STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO,

Petitioner,

v.

PELRB NO. 124-12

STATE OF NEW MEXICO, REGULATION AND LICENSING DEPARTMENT,

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 Recommended Decision issued January 19, 2013 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 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 as a matter of law the Regulation and Licensing Department has violated NMSA 1978 §10-7E-19(A) (B) (C) and (D) and with regard to the Union's allegations that those sections of PEBA were violated the union's Motion for Summary Judgment is hereby **GRANTED.**

IT IS FURTHER ORDERED as follows:

1. The Regulation and Licensing Department is hereby Ordered to cease and desist from violations of §10-7E-19(A) (B) (C) and (D) as found by the Hearing Officer in his January 19, 2013 Recommended Decision which order requires the Department to cease and desist from failing and refusing to recognize Jason Davis, and any other steward designated by AFSCME conforming with the contract interpretation rendered in this decision, as stewards under the CBA;
2. The Regulation and Licensing Department shall post for a period of 60 days, and mail to its employees, notice in the form appended to this Recommended Decision as Appendix A;
3. The Regulation and Licensing Department shall take affirmative action to have a member of its management at the level of Kelly Hunt or above formally introduce Jason Davis to employees in the Albuquerque office, either collectively or an individual basis, as the designated steward;
4. The Regulation and Licensing Department shall remove the suspension at issue in this case from Jason Davis's personnel file and make the employee whole by requiring any adjustments to leave or other benefits accruals adversely effected by the suspension be credited back to the employee along with any lost pay and benefits contributions;
5. The Regulation and Licensing Department shall accept *now* as timely filed *as of their originally submitted dates*, those grievances filed by Jason Davis on David Darrah's behalf and to process them according to the parties' CBA.

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

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 18, AFL-CIO,

Petitioner,

v.

PELRB NO. 124-12

STATE OF NEW MEXICO, REGULATION AND LICENSING DEPARTMENT,

Respondent.

RECOMMENDED DECISION

THIS MATTER comes before Thomas J. Griego, designated as the Hearing Officer in this case on the Petitioner's Motion for Summary Judgment. This case is the second of two Prohibited Practices Complaints involving the Regulation and Licensing Department's ("RLD") refusal to recognize Jason Davis as the duly designated steward for its Albuquerque office and its efforts to discipline him for assisting his union by acting as steward. Much of the relevant factual and legal background has already been determined in the first of the two cases, PELRB 113-13, and is incorporated herein in the numerical order found in my Second Amended Recommended Decision in that case issued December 21, 2012:

1. Jason Davis is employed as a Field Inspector in the Electrical Services Bureau of the Construction Industries Division of the Respondent Department and is assigned to what is called either the "Moriarty" work station or the "Moriarty/Torrance -2204" work location.

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.

3. 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.

4. 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."

5. 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.

6. 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, and 1 Steward and 1 Alternate in Las Cruces.

7. The locations listed in the agreement correspond to the Construction Industries Division of the RLD Regional Offices.

8. 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...

b. **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 ...

c. **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...

d. **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...

9. 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.

10. 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".

11. 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".

12. On July 3, 2012 the Respondent Department issued a letter of reprimand to Jason Davis 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.

In addition to the foregoing I further find:

13. On October 10 and 29, 2012, Jason Davis, acting as union steward, filed step 1 and step 2 grievances on behalf of RLD employee David Darrah. *See* Affidavit of Rob Trombley, attached to Petitioner's Motion for Summary Judgment as Exhibit A, ¶ 4 and attachments 1 and 2 thereto.

14. On November 5, 2012, RLD presented Jason Davis with a Notice of Contemplated Action based on his submitting the grievances referenced in paragraph 12 above, proposing to suspend him for one day. *See* Exhibit A to the Union's Motion for Summary Judgment, ¶ 5 and attachment 3 thereto.

