65-PELRB-2021

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

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

Complainant,

v.

PELRB NO. 101-21

BOARD OF COUNTY COMMISSIONERS FOR BERNAILLLO COUNTY

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") on cross-appeals from both parties for review of the Hearing Officer's Report and Recommended Decision for the Prohibited Practices Complaint filed against the Board of County Commissioners for Bernalillo County ("County").

The Board, after reviewing the pleadings, hearing oral argument at its meeting on August 3, 2021, and being otherwise sufficiently advised, voted 3-0 to adopt the Recommended Decision after amending the remedies to include requiring the County remove any reference to the investigation at issue in the case from the personnel files of Deborah Salas and Alexa Cavis.

THEREFORE THE BOARD adopts the Hearing Officer's Report and Recommended Decision with the above amendment.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Aug. 6, 2021
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES, NEW MEXICO COUNCIL 18, AFL-CIO,

Complainant,

v. **PELRB NO. 101-21**

BOARD OF COUNTY COMMISSIONERS BERNALILLO COUNTY,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, for a Hearing on the Merits of AFSCME, Council 18's Second Amended Prohibited Practices Complaint alleging violations of Sections 17(A)(1), Section 19(F), Section 19(A), Section 19(B), and Section 19(E) of the PEBA when on July 13, 2020, Megan Aragon, Clinical Manager for the Respondent, asked bargaining unit members about the Union being organized and who signed interest cards, and told other employees of the Respondent that they cannot have union-related conversations. AFSCME further alleges that Respondent retaliated against Deborah Salas and Alexa Cavis for their union organizing efforts by the following acts:

1. On or about July 20, 2020, Respondent changed the hours and location of work for Alexa Cavis, leading to less desirable terms and conditions of employment for her.
2. On or about December 23, 2020, Respondent initiated an internal investigation of Cavis and Salas regarding their solicitation of a union authorization card from co-worker Courtney Thomas.

3. Respondent failed to follow correct COVID-19 exposure protocols regarding Ms. Salas while following correct protocols with other employees.
4. Respondent claimed that Ms. Cavis's position is a grant-funded position, even though she has never been notified of that fact since accepting her transfer to that position.
5. Respondent refused to grant bereavement leave to Deborah Salas under circumstances where other similarly-situated employees would receive such leave as a matter of course.
6. AFSCME alleges that Respondent has initiated a "reduction in force" without bargaining with the Union.
7. Respondent has not provided information requested by the Union seeking clarification of which positions are grant-funded relating to the alleged "reduction in force".

Allegations originally brought regarding violation of Section 19(H), prohibiting refusal or failure to comply with a collective bargaining agreement, were resolved and removed by the Hearing Officer's letter decision denying the County's Motion for Summary Judgment discussed below.

Respondent asserts that none of the action taken in regard to either Ms. Cavis or Ms. Salas was in retaliation for their Union activity. Incorrect information regarding contact tracing was inadvertently provided and remedied by Director Margarita Chavez within a short time. Denial of Ms. Salas's bereavement leave and vacation leave was proper. Transfers and work-hour changes were done for a legitimate business reason and not due to anti-union animus. Respondent properly initiated the internal investigation of Cavis and Salas because the co-worker filed a complaint that Respondent was obliged to investigate. The employee complaint was not solicited and the complainant did not receive any benefit from management in return for filing the complaint.

On March 12, 2021 the County filed a Motion for Summary Judgment on the Union's retaliation and breach of contract claims. The Union filed its response on March 22, 2021. On March 24, 2021 the Hearing Officer issued his letter decision denying summary judgment as to claims of retaliation

but recognizing the parties' resolution of the union's allegation in paragraph 13 of the Second Amended PPC that the County violated the terms of a Memorandum of Understanding regarding hazard pay, and summarily dismissing the alleged violation of Section 19(H).

A hearing on the merits was held on April 21 and 22, 2021. At the conclusion of the Union's case-in Chief the County moved for a Directed Verdict on the ground that the union produced no evidence of retaliation arising out of the actions on July 7, 2020, the subsequent investigation, the dissemination of incorrect contact tracing information, the denial of Ms. Salas's leave requests and employee transfers and work-hour changes. After hearing argument and references to evidence in support of its retaliation claims, the Motion for a Directed Verdict was denied and the County proceeded with presentation of its case-in-chief. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Closing briefs in lieu of closing arguments were submitted by both parties on May 12, 2021 and were duly considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT: The following facts were established in the Letter Decision denying summary judgment in favor of the County as to the Union's claims of retaliation and the parties Stipulated Pre-Hearing Order, were not thereafter rendered inaccurate due to subsequent evidence adduced at the trial on the merits, and are incorporated herein:

1. Complainant AFSCME is the duly elected, exclusive bargaining representative for County employees employed by the Respondent. (PELRB Case No. 303-20) and is a "labor organization" as that term is defined in Section 4(K) of PEBA.
2. Respondent Bernalillo County is a "public employer" as that term is defined in Section 4(R) of PEBA.

3. Deborah Salas and Alexa Cavis are employees of Respondent within the bargaining unit represented by Complainant AFSCME and are "public employees" as that term is defined in Section 4(Q) of PEBA.
4. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.
5. Deborah Salas has been a Substance Abuse Technician for the County's Department of Behavioral Health Services ("DBHS") for almost nine years and at the time of the hearing on the merits works at the CARES Campus in Albuquerque. Salas Test., Hearing Day 1, Part 2, at 00:01:00-00:01:57.
6. The CARES Campus is a detox center run by the DBHS. DBHS also runs the Resource Re-entry Center (RRC) located in downtown Albuquerque. The RRC helps inmates being released from MDC obtain needed resources to prevent recidivism. Salas Test., Hearing Day 1, Part 2, at 2:02-2:27; Chavez Test., Hearing Day 1, Part 4, at :57-1:31, Baca Test., Hearing Day 1, Part 5, at 3:02-5:53; Cavis Test., Hearing Day 1, Part 6, at 2:30-4:20.
7. Alexa Cavis has been employed by the County for more than 11 years and on or about March 16, 2019, she transferred to a Community Case Manager position (CM) with the DBHS. Cavis Test., Hearing Day 1, Part 6, at 1:15-27; Joint Ex. 7.
8. Both Ms. Cavis and Ms. Salas were active leaders of the Union organizing campaign. Salas Test., Hearing Day 1, Part 2, at 5:20-5:38; Cavis Test., Hearing Day 1, Part 6, at 6:20-6:42.
9. Prior to helping bring the Union into the facility, both Ms. Cavis and Ms. Salas had an excellent relationship with the DBHS Director, Margarita Chavez-Sanchez. Salas

Test., Hearing Day 1, Part 2, at 5:38-6:07; Cavis Test., Hearing Day 2, at 6:44-8:50; Union Ex. H; Union Ex. I; Union Ex. J.

