

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

AFSCME, COUNCIL 18,

Complainant,

v.

PELRB No. 104-12

N. M. TAXATION & REVENUE DEP'T.,

Respondent

ORDER


THIS MATTER comes before the Board on the Hearing Officer's Decision granting Respondent's Motion for a Directed Verdict following the close of Complainant's case in chief on the merits of its claim heard May 16, 2012. On a vote of 3-0 during the Board's regularly scheduled July Board meeting the Board voted to adopt the Hearing Officers Findings, Conclusions and Rationale as its own and ratify the grant of a Directed Verdict resulting in dismissal of the case;

WHEREFORE, IT IS HEREBY ORDERED:

The requested Directed Verdict in favor of the Respondent is **GRANTED** with the result that Complainant's PPC is hereby **DISMISSED**.

Dated: _____

7-13-12



Duff Westbrook, Chair

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

In re:

AFSCME, COUNCIL 18

Complainant,

v.

PELRB NO. 104-12

**NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,**

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

THIS MATTER comes before the Hearing Officer on the merits. A hearing on the merits was held May 16, 2012 and at the close of the Union's case-in-chief, Respondent moved for judgment in its favor ("directed verdict"). The Motion was granted with the result that the Prohibited Practices Complaint was dismissed in its entirety.

FINDINGS OF FACT:

1. Complainant is the recognized collective bargaining representative for the bargaining unit comprising eligible employees of the New Mexico Taxation and Revenue Department (TRD). (Answer to PPC ¶1).
2. The parties have entered into a successor collective bargaining agreement (CBA) that took effect on December 23, 2009 and which was in effect at all material times pursuant to an "Evergreen Clause" Article 43 of the CBA. (PPC ¶1; Answer to PPC ¶2).
3. Claudette Montoya is an employee within the bargaining unit represented by Complainant and is the President of AFSCME Local 477, on the Executive

Board of AFSCME Council 18 and is a recognized union steward at her workplace. (PPC ¶3; Answer to PPC ¶3; Testimony of Claudette Montoya).

4. On October 3, 2011 Ms. Montoya received an informal oral counseling regarding phone usage. Among the remedial measures taken in the counseling were limitations on personal phone calls and restriction of union-related calls to the last 15 minutes of the workday. (Union Exhibit C; Testimony of Claudette Montoya). According to Exhibit C Ms. Montoya's phone usage was to be reexamined "in about one month" from the date of the reprimand.
5. On October 13, 2011 Ms. Montoya received a written reprimand alleging a variety of policy violations including not only failure to curtail excessive phone usage as directed in the October 3, 2011 informal oral counseling but also for changing her work schedule without permission, failure to follow her supervisor's direction and misuse of agency e-mail and internet for personal business. (Union Exhibit D).
6. Following the written reprimand Ms. Montoya's supervisor began closely monitoring Ms. Montoya's actions in the workplace including listening to her speaking on the phone, watching her while she used department fax and otherwise documenting her phone calls. (Testimony of Claudette Montoya).

CONCLUSIONS OF LAW:

- A. This Board has jurisdiction over the parties and subject matter.
- B. Complainant failed to establish a connection between Ms. Montoya's union affiliation and either the disciplinary action or the corrective monitoring

being undertaken. There were substantial reasons for taking such action apart from her union activities and affiliation that were not distinguished by the union's evidence. Accordingly, no violation of Article 9 §8 of the CBA has been established.

- C. The Complainant's evidence was not sufficient to establish that a violation of NMSA §10-7E-19 (A), (B), (C), (F) or (H) occurred in this case so that judgment in favor of the Respondent is appropriate.

RATIONALE:

A directed verdict is granted if, after reviewing all of the evidence in a light most favorable to the nonmoving party, the evidence as a matter of law is insufficient to justify judgment in favor of the moving party. See, J. Walden, Civil Procedure in New Mexico Sec. 9c (2) (a) at 225 (1973) and 5A J. Moore, Moore's Federal Practice ¶ 50.02 (2d ed. 1987). In this case the union established Ms. Montoya's union affiliation and activities and also established that correction and disciplinary action has been taken but has not established a nexus between the two. The fact that part of the corrective measures being taken included relegating union related calls to the last 15 minutes of the day is not sufficient in and of itself to establish the connection when the evidence showed that during the period Ms. Montoya's phone calls were being monitored there were 40 hours of personal phone use at issue, only 2 hours of which were union related calls. In addition to the 15 minutes allowed at the end of each day Ms. Montoya also testified that she sometimes took union related calls during her break times which were 15 minutes each morning and 15 minutes each afternoon. The Hearing Officer makes no determination whether the 15 minutes

allotted each either alone or in combination with break periods is sufficient time under the CBA. This Board need not reach that question because there was no evidence introduced by the Complainant to show that the restriction interfered with union business so that PEBA §19(B) would be implicated. Neither was there sufficient evidence of a violation of PEBA §19(A) because a good overall evaluation does not preclude an employer taking corrective or disciplinary action for isolated infractions of its work rules. Furthermore, Ms. Montoya's performance evaluations Exhibit F indicate that her phone call usage was an issue in those evaluations.

The union alleged as the basis for its claim under PEBA §19(H) that Article 9 of the CBA was violated by the corrective and disciplinary actions. Article 9 §3 expressly does not preclude disciplinary action being taken and contrary to Complainant's assertions Article 9 §8 is not implicated under the facts of this case.

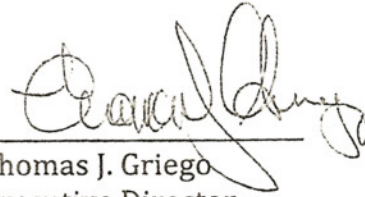
In the absence of any evidence suggesting that union business was compromised by the actions taken there can be no conclusion that the employer dominated or interfered in the administration of the union. Therefore there is no factual basis to support Complainant's allegation that PEBA §19(C) was violated.

Evidence of the employers violations of notice rights pertain to interrogations and investigations leading up to discipline (none of which are at issue here) not to the imposition of the discipline itself No evidence was presented as to any other specific provisions of PEBA alleged to have been violated by the employers conduct in the case. Accordingly, there is no evidence to support a claim that PEBA §19(G) was violated.

Recommended Order:

It is the recommended decision of the Hearing Officer that the Respondent's Motion for Directed Verdict be **GRANTED** with the result that Complainant's PPC shall be **DISMISSED**.

Issued this 23rd day of May 2012



Thomas J. Griego
Executive Director
Public Employee Labor Relations Board
2929 Coors Blvd N.W., Suite 303
Albuquerque, NM 87120