, it has been separately notified by the Union of its designated steward. In this case the requisite authorization for Jason Davis to act on behalf of the Union was received by the RLD on May 23, 2012 when Rob Trombley sent an e-mail message to Tony Barajas, Malanie Otero, Mary Kay Root from Respondent RLD, to Sandy Martinez from the State Personnel Office and to Ken Long, President of AFSCME Local 1211, designating Jason Davis as a union steward "for RLD" and claiming for him "all protections, rights and privileges bargained in the CBA and [afforded under] PEBA". (Exhibit 2 to Jason Davis Affidavit.). So, while RLD might complain that the union is not as scrupulous as it ought to be in maintaining a current list of union officers required by Article 9 Section 2, there is no factual or legal basis for asserting that the failure to do so enables the employer to reject the union's appointment of its stewards and officers.

Having determined that there was no legal impediment to Jason Davis' appointment as a union steward for the Albuquerque area I am compelled to conclude that the Employer acted improperly in refusing to recognize his appointment, by denying him leave for union-related activities (except as noted below regarding steward training) and by imposing discipline for attempting to act as a union steward. I do not conclude that RLD committed a PPC when it refused paid leave to attend steward training. I reach this conclusion by

analysis of Article 9 Section 3 which requires the Employer to allow employee union officials to attend on paid status meetings agreed to by the parties for purposes of administering this Agreement. Section 3 defines the term "Union officials" as the Local Union Presidents, Local Vice-Presidents, and any ***other union official as designated by mutual agreement of the parties.*** The parties' CBA does not contain a designation of union steward as an official agreed to by the parties for whom leave must be approved. If paid leave for union business is to be extended to employees other than Local Presidents and Vice-Presidents, it must be by mutual agreement of the parties. It is plain from the context of the PPC and the parties' respective dispositive motions that Jason Davis is not mutually agreed to be a union official under Section 3. A different result obtains, however, with regard to RLD's obligation under Section 3 to grant leave for the investigation and processing of grievances (which was also denied Davis). Section 3 requires RLD to allow employee union stewards paid leave "for the purposes of representing employees only within their respective agency at grievance meetings, disciplinary appeals based on suspension, demotion, or dismissal and cases to the PELRB".

The PEBA at §10-7E-5 NMSA 1978 (2003) guarantees public employees the right to "form, join or assist a labor organization...without interference, restraint or coercion." §10-7E-19(B) NMSA 1978 (2003) further prohibits a public employer from interfering with, restraining or coercing a public employee in the exercise of rights guaranteed under PEBA including Section 5's right to assist the union without restraint or coercion. It is well settled law that this Board will interpret language in PEBA in the same manner as the NLRA has been interpreted to the extent that the language at issue is the same. *Las Cruces Prof'l. Firefighters v. City of Las Cruces,* 123 NM 239, 938 P.2d 1384 (Ct. App. 1997). Here, the

language in PEBA guaranteeing public employees the right to "form, join or assist a labor organization...without interference, restraint or coercion and § 19(B)'s prohibition against a public employer interfering with, restraining or coercing a public employee in the exercise of their rights are identical to the NLRA, 29 U.S.C. §§ 157 and 158(a)(1). It is therefore appropriate to apply the rationale in the cases decided under the NLRA cited by the union in its Motion, notably *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). (Holding union office is protected by NLRA §7 and the imposition of discipline on union officials inhibits qualified employees from holding office.)

With regard to the discipline imposed by the Employer there is no dispute that it is being taken for Davis' having acted as a union steward against the wishes of the Employer. There are no questions of pretextual or mixed motives present here that would require our usual "shifting burden" analysis as under the *Wright Line* cases. The employer has made quite clear that its reason for disciplining Jason Davis was his "acting in a union capacity" and for requesting to be compensated "as a representative of the union". Statement of Uncontested Facts No. 6. However, even under a *Wright Line* shifting burden analysis, the union prevails as the RLD produces no evidence that it took action against the employee for any reason other than his purporting to act as a union steward. Allegations against him that he was insubordinate and misused state property are premised entirely on RLD's erroneous belief that he may not serve as a steward for the Albuquerque area unless he is assigned t that workstation. The disciplinary action taken in this case is "inherently destructive of important employee rights" guaranteed by the PEBA Section 5[1] and threatens to reduce

[1] §10-7E-5 guarantees eligible 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***..."

protected activity to futility. See, *Consumers Power Company and Local 103, Utility Workers of America,* AFL-CIO, 245 NLRB 183 (1979) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963) applied here by analogy.