15. The Notice of Contemplated Action expressly acknowledges RLD's awareness that the Public Employee Labor Relations Board Director's Recommended Decision issued more than a month earlier on September 24, 2012 found that RLD committed a Prohibited Labor Practice by refusing to acknowledge Jason Davis' appointment by the union as a steward and by taking disciplinary action against him for acting in his capacity as a steward, but disregards that decision stating: "However, the PELRB has not adopted this recommendation and therefore it is not a binding decision on RLD until, or if, the PELRB adopts such a recommendation." *See* Exhibit A to the Union's Motion for Summary Judgment.

16. On November 15, 2012, RLD sent a letter to David Darrah regarding the grievance submitted on his behalf, refusing to "recognize" it because it was submitted by Jason Davis. *See* Exhibit A to the Union's Motion and attachment 4 thereto.

17. On December 21, 2012, the RLD issued a Notice of Final Action, imposing a one-day suspension on Jason Davis without pay for his actions as a union steward on behalf of David Darrah. Jason Davis served that one-day suspension without pay. *See* Exhibit A to the Union's Motion and Attachment 6 thereto.

STANDARD OF REVIEW:

This Board has historically applied the standard of review for cases decided under Rule 1-056 NMRA when deciding a Motion for Summary Judgment. 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 Servs., L.L.C.,* 150 N.M. 123, 257 P.3d 943 (2011); *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). Additionally, the Board considers National Labor Relations Board and Federal Court precedent decided thereunder as appropriate sources of law for interpretation of the New Mexico Public Employee Bargaining Act (PEBA) where the applicable statutory provisions are sufficiently similar. *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:

As the Complainant in this Prohibited Practices proceeding, the union has the burden of proof both on the merits ultimately (*See,* NMAC 11.21.1.22) and the initial burden on its Motion for Summary Judgment. In light of the undisputed facts based on the pleadings including the respective parties' supporting affidavits there are no material issues of fact so as to preclude a finding that as a matter of law the RLD committed a prohibited labor practice (PPC) by violating the requirements of §§10-7E-19(A) (B)(C) and (D) and RLD has presented no facts requiring resolution by a hearing on the merits for the reasons more fully stated below.

The discipline imposed by the Employer in this case as in PELRB 113-12 is admittedly taken for Davis' acting as a union steward against the wishes of the Employer. Therefore, there is no need to undertake a "shifting burden" analysis as under the "Wright Line" cases. It appears from Exhibit A to the Union's Motion that the Employer also admits that it understood the Recommended Decision of September 24, 2012 in PELRB 113-12 if not also the Second Amended Recommended Decision in that case issued December 21, 2012, to mean that the RLD's refusal to recognize Jason Davis as the union's designated steward, by refusing to cooperate with him in the performance of his duties as required by the parties' CBA and by taking the disciplinary action against him at issue here, constituted a Prohibited Labor Practice. What the Employer does not admit is the impropriety of not only continuing to act in a manner found by a neutral and experienced finder-of fact to have violated the law, but "doubling down" on its offense by increasing the punishment found to

have constituted part of its prohibited practices. That sort of "in your face" approach to labor relations is not consistent with the stated purpose of the PEBA to "...promote harmonious and cooperative relationships between public employers and public employees..." NMSA 1978 §10-7E-3 (2003). I refer here, not to any legal obligation to comply with a recommended decision before it has been appealed to the Board, (which is a legal issue collateral to this decision and upon which I decline to pass judgment) but to the wisdom of continuing in a course of conduct that an unbiased fact-finder, trained in the specific law at issue, has opined to be prohibited. Neither I nor the PELRB has the power to compel parties to act wisely, but we ought to by our decisions at least encourage them to do so.