10. On July 7, 2020, Ms. Cavis approached a co-worker, Mike Garcia, to see if he was interested in bringing the Union in. He told her he was not, and that people had tried to bring a union in before but were not successful. Cavis Test., Hearing Day 1, Part 6, at 8:51-9:24.
11. Mike Garcia reported Ms. Cavis's contact with him about union organizing on the same day, July 7, 2020, to Director Chavez-Sanchez, so that she learned of the Union organizing drive at that time, though not which employees were behind the organizing effort. The Union did not rebut testimony of Director Chavez-Sanchez that although Mr. Garcia did tell her about the union organizing effort, he did not mention Ms. Cavis's name. Cavis Test., Hearing Day 1, Part 6, at 0:9:24-0:9:52; Chavez-Sanchez testimony Day 2 part 4 at 28:58-29:50.
12. Ms. Chavez-Sanchez spoke with Ms. Salas on July 7, 2020, during which conversation she related what Mike Garcia had told her about the Union organizing drive and asked if Ms. Salas had heard any rumors about a Union coming in. Salas Test., Hearing Day 1, Part 2, at 6:15-7:36; 8:55-9:10; Chavez-Sanchez testimony Day 2 part 4 at 29:50-31:43.
13. Ms. Salas's testimony that during her conversation with Ms. Chavez-Sanchez on July 7, 2020, Ms. Chavez-Sanchez described a career ladder she was working on but said that if the Union came in she would not proceed with that plan, is not credible. Salas Test., Hearing Day 1, Part 2, at 7:37-8:16. Chavez-Sanchez testimony Day 2 part 4 at 29:50-35:21.

14. Ms. Chavez-Sanchez's denial that during the July 7, 2021, meeting with Ms. Salas she said something to the effect of "ever since a certain someone had recently come in, she has been stirring things up", is more credible than Ms. Salas's testimony that the statement was made. Salas Test., Hearing Day 1, Part 2, at 8:21-8:53; 32:01-32:03; Chavez-Sanchez testimony Day 2 part 4 at 29:50-31:44.
15. On July 15, 2020, the DBHS held a Tech Lead Staff meeting, during which Megan Aragon, the Clinical Manager, told the Tech Leads in attendance that there may be talk of a Union coming in and if they hear that, they should tell their employees not to engage in discussions about the union during work time. Chavez Test., Hearing Day 1, at 2:47-3:40; Joint Ex. 8.
16. On July 15, 2020, Ms. Salas and Ms. Cavis sent an email to Ms. Chavez-Sanchez requesting "When you have time can Deb and I speak with you? Thank you." Union Ex. K.
17. On July 20, 2020, Ms. Chavez-Sanchez responded to the above email: "If you ladies still want tot [sic] chat I have availability to meet mid-day tomorrow. Please let me know so I can get it on the calendar." Id.
18. Ms. Cavis was unavailable for a meeting at the suggested time and on July 27, 2020, at 8:24 a.m. Ms. Chavez-Sanchez sent an email to Ms. Salas and Ms. Cavis memorializing her understanding that they no longer wished to meet with her: "…as I asked you both to come into my office this morning as per your request. You both stated you 'were good' and did not want to talk. Please let me know if this changes. Thank you." Id.
19. Ms. Cavis apparently changed her mind about not wanting to meet with Ms. Chavez-Sanchez because at 8:30 a.m. on July 27, 2020, she replied to Ms. Chavez-Sanchez's

email stating "I needed to call one of my clients this morning. I completed the call and am ready to meet with you." There are no further email communications among Cavis, Salas and Chavez-Sanchez concerning the requested meeting. Id.

20. Ms. Salas and Ms. Cavis testified that the reason they requested a meeting with Ms. Chavez-Sanchez on July 15, 2020, was to explain why they were bringing in the Union. Salas Test., Hearing Day 1, Part 2, 00:09:45-00:11:30; Cavis Test., Hearing Day 1, part 6, at 9:52-11:03. I find no support for the Union assertion that Ms. Chavez-Sanchez admitted she knew the requested meeting related to the Union and the Union provides no reference to testimony or documentary evidence for that assertion.

21. On July 20, 2021, Ms. Chavez-Sanchez sent an email to her "CM Team" announcing that Ramses Leyva took a position as Project Supervisor at the RRC with the result that:

    a. "Losing him on campus has given us an opportunity to reevaluate the case management needs for the larger department. We have interviewed and are in comp review for 6 full time case managers for daily operations at the RRC the role that the Boundary Spanner Team is filling now and we hope to have them on board soon. This being said, it has been made clear that 6 staff are not enough to meet the full needs of the RRC. We will need to pull one of our full time, on campus case managers to the RRC meet this need. Based on this shuffle, the on-site hours have also shuffled. Please make sure you look at the schedule below effective August 1, 2020. To make things even more complicated, once we get the full 6 Full [sic] time CM on board and trained they will fill the existing RRC schedules and the boundary spanners will have yet another schedule change but it would be more day time hours. I expect that this will happen in about a month but want to let you all know in advance…"

Ex. J-10.

22. By moving her to the RRC, Ms. Cavis's schedule changed from Monday through Friday, 8:00 a.m. to 4:30 p.m. to Monday through Friday, 2:00 p.m. to 10:00 p.m. Id.

23. Ms. Cavis questioned why she was selected for the transfer and Ms. Chavez-Sanchez answered the decision was based on Ms. Cavis's seniority. Id. By the term "seniority" Ms. Chavez-Sanchez was referring to department seniority. Chavez-Sanchez testimony Day 2 part 4 at 47:00-49:25.
24. The revised schedule included positions other than Ms. Cavis's whose schedules were also changed and the decision to change the schedules was made several weeks prior to the email (Ex. J-10) and well before Ms. Chavez-Sanchez was aware of Ms. Cavis's union activities. Chavez-Sanchez testimony Day 2 part 4 at 40:00-44:40.
25. Management became aware of Ms. Cavis's and Ms. Salas's union organizing activities on July 27, 2020. Chavez-Sanchez testimony Day 2 part 4 at 0:29:06 – 0:35:36.
26. I take special notice of Bernalillo County's Employment Relations Rules & Regulations, Sections 600 Re: Disciplinary Actions; 1000 Re: Leave and Holidays; 1300 Re: Unclassified Employees and Section 800 Re: Reduction In Force.
27. According to Ms. Salas, on November 8, 2020, she returned a telephone call from Jessica Jaramillo the prior day, who "was calling to figure out the contact tracing for those in contact with two clients that tested positive for COVID." Joint Ex. 16.
28. The difference between the procedure followed with Ms. Salas and what was called for under the County's testing protocols as eventually developed, was that Jessica Jaramillo did not require testing and contact tracing because Ms. Salas's contact with two clients testing positive for CVID-19 was within 48 hours of their specimen collection, not within 48 hours of testing positive. Joint Ex. 16.
29. Shortly before the exposures in question, the Center for Disease Control (CDC) updated its guidelines to specify the timing of the 48-hour window. Chavez-Sanchez testimony Day 2 part 4 at 1:20:19 – 1:20:56; Ex. 3.

30. I take special notice of CDC guidelines updated February 25, 2021, providing:

> "For COVID-19, a close contact is anyone who was within 6 feet of an infected person for a total of 15 minutes or more. An infected person can spread COVID-19 starting from 48 hours (or 2 days) before the person has any symptoms or tests positive for COVID-19. A person is still considered a close contact even If they were wearing a mask while they were around someone with COVID-19."