In addition to the disciplinary action taken against the union employee here, the RLD's conduct in this case in refusing to recognize the union's designated steward and by refusing to cooperate with him to perform his duties as provided in the parties' CBA compel a finding that as a matter of law the RLD committed a PPC by violating the requirements of §§10-7E-19(B) and (C)[2]. RLD has introduced no facts through counter-affidavit or exhibits to counter the facts as found here. The assertion by RLD that its interpretation of the applicable CBA is the correct one is merely an attempt to manufacture a material issue of fact or law where one does not in reality exist. The mere assertion by RLD that it is right and the Union is wrong cannot defeat a motion for summary judgment absent other evidence which RLD has not produced.

In accordance with the above findings and conclusions the RLD's Motion to Dismiss must be denied. In light of the foregoing, accepting all well-pleaded factual allegations as true but resolving all doubts in favor of sufficiency of the complaint, dismissal would not be appropriate because RLD has not only failed to establish that the complainant is not entitled to recover under any theory of the facts alleged in their complaint, but to the

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[2] §10-7E-19(B) and (C) provide that it is a prohibited labor practice for a public employer to:
B. interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act;
C. dominate or interfere in the formation, existence or administration of a labor organization;

contrary complainant is entitled to judgment in its favor on summary judgment on its claim that the Department's conduct violated §10-7E-19(B) and (C) NMSA 1978 (2003).

I also conclude that strictly under the facts of this case the evidence was insufficient to demonstrate that as a matter of law the employer violated NMSA 1978 §10-7E-19(A) and (D).

RECOMMENDED DECISION:

The Respondent Department's Motion to Dismiss should be **DENIED.**

The uncontested facts demonstrate that as a matter of law the Department has violated §10-7E-19(B) and (C) NMSA 1978 (2003) and with regard those three sections of PEBA the union's Motion for Summary Judgment should be **GRANTED.**

The uncontested facts are insufficient in my opinion to demonstrate that as a matter of law the Department has violated NMSA 1978 §10-7E-19(A) and (D) and with regard those two sections of PEBA the union's Motion for Summary Judgment should be **DENIED.** If the union elects to proceed to an evidentiary hearing on whether the Department has violated NMSA 1978 §10-7E-19(A) and (D) it may request a scheduling conference to establish a hearing date and to set pre-hearing deadlines.

To remedy the violations this Board should:

(1) Order the Department to cease and desist from the above violations of PEBA, which Order requires the Department to recognize Jason Davis as the union's designated steward in Albuquerque;

(2) Require the Department to post for sixty (60) days, notice of the violations in the form attached to this decision as Appendix A;

(3) Order the Department to reimburse Jason Davis for compensatory time used for his union steward activities other than training, and;

(4) Order the Department to remove the written reprimand from Jason Davis' file.

Issued this 21st day of December, 2012.

Thomas J. Griego
Executive Director
Public Employee Labor Relations Board

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

An Agency of the State of New Mexico

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

You have the right under Public Employee Bargaining Act NMSA §10-7E-5 to form, join or assist a labor organization for the purpose of collective bargaining through your chosen representative without interference, restraint or coercion. The Act also forbids us to interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act and forbids us to dominate or interfere in the formation, existence or administration of a labor organization.

On May 23, 2012 AFSCME Local 1211 appointed Jason Davis as a union steward. The day following his designation as a union steward, Jason Davis submitted a request for leave to attend Union Steward training on June 1, 2012. The request for leave was denied by Mr. Davis' immediate supervisor and Regulation and Licensing Department Administrators refused to recognize his status as a union steward. Furthermore, on July 3, 2012 the Regulation and Licensing Department issued a letter of reprimand to Jason Davis because, despite Davis having been told by Regulation and Licensing Department Administrators on numerous occasions that he is not recognized as, nor is he to act in the capacity of a union representative, he continued to act in the role of union steward.

Because of the disciplinary action taken against Jason Davis on July 3, 2012, because of the Regulation and Licensing Department's refusal to recognize him as one of the union's designated stewards and because of the Department's refusal to cooperate with Davis in the performance of his steward duties as required by the applicable Collective Bargaining Agreement we committed a prohibited labor practice by violating the requirements of the Public Employee Bargaining Act §§10-7E-19(B) and (C).

We acknowledge the above-described violations of protected rights, our responsibilities under the Act and acknowledge that we will not in any like manner interfere with, restrain or coerce a public employee in the exercise of a right guaranteed under the Public Employee Bargaining Act or in any way dominate or interfere in the administration of a labor organization.

_____ Date:_____

For the Regulation and Licensing Department