To excuse its conduct, the RLD's attorney writes in attachment 4 to Exhibit A to the Union's Motion that "the PELRB Board [sic] voted 3-0 to reverse the Recommended Decision of the Executive Director, and to remand the matter to the Director to make another decision. The decision by the PELRB Board, therefore, means that 'Jason Davis' never has been recognized by the Regulation and Licensing Department as a Union Steward, and the PELRB upheld a 'Recommended Decision' not to recognize 'Jason Davis' as a Steward." A copy of the Board's Order of November 26, 2011 referenced by Mr. McKay is attached hereto and incorporated by reference. It is clear that the Recommended Decision (which was not appealed by the RLD) was remanded solely for the limited purpose of permitting the Executive Director to "establish a briefing schedule for the purpose of the allowing the parties an opportunity to brief the question of how the Board should interpret the apparent internal inconsistencies of the first and second sentences of Article 9 Section 1 of the applicable CBA." In no way did the Board reverse the Recommended Decision as stated by

Mr. McKay nor was it remanded to the Director with instructions to "make another decision". The plain language of the Order left it to the Director's discretion to amend his recommended decision by issuing another Order if he thought it prudent to do so "[a]fter considering those briefs and other pleadings..." dealing with the limited issue of perceived inconsistencies in Article 9 Section 1. I do not think I would be engaging in hyperbole to label as "fantastic" RLD's interpretation of this Board's Order to mean that "the PELRB upheld a 'Recommended Decision' not to recognize 'Jason Davis' as a Steward". However, it should suffice to call it "incorrect".

This Recommended Decision that that the Union is entitled to judgment as a matter of law is based on Section 5 of the PEBA (NMSA 1978, § 10-7E-5 (2003)), which guarantees public employees the right to "form, join ***or assist*** a labor organization" for the purpose of collective bargaining "without interference, restraint or coercion." (Emphasis added). In turn, Section 19(B) (NMSA 1978, § 10-7E-19(B) (2003), makes it a prohibited practice for the employer to: "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]." These two provisions use identical language as Sections 7and 8(a)(1) of the National Labor Relations Act, respectively. *See* 29 U.S.C. § 157 (giving employees the right to "form, join or assist labor organizations"); 29 U.S.C. § 158(a)(1) (making it an unfair labor practice to 'interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7").

NMSA 1978, § 10-7E-19(B) (2003), makes it a prohibited practice for the 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," and § 19(D) makes it a prohibited practice to "discriminate in regard to hiring, tenure or a term or

condition of employment in order to encourage or discourage membership in a labor organization." These provisions echo Section 8(a)(3) of the National Labor Relations Act. *See* 29 U.S.C. § 158(a)(3) (making it an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization). It has been held under the NLRA that Section 8(a)(3) covers "discrimination to discourage participation in union activities, as well as to discourage adhesion to union membership." *Radio Officers' Union of Comm. Telegraphers Union v. NLRB*, 347 U.S. 17, 40 (1954). Because the PELRB has a history of interpreting language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted, I follow well-settled decisional authority under the NLRA that explicitly views the discipline of stewards for administering the collective bargaining agreements as inherently destructive of a Union's rights under the NLRA:

> Clearly, the administration of the collective-bargaining agreement's grievance procedure provisions qualifies as an 'important' Section 7 right. Indeed it has been labeled both basic and fundamental. Without this right, protection of any preceding and supportive concerted activity becomes useless and a sham. ***Interfering with and discriminating against a union steward for pursuing his responsibility in this respect, of necessity, has a significant effect upon employees and is inherently destructive of important employee rights, for it threatens to reduce all of their protected activity to an exercise in futility."***

Consumers Power Company and Local 103, Utility Workers of America, AFL-CIO, 245 NLRB 183 (1979) (Emphasis added.)

The actions of RLD, in this instance, constitute inherently destructive behavior demonstrated by employer conduct so egregious that the requisite unlawful intent "is founded upon the inherently discriminatory or destructive nature of the conduct itself." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963). In such instances, the employer is held, "To intend the very consequences which foreseeably and inescapably flow from his actions... (because) his conduct does speak for itself – it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but must have intended." *Id.*, at 229.