31. On November 14, 2020, Pam Acosta denied Ms. Cavis's request for one hour of vacation to attend a doctor's appointment, on the grounds that she had only given two days' notice, not three. Cavis Test., Hearing Day 1, Part 6, at 47:59-48:53.
32. In late January of 2021, Ms. Salas requested vacation time. That request was denied, due to "insufficient staffing." Ex. J-15, at page 3.
33. On November 26, 2020, Ms. Thomas filed a formal HR Complaint form that led to an investigation of Ms. Salas and Ms. Cavis for harassment. Id. at Attachment 1.
34. On December 23, 2020, Respondent issued notices of investigation to Ms. Cavis and Ms. Salas informing them that they were the subjects of an investigation into allegations of harassment arising out of allegedly pressuring a fellow employee into signing a union petition in the CARES Campus parking lot on September 23, 2020. Ex's. J-2 & J3.
35. At no point during or after the parking lot conversation that is the basis for the harassment complaint, did Ms. Thomas indicate she felt intimidated or pressured by Ms. Cavis or Ms. Salas until a conversation with Ralph Chavez, the Compliance Officer of DBHS and a member of management, on October 12, 2020. Salas Test., Hearing Day 1, Part 2 at 0:20:55-0:21:44.
36. As noted in the investigative report, Ex. J-4, the HR Complaint was filed after Ms. Thomas had a conversation with the DBHS Compliance Officer in which she recounted her encounter with Ms. Salas and Ms. Cavis in the CARES Campus

parking lot on September 23, 2020. Mr. Chavez "believing that policy violations occurred" got permission from Ms. Thomas to speak with management about what happened. Ex. J-4, at 10. He also "directed her to file a complaint, which Mr. Chavez believed she completed." Ex. J-4, at p. 10.

37. Mr. Chavez told the HR Complaint investigator, Mr. Cappon, that it was his understanding that Ms. Cavis and Ms. Salas are allowed to conduct Union business on County time or property. Ex. J-4; testimony of R. Chavez, Day 1 at 0:08:53-0:09:15.

38. Following Mr. Chavez's directive to file a complaint, on October 13, 2020, Ms. Thomas wrote an email to Ms. Chavez-Sanchez about the parking lot encounter. In response, Ms. Chavez-Sanchez by email told her that she (Ms. Chavez-Sanchez) "will make sure that County leadership is aware of this situation" and that "I also encourage you to bring any issues forward to myself or your leadership and/or HR related to this situation or any others you may ever encounter." She thanked Ms. Thomas "for your bravery in raising this issue." Ex. J-4, at Attachment 5, page 2.

39. Jessica Jaramillo sent an email on October 15, 2020, about a conversation she had with Ms. Thomas the prior day about the HR Complaint. According to the email, "She will be completing the complaint form from HR. I advised her to put in the incident that occurred yesterday evening in as well" (referring to Ms. Salas contacting her using the phone number the County provided in response to this Board's direction in the card check process). Id. at Attachment 5, page 1.

40. On November 26, 2020 (two months after the parking lot conversation) Ms. Thomas filed the formal HR Complaint form that led to the investigation. Id. at Attachment 1.

41. Because they had done nothing wrong, both Ms. Salas and Ms. Cavis were exonerated of any charges after completion of the investigation. Ex's. J-5 & J-6.

42. On January 24, 2021, Ms. Salas inquired about whether she was eligible for bereavement leave to attend her cousin's funeral and was informed by her supervisor, Jessica Jaramillo, that such leave did not apply to cousins. Ex. 1.

43. At the suggestion of someone at Human Resources Ms. Salas requested two days of vacation leave instead of bereavement leave but her request was denied. Id.

44. The reason given by Ms. Jaramillo for denying the requested vacation leave was short staffing. Id.

45. With regard to Ms. Salas's leave requests at issue, although she was not eligible for bereavement leave, Ms. Jaramillo did approve a day of annual leave, which Ms. Salas took on January 25, 2021, so that she could spend time with her family before they left Albuquerque for Oklahoma where her cousin's funeral was being held. Id.

46. Ms. Jaramillo also offered to allow leave for part of the day of the funeral so Ms. Salas could attend remotely via Zoom and to personally cover her absence for a "couple of hours" for that purpose and "…since this is an emergency you can have your phone with you so in case your family calls you, you can answer their calls…" Eventually, Ms. Jaramillo allowed her one hour "off the floor" to participate in the funeral services via Zoom. Id.

47. At the time of Ms. Salas's request for two days of vacation leave, two other employees in the same job classification were allowed vacation leave; one to take care of her father and the other for a job interview with the State. Response to the MSJ at ¶ ¶ 14 and 15.

48. Two of the clients with whom Ms. Salas was working on or about November 4 and 5, 2020, tested positive for COVID-19. Salas Test., Hearing Day 1, Part 2, at 0:31:38-0:33:14.
49. Ms. Jaramillo asked Ms. Salas if she had worked with those two individuals to which she replied that she had close contact with them on Wednesday and Thursday. Ms. Jaramillo asked, "Not Friday?" When Ms. Salas said "no", Ms. Jaramillo told her "Oh, you're fine then." Response to MSJ at ¶ 12; Ex.1.
50. Around the same time, Ms. Chavez-Sanchez sent emails stating that contact tracing would be done for anyone with exposure within two days of a positive test specimen collection. That contact tracing was not done in Ms. Salas's case and so, she was treated differently than was called for in the announced protocols. Id. at ¶ 13 (Modified). See also Ex. J-9.
51. At paragraph 12 of its Answer to the Second Amended Complaint the County acknowledges that "several positions were temporary positions that have ended" and further in response to union inquiries regarding the ending of grant funded positions the County's stated position is that was "continuing the *status quo* in the situation of when a grant ceases to exist." Exhibit L.

In addition to the foregoing findings, I find the following additional facts:

52. The Boundary Spanner positions at issue in this case as Community Case Managers were within the bargaining unit at DBHS represented by Complainant AFSCME, Council 18. Hrg. audio Day 2, part 1 at 00:05:01 – 00:05:25; Ex's. 6-9 inclusive.
53. On December 29, 2020, Greg Perez, Fire Chief/Deputy County Manager, wrote to Rob Trombley, AFSCME, Council 18 Public Safety Coordinator/Staff

Representative via email concerning the loss of grant funding for the Boundary Spanner positions and the delay in scheduling contract negotiations stating:

> "The goal is to get to the table in the next few weeks, we are waiting for the County Manager to identify her lead spoke person as John Martinez who has served in that capacity is retiring. We know all of the members of the team outside of this one spot. Once we have this person identified, we will start scheduling. Knowing this particular issue [loss of the grant funding for Boundary Spanners] is fast approaching, can we negotiate something via Labor Management to cover us in the event we don't get to the table?"

Ex. R.

54. Mr. Trombley responded to Mr. Perez's December 29 email on January 1, 2021, writing:

> "Happy New Year. Yes we need to address. Time is short, so we should address as soon as possible. Keep in mind, this is a mandatory subject and PEBA mandates final and binding arbitration. There are jobs open they can slide right into. Let me know when you can get together on this issue.
> I will move whatever I have to in order to accommodate you."

Id.

55. On January 4, 2021, Rob Trombley, AFSCME, Council 18 Public Safety Coordinator/Staff Representative wrote to Margarita Chavez-Sanchez via email stating:

> "Understanding the funding source may no longer be available, the terms and conditions of the layoff "Who, What, Where, When, and Why," are mandatory subjects of bargaining that are negotiated in every contract. The union requested contract negotiations on October 14, 2020.
>
> To date the county has been unwilling to provide dates for formal negotiations. The union is requesting to bargain the terms and conditions of employment related to this issue as soon as possible. Please Advise."

Id.

56. On behalf of the County, Attorney Dina Holcomb wrote to AFSCME representatives on February 8, 2021, via email stating:

"…Rob has asked to meet and bargain regarding the Boundary Spanners. The County does not believe this is a mandatory subject of bargaining, however, we are prepared to meet to discuss the impending end of the grant. Does Tuesday, February 17, 2021, at 1:30 PM work for you, Sam, and/or Alexa and Deborah?"

Ex. L.

57. Although the County offered to "meet in an effort to resolve this issue and address the Union's concerns…", it did not agree to bargain the Boundary Spanners issue as a mandatory subject of bargaining, prompting AFSCME's attorney, Stephen Curtice to reply:

"Unless the County agrees that this is a mandatory subject of bargaining, what is the purpose of the meeting on Wednesday? We are seeking to bargain. On what basis does the County believe it does not have an obligation to do so?"
Id.

58. Incidental to his requests for bargaining Rob Trombley requested information about the specific grant or grants funding the Boundary Spanner positions and documentation showing that the positions were in fact funded by a grant as the County asserted. More specifically, Ex. Q set forth some of the information requests and the County's responses as follows:

    a. In response to Mr. Trombley's request for a copy of the "last internal audit regarding MATS/CARES Campus" the County was unable to find any such audit and referred him to an internet link to its internal audits "in case it could be under another title."

    b. Within two weeks of his request for copy of the audit and after receiving a copy of the Mental Health Department's audit from 2018 (presumably from the referenced internet link), Mr. Trombley noted that based on the concerns of the auditor, it would be reasonable to believe that there have been more

recent audits and that the 2018 audit did not consider grant funding as a separate audit item. Consequently, Mr. Trombley asked "Is [sic] there other audits?" The County responded: "This is the only recent Internal Audit."

c. In response to Mr. Trombley's question "Are audits conducted yearly?" the County answered: "Financial Audits are conducted yearly, but Internal Audits are based on risk and only high risk auditees get audited yearly."

d. To the question "Is there a different audit for grants?" the County answered: "Federally awarded grants have a Single Audit that is performed, in addition to the Financial Audit. This is included in the back of the Comprehensive Annual Financial Report, which is on our website."

e. Trombley asked for an explanation of "…how your department administers, coordinates, oversees and monitors the various grants awarded from all organizations and governments" to which Pamela Moon responded: "Grants are monitored by departments. My department is focused on getting new grants and providing training for departments."

f. To the question "Can the county intermix funding sources such as tax dollars and grant funding or are the grants awarded specific to certain services or projects?" The County answered: "Grants are for specific purposes and cannot be intermixed or used other purposes [sic]. Tax dollars can be used for the same purpose as a grant, but not the other way around. The accounting for grants is segregated."

g. The County answered Mr. Trombley's question "Can grant employees in grant funded jobs work in tax based jobs?" by stating "It is possible that a person can split time between grant funded jobs and tax based jobs."

h. Mr. Trombley asked: "How does your department ensure that the different departments are using the grants for what they are intended for?" The County responded: "Departments are responsible for administering their grants in accordance with the grant requirements."

i. The County also provided paycheck stubs for the individuals at issue, but Mr. Trombley considered those responses to be insufficient to allow him to decide whether or which of the Boundary Spanner positions were grant funded and the source and limitations of the grant or grants involved. Hrg. Audio Day 2 part 2 at 00:04:29 – 00:6:53; Ex. Q.

59. Requests for information were also made during Labor Management meetings. (Ex. J-12 at p. 2), wherein Ms. Cavis requested "copy of the grants, criteria for grant funded positions, and criteria of employee status." The record does not establish whether the County provided the information requested by Ms. Cavis.

60. The Boundary Spanners' individual Term Employment Agreements, include a reference to "the 460201 DSAP Miscellaneous Grants Payroll Unit". Ex's. 6-9 inclusive.

Any proffered findings not set forth above were considered and I decline to adopt them. More specifically, I decline to accept requested findings and suggested implications that both Ms. Thomas (who made the complaint as directed by management) and Jennifer Mangum (who provided evidence to the investigator, including internal Union communications were promoted in proximity to those actions (See Union Ex. O) and that it is known at the facility that some people get promised a promotion before the jobs are posted at the department. Salas Test., Hearing Day 1, Part 2, at 30:05-30:32. The preponderance of the evidence

suggests that the positions to which those employees were either not promotions and/or were open competitions for which neither Ms. Cavis nor Ms. Salas sought to compete.

REASONING AND CONCLUSIONS OF LAW: Based on the Stipulated Pre-Hearing Order entered herein, the issues to be resolved are:

1. Whether the County violated Sections 17(A)(1) and 19(F) of the PEBA by making unilateral changes to terms and conditions of employment of the bargaining unit without notice to AFSCME or an opportunity to bargain the same and by failing or refusing to provide AFSCME with requested information.

2. Whether by the actions alleged by AFSCME, the County violated Sections 19(A), 19(B), 19(D) and 19(E) of the PEBA.

3. If the foregoing issues are decided in favor of AFSCME, what is the appropriate remedy.

I analyze each of the above three issues as follows:

I. FAILURE TO BARGAIN IN GOOD FAITH

A. Sections 17(A)(1) and 19(F) analysis:

Because AFSCME, Council 18 is the exclusive bargaining representative for a group of public employees employed by the County and because Deborah Salas and Alexa Cavis are County employees within the bargaining unit represented by AFSCME, NMSA 1978 Section 10-7E-17(A)(1) (2020) requires Bernalillo County and AFSCME, Council 18 to bargain in good faith on wages, hours and all other terms and conditions of employment. NMSA 1978 Section 10-7E-19(F) (2020) makes it a prohibited labor practice to "refuse to bargain collectively in good faith with the exclusive representative" contrary to the requirement of § 17(A)(1).

This Board has long held that the duty to bargain in good faith includes the duty to provide information necessary to negotiate, administer and police the parties' Collective Bargaining Agreement (CBA), and to fairly and adequately represent all collective bargaining unit employees. See *National Union of Hospital and Health Care Employees, District No. 1199 v. UNMH*, 3-PELRB-2005 (Oct. 19, 2005). (Information required to be produced included any information that would assist the Union in determining the extent and number of employees affected by an erroneous wage implementation, work schedules, a list of casual pool employees and copies of contracts between the employer and staffing agencies. This information is all a type routinely required and requested in implementing a contract because it concerns wage information, information related to hours and other terms and conditions of employment, employee lists, and information pertaining to possible loss of work.) The duty to bargain under the PEBA should be interpreted in line with the same statutory duty imposed by the National Labor Relations Act (NLRA) as the PELRB so held in *National Union of Hospital and Health Care Employees, District No. 1199, supra.* See also *Communication Workers v. State of New Mexico and Public Employee Labor Relations Board*, 2019-NMCA-031 (February 21, 2019).

The NLRA, as does the PEBA, prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees," 29 U.S.C. § 158(a)(5) (2012), and further provides that the duty "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to ... confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" 29 U.S.C. § 158(d). As the United States Supreme Court has held:

> "Clearly, the duty [to bargain collectively] may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact-'to meet and confer'-about any of the mandatory subjects. A refusal to negotiate in fact as

> to any subject which is within [§] 8(d), and about which the union seeks to negotiate, violates [§] 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of [§] 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of [§] 8(a)(5) much as does a flat refusal."

NLRB v. Katz, 369 U.S. 736, 743 (1962).