To the extent it is not self-evident that acting as a steward is protected activity under PEBA because it represents the employee's attempt "to assist" the Union in administering the CBA. Indeed, the Supreme Court has noted "Holding union office clearly falls within the activities protected by § 7, ... and there can be little doubt that an employer's unilateral imposition of discipline on union officials inhibits qualified employees from holding office....." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983). Moreover, where, as here, the union's grievance procedure is implicated, an employer's conduct interfering with the steward's role in that procedure is all the more egregious because the grievance procedure is so integral to the collective-bargaining process. *See, Limbach Co.*, 337 NLRB 573, 589 (2002), and *Consumers Power Co.*, 245 NLRB 183 (1979).

Here, RLD continues to refuse to recognize Jason Davis as steward, has refused to accept a grievance he filed on behalf of David Darrah in that capacity and disciplined Davis for purporting to act as a union steward. Applying as analogous the afore-mentioned NLRB cases such actions violate PEBA §§ 19(B) and (C) by violating Davis' right to assist his union

and by interfering in the administration of the union. I also conclude that the RLD's continuing refusal to recognize Jason Davis as AFSCME's designated steward under the CBA, its refusal to accept grievance he filed on behalf of David Darrah, and its additional discipline of Jason Davis for attempting to exercise his PEBA § 5 rights and act as AFSCME's steward, also violate §§ 19(A) and (D) of the PEBA.

As stated in the Seconded Amended Recommended Decision issued in PELRB 113-12, RLD misconstrues the parties' CBA to require the union to appoint its stewards only from among those employees assigned to work in the Santa Fe, Las Cruces and Albuquerque workstations. As a general proposition, appointment of stewards is an internal union business matter and that general proposition has not been modified by contract in the manner suggested by RLD. The union is free to appoint whomever it will to serve in the capacity of steward as long as it limits the stewards to the number established in the Stewards Agreement. The parties' CBA is unambiguous on this question and a plain reading of the document reveals that the union reserved the right to appoint it stewards without reference to any correlation between a steward's assigned workstation and the slots designated in the parties' steward agreement other than as to the total number of stewards who may be appointed. The parties' CBA is similarly unambiguous in its contemplation that from time to time the agreed-upon list of the names, addresses, telephone numbers and the agency in which they are employed ***who are authorized to act on behalf of the Union*** must be updated at least every calendar quarter or when additions and/or deletions have occurred. (CBA Section 2). In section 2 it is clear that it is not the list which controls who may be a steward but rather, it is a compilation of those who are already authorized by the union to act on its behalf. There is no factual or legal basis for asserting that the failure to

maintain a current list of union officers enables the employer to reject the union's appointment of its stewards and officers.

Accordingly, this Board need not address any purported factual dispute advanced by RLD as to whether Jason Davis is or is not assigned to work in the Albuquerque worksite because ultimately, it doesn't matter. The union is free to appoint Jason Davis' to be a steward to the Albuquerque area as long as his appointment does not exceed the number of stewards or alternates for that area agreed to by the parties. There is no objection raised to Davis' appointment on that basis.

RLD argues that because this Board has not yet reviewed the Second Amended Recommended Decision in PELRB 113-12 it would be premature for Findings of Fact and Conclusions of Law to be rendered in this case. The fact that they have not yet been reviewed does not render them "in dispute" as argued by RLD particularly where RLD has not, in fact, disputed them by counter-affidavit or reference to counter evidence. The grant of Summary Judgment here is based entirely on undisputed facts appearing in the record. The union's threshold burden for granting Summary Judgment having been met it is incumbent on RLD to "demonstrate the existence of specific evidentiary facts which would require trial on the merits." It has not done so.

CONCLUSION:

The RLD's unreasonable persistence in punishing union officials who disagree with its notion that the parties' CBA does not permit appointment of a union Steward whose primary workplace is outside of the Albuquerque, Santa Fe or Las Cruces work location areas, does not bode well for the future of labor relations unless a significant step is taken

to change the RLD's perception of what it means to foster harmonious and cooperative relationships as contemplated by PEBA §2. Therefore I recommend remedial action beyond that which would usually be levied. Among the more egregious violations found here, is RLD's impugning the union's appointment of its steward directly to a represented employee by its letter to David Darrah of November 15, 2012. That letter, together with the discipline imposed on Jason Davis constitutes "inherently destructive conduct" as that term is used in cases construing the NLRA because it has caused and is likely to continue to cause confusion by at least one represented employee as to who is the proper steward to contact to administer the Collective Bargaining Agreement in the Albuquerque area.