I recognize the well-established premise that layoffs impact wages, hours and other terms and conditions of employment and are thus subject to the mandatory bargaining obligation as to their effects. *First Nat'l Maint. Corp. v. NLRB,* 452 U.S. 666, 681–82, (1981). However, I cannot presume without further legal development that the Boundary Spanners job actions at issue constituted a "layoff" so that they would be subject to bargaining as claimed. That further development is rather easily done. Although the term "layoff" in common parlance typically refers to a separation from employment due to lack of work, that understanding of the term is not universal and the County in Section 801 of the County's Employment Relations Rules & Regulations entitled "Reductions-In-Force (Layoffs)" has ascribed the term "layoff" a more expansive meaning, comprising separations from employment for reasons other than lack of work:

> "Employees are subject to separation by layoffs due to a shortage of County funds, abolishment of position(s), lack of work, or action by the Board of County Commissioners to reduce or eliminate function(s)."

By this definition the Boundary Spanner job actions at issue here, constitute a "layoff" even though the positions were term positions eliminated due to the loss of grant funding because that term as recognized by the County includes separation due to a shortage of County funds.

In the absence of a recognized bargaining representative, and the mutual good faith bargaining obligations present here, it may well be that the County would be free, perhaps

even required, to terminate the Boundary Spanner positions in a manner consistent with past practice for term positions. But the collective bargaining relationship that exists requires the County to act in accordance with its obligations under Sections 17(A)(1) and 19(F) of the PEBA in addition to any obligations it may have under former practices or its obligations under its Employment Relations Rules and Regulations Section 800 *et seq*. That duty includes bargaining over the mandatory subject of Boundary Spanner layoffs. Even if the County established a management right to relieve them of their duties in a manner consistent with their term employment agreements, because the layoff of public employees is a mandatory subject of bargaining, the Union was entitled to a significant opportunity to bargain in a meaningful manner and at a meaningful time over the effects of the County's decision to lay them off.

In this respect the County confuses the absence of a collective bargaining agreement, which has yet to be bargained, with the "absence of a collective bargaining relationship". Accordingly, any argument surrounding when the layoffs occurred in relation to the recognition of the bargaining unit, are not material.

The record established that AFSCME requested bargaining generally in October 2020 and specifically over the effects of terminating the grant-funded Boundary Spanner positions in February 2021 but the County did not agree to negotiation dates and did not consider the issue of the Boundary Spanners layoff to be a mandatory subject of bargaining. See Ex's. L and R.

After reviewing the record as a whole, I conclude based on findings Nos. 51 through 60 inclusive, that the Boundary Spanner job actions at issue constituted a layoff of bargaining unit employees, which is a mandatory subject of bargaining under § 17(A)(1), and that the County refused to bargain both the layoffs themselves and the effects of those layoffs.

Accordingly, I agree with the Union that the County committed a prohibited labor practice pursuant to Section § 19(F) by that failure or refusal to bargain.

A second aspect of the Union's failure to bargain claim involves the alleged failure of the County to provide information necessary to support the Union's bargaining demand. The Union's closing brief contains barely a mention of this claim and no record references to support it, preferring to concentrate on the claimed retaliation against Deborah Salas and Alexa Cavis. I cannot tell from the exhibits or Rob Trombley's testimony whether he requested copies of the Boundary Spanners' Term Employment Agreements and if he did whether the County provided them for the additional information they contain concerning the grant funding for the positions. What I can tell from the record is that Mr. Trombley requested specific information from the County, which information was timely shared within the narrow confines of the specific requests, but ultimately does not provide the level of detail needed to determine which positions were grant funded, the source of the grants and limitations on the budget related to the grants. Ms. Cavis on behalf of her union separately requested information relevant to those questions and the record does not indicate whether her inquiries were ever answered. See finding 59.

Accordingly, I conclude that the preponderance of the evidence supports a conclusion that the County violated of Sections 17(A)(1), Section 19(F) by withholding information relevant to the layoff of Boundary Spanners.

II. Discrimination, Retaliation and Interference Claims.

A. Section 19(A) analysis. The Legislature declared the purpose of the PEBA as being (1) to guarantee public employees the right to organize and bargain collectively with their employers; (2) to promote harmonious and cooperative relationships between public employers and public employees; and (3) to protect the public interest by

ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions. See NMSA 1978, § 10-7E-2 (2020). Consistent with the second and third stated purposes, the Legislature provided that it shall be a prohibited practice for a public employer to "discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization[.]" See NMSA 1978, § 10-7E-19(A). Treating two similarly situated persons differently on the basis of an identifiable characteristic is the hallmark of discrimination. *Cf.* NMSA 1978, § 28-1-7(2021) (describing an "unlawful discriminatory practice" under the New Mexico Human Rights Act as being where an employer takes an employment action "because of" a particular trait, such as race, age, religion, or sex); *Griego v. Oliver*, 2014-NMSC-003, ¶ 27, 316 P.3d 865 12 (under equal protection analysis, the first question to ask in determining the constitutionality of a discriminatory state law is "whether the legislation creates a class of similarly situated individuals and treats them differently"); *Burch v. Foy*, 1957-NMSC-017, ¶10, 62 N.M. 219, 308 P.2d 199 (explaining that in order to be legal, a classification "must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule[,]" and concluding that "[i]f persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification"). Under Section 19(A), union membership is the identifiable characteristic that may not serve as the basis for treating an otherwise similarly situated public employee differently with respect to the terms and conditions of his or her employment.

I do not accept the Union's invitation to adopt a *Wright Line* analysis of union animus for this claim because, unlike a claim brought under Section 19(D), union animus is not an element of a Section 19(A) claim. By its plain language, Section 10-7E-19(A) requires only

that the discriminatory treatment be "because of the employee's membership in a labor organization" in order for such treatment to constitute a prohibited practice. *State of New Mexico Corrections Department v. American Federation of State, County and Municipal Employees, Council 18, AFL-CIO;* 2018-NMCA-007 (September 5, 2017); *cert. denied,* S-1-SC-36688 (October 24, 2017). (In re: PELRB Case No. 105-09). [1]

To the extent prior Board decisions construing claims brought under Section 19(A) engaged in a *Wright Line* type of analysis in search of union animus, I conclude today that such analysis is not necessary under NMSA 1978 § 10-7E-19(A) (2020).

The Union's closing brief does not specify which of the various acts complained of constitute discrimination against Ms. Cavis or Ms. Salas with regard to terms and conditions of employment because of their membership in the Union. The Union's Second Amended Prohibited Practices Complaint lumps together alleged violations of Section 19(A) with all other alleged prohibited practices under Sections 19(F), 19(B), and 19(E). The parties' Stipulated Pre-Hearing Order does not provide any clarification of that question and while it lists acts the Union considers to be retaliation it lists none that it considers to constitute discrimination. Consequently, I am obliged to examine each of the Union's contentions plead in its second Amended Complaint for evidence of discrimination in order not to inadvertently overlook acts the Union intended to state a claim under Section 19(A):

1. On or about July 15, 2020, Megan Aragon, Clinical Manager, pulled staff into her office asking them about the Union being organized and asking who had signed. Second Amended Complaint ¶ 7. If this occurred, which is disputed, while it may violate other

[1] In *State of New Mexico Corrections Department v. American Federation of State, County and Municipal Employees, Council 18*, it was AFSCME, the Complainant in this case, taking the position that union animus is not an element of a Section 19(A) claim.

provisions of the Act, there is no indication that the meeting presents a claim of discrimination under the Act.

2. On or about the same day, Clinical Manager Aragon also told Tech Leads during their meeting that they cannot have union conversations and to make sure employees do not talk about the Union. Second Amended Complaint ¶ 8. If this occurred, which is disputed, there is no indication that this meeting presents a claim of discrimination under the Act.

3. The following allegations set forth in ¶¶ 9 expressly plead a claim for retaliation, not discrimination and there are no contrary facts that would lead me to believe otherwise. Consequently, disputed allegations that the County changed the hours and location of work for Alexa Cavis on or about July 20, 2020; that it investigated Alexa Cavis and Deborah Salas on or about December 23, 2020, regarding their solicitation of union authorization cards; and that the County claimed that Ms. Cavis's position is a grant-funded position, even though she has never been notified of that fact since accepting her transfer to that position, do not state a claim under Section 19(A).

Conversely, although the allegation in ¶ 9c that the County failed to provide Ms. Cavis and Ms. Salas with information regarding possible COVID-19 exposure and/or provided them false information, despite telling other employees correct information is expressly delineated as a retaliation claim, I find that it implicates Section 19(A); and , although the allegation in ¶ 9e that the County refused to grant bereavement leave for Deborah Salas under circumstances where other similarly situated employees would receive such leave as a matter of course, is expressly delineated as a retaliation claim, I find that it too, implicates Section 19(A).

All remaining allegations in the Second Amended Complaint, such as that employees were locked out of accessing workplace policies sometime around July 15, 2020; that inconsistent

sets of policies were given to the union in response to its request; that the County unilaterally implemented changes to the policies affecting terms and conditions of employment of the bargaining unit without first providing notice to the Union or an opportunity to bargain the same; adding security cameras with audio in order to monitor employees, in violation of their own policies; refusing to allow employees to take vacation; requiring flex time without bargaining; initiated a reduction in force, without bargaining or providing information requested by the Union relating to that reduction in force and violating the terms of a MOU regarding hazard pay do not state a claim under Section 19(A).

Although the Union did not plead that the County discriminated against Ms. Cavis in connection with COVID-19 contact tracing procedures, at ¶¶ 31 and 32 of its Closing Brief the Union argues that on October 25, 2020, one of Ms. Cavis's coworkers notified her that he had been notified of a COVID-19 exposure. Ms. Cavis had not been contacted until the end of the following day after she reported to work despite that coworker (who subsequently tested positive for COVID-19) telling Ms. Acosta that he had been in contact with Ms. Cavis and that Ms. Acosta needed to alert Ms. Cavis. Based on the foregoing, the Union argues that Ms. Cavis received notification of a potential COVID-19 exposure later than her coworkers, implying that the County purposefully delayed notice because of Ms. Cavis's union activities.

Consequently, I turn my attention to the allegations that the County discriminated against Ms. Cavis and Ms. Salas regarding COVID-19 exposure and by denying bereavement leave to Deborah Salas because of their union activities.

i. Discrimination based on COVID-19 exposure procedure.

It is not disputed that two of the clients with whom Ms. Salas was working on or about November 4 and 5, 2020, tested positive for COVID-19. Within a day of Ms. Salas's

exposure Ms. Jaramillo was actively developing a response procedure for such exposures and on November 8, 2020, she asked Ms. Salas if she had worked with those two individuals to which she replied that she had close contact with them on Wednesday and Thursday. Ms. Jaramillo asked, "Not Friday?" When Ms. Salas said "no", Ms. Jaramillo told her "Oh, you're fine then." The critical distinction here is that Ms. Salas had contact with these individuals within 48 hours of their *specimen collection*, but not within 48 hours of when they *tested positive*. By this exchange Ms. Jaramillo apparently determined that Ms. Salas did not require further contacts questioning and that there was no need to refer her for testing. I agree with the County's view of this incident as a mere mistake because Bernalillo County's policy for contact tracing was in flux, with specific guidance from the Centers for Disease Control having recently been updated to specify the timing of the 48-hour window. I rely on the testimony of Ms. Chavez–Sanchez for that proposition as well as Ex's. 3 & J-16. I also have taken special notice of CDC guidelines providing for the appropriate 48-hour timeframe. That the County quickly corrected the miscalculation of CDC's 48-hour timeframe is not sufficient evidence of disparate treatment or if it is, constitutes a legitimate good faith reason for any disparate treatment.

Ms. Acosta testified she was unaware that Ms. Cavis was exposed to COVID-19 let alone that Ms. Acosta herself delayed notification to Ms. Cavis. Notably, this specific act of discrimination is not plead in the Second Amended PPC and is not mentioned in the parties stipulated Pre-Hearing Order. Based upon the lack of testimony from any other witness or any documentary evidence that this actually occurred as well as contrary testimony from Ms. Acosta, Petitioner has failed to carry its burden on that claim. Ms. Cavis testified that she did not think much of the fact that she had received notification of a potential COVID-19 exposure later than her coworkers at the time and only became concerned when she later

thought the same thing happened to Ms. Salas. Cavis testimony Day 1 Part 2 at 0:47:46-0:48:53. Based on the foregoing I conclude not only that late notice was not an issue for Ms. Cavis at the time it occurred but it was not an issue at all until she needed it to be one to bolster the Union's position for the hearing. I further conclude that the testimony of Ms. Cavis on this and any other claim not originally plead or alleged in the Second Amended PPC, is not credible. Therefore, the evidence is insufficient to establish that anyone at the County violated Section 19(A) by treating Ms. Cavis and Ms. Salas differently than other similarly situated employees, concerning notice of COVID-19 exposures as alleged. I do not find the Union's witnesses' testimony to be credible in this regard and surrounding circumstantial evidence does not support an inference in favor of the union. For example, Petitioner did not introduce any evidence that Ms. Jaramillo gave the correct information to non-union members who had close contact with COVID-19 positive clients around the same time she gave incorrect information to union members. Thus, Petitioner has failed to prove anti-union discrimination in violation of Section 19(A) and that should be dismissed.

ii. Discrimination based on denial of leave.

I find the Union's version of the events surrounding denial of bereavement leave for Ms. Salas to be inaccurate. First, bereavement leave was neither applied for nor denied. Ms. Salas merely inquired about whether she was eligible for bereavement leave. Jessica Jaramillo correctly informed her that such leave did not apply to cousins. See County Personnel rules Section 1012 regarding Bereavement Leave. Neither do I ascribe any malice or disparate treatment in connection with denial of her request for two days of vacation leave. At the time of Ms. Salas's leave request, two other employees in the same job classification had already been granted vacation leave; one to take care of her father and the other for a job interview with the State. Response to the MSJ at ¶ ¶ 14 and 15; findings 42-47 *supra*.

Complainant produced no evidence that the grant of leave to those two individuals occurred after Ms. Salas's request for leave was denied (which would indicate discriminatory treatment) and does not argue that was the case. I infer therefore that by the time of Ms. Salas's leave request two of her peers had already been granted leave. With each grant of leave, staffing levels change, so that the evidence leads to a conclusion that by the time Ms. Salas requested two days of leave, she was not similarly situated with her peers who were granted leave. For that reason, testimony of witnesses without knowledge of leave requests granted or pending approval, based on schedules alone is given little weight.

Nothing is known about the union membership of the employees granted leave. We do know that because they were in the same job classification as Ms. Salas that they were in the same bargaining unit, so that two members of the unit were granted their requested leave while one was not. Those facts do not support the Union's claim of discrimination.