RECOMMENDED DECISION:

It is my decision that the uncontested facts demonstrate that as a matter of law the RLD has violated NMSA 1978 §10-7E-19(A) (B) (C) and (D). With regard to the PPC's allegations that those sections of PEBA were violated the union's Motion for Summary Judgment should be **GRANTED.**

To remedy its violations, and to make the Union and Jason Davis whole, it is my recommendation that the Board order the following:

1. Order RLD to cease and desist from violations of the PEBA as found above;
2. Require RLD to post for a period of at least 60 days, and mail to its employees, notice similar to that appended to this Recommended Decision as Appendix A;
3. Order RLD once again to recognize Jason Davis, and any other steward designated by AFSCME conforming with the contract interpretation rendered in this decision, as stewards under the CBA, and to take affirmative action to have a member of its management at the level of Kelly Hunt or above formally introduce him to

employees in the Albuquerque office as the designated steward, either collectively or an individual basis;

4. Order RLD to remove the suspension from Jason Davis's personnel and make the employee whole by requiring any adjustments to leave or other benefits accruals adversely effected by the suspension be credited back to the employee along with any lost pay and benefits contributions;
5. Order RLD to accept *now* as timely filed *as of their originally submitted dates*, those grievances filed by Jason Davis on David Darrah's behalf and to process them according to the parties' CBA.

Issued this 19th day of January 2013.

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 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.
On October 10 and 29, 2012, Jason Davis, acting as union steward, filed step 1 and step 2 grievances, respectively, on behalf of RLD employee David Darrah. On November 5, 2012, RLD presented Jason Davis with a Notice of Contemplated Action based on his submitting those grievances, proposing to suspend him for one day. The RLD was aware of a PELRB Director's Recommended Decision issued more than a month earlier on September 24, 2012 finding that RLD committed a Prohibited Labor Practice by refusing to acknowledge Jason Davis' appointment by the union as a steward and by taking disciplinary action against him for acting in his capacity as a steward but decided to ignore that Decision until the PELRB adopted the Decision. On November 15, 2012, RLD set a letter to David Darrah regarding the grievance submitted on his behalf and refusing to recognize it because it was submitted by Jason Davis. On December 21, 2012, the RLD issued a Notice of Final Action, imposing a one-day suspension on Jason Davis without pay which suspension was served.

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 and its 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. Despite a Hearing Officer's Recommended Decision that the foregoing conduct by RLD constitutes a Prohibited Labor Practice, RLD continued in its refusal to recognize Jason Davis as steward, refused to accept grievances he filed on behalf of David Darrah and imposed additional discipline on Davis for acting in a union steward capacity. Those actions also violate PEBA §§ 19(B) and (C) as well as §§ 19(A) and (D) of the PEBA. The actions of RLD constitute behavior that is inherently destructive of the purposes of PEBA because it demonstrates discriminatory or destructive conduct inherent in the nature of the conduct itself.

We acknowledge the above-described employee rights and our responsibilities under PEBA 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 or engage in any such similar inherently destructive behavior.

_____

For the New Mexico Regulation and Licensing Department — Date

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 for review and ratification of the Hearing Officer's Summary Judgment Decision issued September 25, 2012. Upon a 3-0 vote at the Board's November 8, 2012 meeting this matter is remanded to the Executive Director to establish a briefing schedule for the purpose of affording the parties an opportunity to brief the question of how the Board should resolve the apparent internal inconsistencies of the first and second sentences of Article 9 Section 1 of the applicable CBA. After considering those briefs and other pleadings, in his discretion the Director may issue a second amended decision.

IT IS THEREFORE ORDERED that this matter is remanded to the Executive Director for the purpose and under the conditions outlined above.

Date: _____

Dan Westbrook, Chair,
Public Employee Labor Relations Board