Furthermore, although the request for two days off was denied, Ms. Jaramillo offered to allow leave for part of the day of the funeral so Ms. Salas could attend remotely via Zoom. She also offered to personally cover her absence for a "couple of hours" for that purpose and "…since this is an emergency you can have your phone with you so in case your family calls you, you can answer their calls…" and allowed her one hour off the floor to watch the services on Zoom. These offers of self-sacrifice in order to accommodate Ms. Salas's needs are not consistent with her claim of disparate treatment on the basis of her union membership.

Neither has the Union proven anti-union discrimination in violation of Section 19(A) concerning denial of Ms. Salas's requested leave and though not plead, to the extent such a claim was made at the hearing, that claim should be dismissed. Ex. J-15 shows that neither Courtney Thomas nor Jennifer M. were granted vacation time on the same dates requested

by Ms. Salas. After being denied vacation leave, Ms. Salas simply called in sick for these two days, a decision that I consider to be abuse of sick leave as provided for in County Personnel Rules Section 1007 concerning Sick Leave Authorization, and which provides that such leave is authorized "…when an employee is unable to perform normal job duties *due to medical considerations* including, but not limited to *illness, injury, prearranged medical or dental examinations, quarantine, therapy, counseling, and treatment, for the employee, his/her spouse, parents, children, or any person for whom the employee serves as legal guardian*." (Emphasis added.) Calling in sick for the two days denied vacation leave damages Ms. Salas's credibility in this case. Although the Union alleged that on the days Ms. Salas was denied leave there was actually excess staffing, Ms. Salas has no personal knowledge about the staffing on January 28 and 29 because she did not come to work. Accordingly, Petitioner has failed to carry its burden on this claim.

B. Section 19(B) analysis. Interference with, restraint or coercion of a public employee in the exercise of a right guaranteed by the Public Employee Bargaining Act is prohibited by Section 19(B) of the Act. This Board looks to the standard set by the NLRB for violation of similar provision of the National labor Relations Act to find that an employer violates Section 19(B) when it threatens employees with economic reprisals such as layoffs or termination for engaging in protected activity. See, *NLRB v. Gissell Packing Co.,* 395 U.S. 575, 616-618 (1969); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000).

I perceive a fundamental flaw in Union's analysis of Section 19(B) by first considering whether anti-union animus exists before looking at the Employer's actions it claims violate the Act.[2] Viewed through that lens, once antiunion animus is found to exist virtually any

[2] To illustrate the point, in its Closing Brief the Union argues "*As a direct and proximate result of this anti-union animus,* the County took several retaliatory actions against Ms. Cavis and Ms. Salas, set forth above." (Emphasis added).

action by an employer concerning a union member may be seen as a violation of Section 19(B). Once a union has decided an employer harbors animus the natural tendency will be to search for an offense. That tendency explains why the Union in this case claims unspecified "general harassment" as stating a claim under Section 19(B).

Because antiunion animus alone is not actionable, I do not begin my analysis by searching for evidence of antiunion animus first, but by looking first to the acts complained of to decide whether there is evidence to support a conclusion that those acts "interfere[d] with, restrain[ed] or coerce[d] a public employee in the exercise of a right guaranteed pursuant to the [PEBA]." Only if and when that bridge is crossed do we concern ourselves with whether the employer's actions were motivated by anti-union animus. It is only by adopting that approach that the burden shifting standard under *Wright Line* make sense.

Under that method I note that in its Closing Brief the Union points to the following acts as violating Section 19(B):

a. Changing job assignments;
b. Moving schedules and positions;
c. Giving false and pretextual positive coachings;
d. Denying vacation requests when adequate staff was actually available;
e. Sending Ms. Cavis and Ms. Salas home for pretextual dress code violations;
f. Placing Ms. Cavis and Ms. Salas under investigation for their Union activities, and;
g. "General harassment".

a. Changing job assignments. I consider the claim that the County changed "positions" to be the same claim as "Changing job assignments". As best I can tell, Complainant relies on a re-assignment of duties that took place effective August 1, 2020 following an email from Ms. Chavez-Sanchez stating that due to Ramses Leyva transferring to another job and hiring six new Case Managers to replace the Boundary Spanner positions lost to expiration of grant funding, there existed a "…need to pull one of our full time, on campus case managers to the RRC meet this need." On-site hours also had to be adjusted to

accommodate all those reassignments. Ms. Cavis was not the only employee to have her schedule re-adjusted when she was selected to be re-assigned to the RRC as the seventh full time Case Manager. See Ex. J-11.

When Ms. Cavis questioned why she was selected for the transfer Ms. Chavez-Sanchez told her that the decision was based on Ms. Cavis's "seniority". The Union argues that the resort to seniority was a pretext for discrimination and/or retaliation based on union activities. The Union presumes that application of seniority in the decision to select a case manager for transfer could mean only that the least senior case manager should have been selected: "However, Ms. Cavis is not the least senior employee that could have been selected, if [seniority] was indeed the criteria…" Union Closing Brief Stmt. of Fact 21. "As a perm employee, [Ms. Cavis] was ahead of term employees and employees on probation (as Stephany Foreman was at the time)." Union Closing Brief Stmt. of Fact 21. Because the work previously done by Boundary Spanners would now be done by six newly hired (and inexperienced) Case Managers and the changes were made necessary by the RRC supervisor Ramses Leyva leaving for another job, it is entirely possible that Ms. Cavis was selected because she was a *more* senior employee, with more experience than others, especially term or temporary employees who might have been selected for reassignment. Ms. Cavis was not the only employee reassigned as is shown by Ex. J-11. Moreover, the e-mail explicitly states the move was based upon Ms. Cavis's department seniority. See Ex. J-11. In any case, Ms. Chavez-Sanchez clarified at the merits hearing that she was referring to "department seniority". The Union did not present evidence that re-assignment was not appropriate under department seniority rather than County employment seniority. Therefor the evidence is insufficient to prove that the County's seniority calculation was inappropriate.

Finally, Petitioner attempted to show the transfer occurred after Director Chavez-Sanchez became aware that Ms. Cavis was involved in organizing the Union. That fact is not sufficient to prove a claim under Section 19(B) because it does not take into consideration when the decision to transfer was made (which is really the critical fact) as contrasted with when the transfer was actually affected.

Furthermore, the evidence does not support a conclusion that the transfer occurred after Director Chavez-Sanchez became aware that Ms. Cavis was involved in organizing the Union. The Union relies on Ms. Cavis's testimony for the proposition that Director Chavez-Sanchez became aware of her union organizing after Mike Garcia spoke with Ms. Chavez-Sanchez on July 7, 2020. However, Ms. Chavez-Sanchez testified that although Mr. Garcia did tell her about the potential union on July 7, 2020, he did not mention Ms. Cavis's name. Petitioner did not rebut this testimony. Further, Ms. Chavez-Sanchez testified that she spoke with Ms. Salas later that same day about the union organizing. The testimony of both Ms. Salas and Ms. Chavez-Sanchez agree that Ms. Cavis was not mentioned in that conversation by name. Ms. Salas did not tell Ms. Chavez-Sanchez during that conversation that she herself was organizing the Union. Ms. Salas alleges Director Chavez-Sanchez made a comment about a new employee "stirring things up" that Ms. Salas felt referred to Ms. Cavis, but there were several employees who were "new" to the department and Ms. Chavez-Sanchez denied any knowledge of Ms. Cavis's involvement in the Union at that time.

Following the July 7th conversation, Ms. Cavis and Ms. Salas sought to meet with Director Chavez-Sanchez to tell her that they were the ones bringing in the Union. That testimony undermines their assertion that the Director knew of Ms. Cavis's involvement on July 7, 2020. It is inconsistent to assert knowledge of Ms. Cavis's union organizing activities on July 7, 2020, while simultaneously requesting a meeting weeks later to inform the Director of that

same involvement. I do not give much weight to Director Chavez-Sanchez's "admission" that she thought the requested meeting concerned the Union when she also testified that when she got the meeting request she thought it could be about any number of topics, including the Union, wages, etc. That requested meeting occurred July 27, 2020, seven days *after* Ms. Cavis's transfer. I agree with the County's argument that because the Director did not know of Ms. Cavis's role in organizing the Union until the July 27th meeting, Ms. Cavis's union activity played no role in the decision to transfer her to the RRC.

Therefore, I cannot conclude that the evidence supports an inference that the County's explanation that Ms. Cavis was selected based on seniority was false and thus no inference that it was a pretext for discrimination may be drawn. Neither does the evidence establish that the reassignments generally and Ms. Cavis's in particular, had anything to do with the employees' union membership, or that her schedule changes were any different than others reassigned based on her union activities.

Concerning Ms. Chavez- Sanchez's statement that because the Intensive Case Management (ICM) position was not permanently funded it would be filled by a term employee, I disagree with the Union's proposition that the statement makes no sense. The reason given by Ms. Cavis for why she believes it makes no sense is that ICM was the position she previously held and she held it as a permanent employee. Ms. Cavis conflates the *funding* for a position with the employment *status* of the employee holding that position. An employer may fill a non-permanent grant funded position with either a term employee or a permanent employee, with the only difference being how that employee is regarded if and when the grant funding ends. Although the claim that ICM was not permanently funded makes no sense to Ms. Cavis and the Union, it makes sense to me for the reasons stated and so, I conclude that no inference may be drawn from it to support a pretext for discrimination.

Similarly, the Union's argument that the RRC was "budgeted for six community case managers and Ms. Cavis made the seventh" (Id. at 0:26:59-0:28:21; Union Ex. P) overlooks the fact that money is fungible and a management decision that six community case managers at the RRC was too few does not mean that no budget existed to fund the added seventh position. The union presumes that the RRC was budgeted for six community case managers because that is how many worked there prior to the reassignments at issue based on what it purports to be a budget statement, Ex. P. Director Chavez-Sanchez provided unrebutted testimony that Ex. P was outdated and positions in various worksites had changed since that particular budget was developed. Because Ms. Cavis's position is and always was a permanent position, it is both budgeted and funded regardless of where she is assigned within the DBHS, even if that assignment is to fill a grant-funded position. I do not see, and the Union Brief does not explain, how a change in her work location and schedule would require a change in the DBHS overall budget for full-time regular employee salaries and benefits. At most, a line-item adjustment, moving one funded position in one division to another without a change the broader budget category for salaries and benefits, is all that would be required. No support for a claim under Section 19(B) may be found by line-item budget adjustments after the transfer decision was made.

For the above reasons, whether or not Deputy County Manager Greg Perez claimed during a Labor-Management meeting that all positions at DBHS were grant-funded, and whether that statement is true or not, is immaterial. Similarly, it is immaterial that the Union and Ms. Cavis challenge the wisdom of transitioning back to Ms. Foreman clients transitioned from her just a couple of months prior. Such disruptions and temporary inefficiencies are not uncommon in the wake of a reorganization such as that required by the loss of the Boundary Spanner grant present here. That this may be a "lengthy process" as argued by the Union,

and a decision that "negatively impacted those clients, who were understandably upset" but I find no credible evidence to support the Union's conclusory statements in that regard. The preponderance of the evidence weighs against the County undertaking such a complicated and impactful reorganization justified by the loss of six grant-funded positions for the purpose of retaliating or discriminating against Ms. Cavis.

Subsumed within this claim is the re-assignment of the Boundary Spanner positions themselves after expiration of their grant funding. Union inquiries at the time of transfer about why the laid-off Boundary Spanners could not have been simply transferred into the permanent positions for which six new hires were made does not seem to have an answer in the present record. However, I have concluded that there was a problem with the County's handling of their positions after expiration of grant funding and that problem resulted in a conclusion that the County committed a prohibited labor practice under Section 19(F) of the Act. Absent evidence of all the Boundary Spanners' union membership, in view of positive efforts by the employer to place them in other jobs for which they were qualified there are insufficient points of comparison upon which I might conclude that what happened to the Boundary Spanners was the result of discrimination because of their membership in a labor organization. Consequently, I conclude that the Union has not proven a *prima facie* case for violation of Section 19(B) arising from the Boundary Spanners layoff and failure to place them directly into new Case Manager positions.

Ms. Salas complained that Ms. Jaramillo assigned her to "work the floor" in late 2020 as part of the Union's Section 19(B) claim. Ms. Salas claimed she had not had to work the floor for a long period of time and that this post is generally reserved for new people, but she also testified that at the time of the assignment she did not mind it because the work was easy. So, I give little weight to the Union's argument that the assignment was considered a

demotion worthy of redress as a discriminatory act. The union provides no points of comparison from which I might conclude that the assignment to work the floor was the result of discrimination because of Ms. Cavis's membership in a labor organization. Consequently, I conclude that the Union has not proven a *prima facie* case for violation of Section 19(B) arising from Ms. Jaramillo assigning her to "work the floor" in late 2020. Possibly, the Union is also referring to Ms. Jaramillo changing post assignments for the "techs" because she received several complaints from employees who felt the schedule was influenced by favoritism as a claim under Section 19(B). Ms. Jaramillo revised the schedule to ensure that all staff work all positions periodically instead of some staff working the same positions all the time. That change in work assignments is consistent with "techs" history of being assigned to a number of different posts during their shift, that each "tech" is expected to be competent in each post and that no staff is entitled to work any specific post. It is perhaps natural that any given "tech" would have an individual preference as to which position they like to work, but fundamental fairness requires the sort of revision to scheduling undertaken by Ms. Jaramillo in this case to avoid employee complaints that the schedule was influenced by favoritism. I find nothing in the evidence to suggest that changing post assignments for the "techs" in any way interfered with, restrained or coerced employees in the exercise of a right guaranteed by the Public Employee Bargaining Act primarily because it maintained the *status quo* of making post assignments on a less biased basis, eliminating personal favoritism from the process. Consequently, I conclude that changing post assignments for the "techs" does not state a claim for violation of Section 19(B).

b. Changing schedules. The Union's closing brief does not specifically identify whose schedules are at issue here. I see by the stipulated Pre-Hearing Order that the

schedule change that figures most prominently in the PPC is that accompanying Ms. Cavis's re-assignment to RRC. For the same reasons the re-assignment itself did not violate Section 19(B), I conclude that the schedule change attendant to that reassignment does not violate Section 19(B).

c. False and pretextual "positive coachings". On October 6, 2020, Ms. Cavis was called into a meeting with her supervisors Ramses Leyva and Pam Acosta where they corrected her time reporting for remotely attending the card count conducted by this Board on September 28, 2020. (See *AFSCME, Council 18 & Bernalillo County*; PELRB 303-20). The Union argues that no correction was necessary because Ms. Cavis's time reporting comported with Pam Acosta's instructions with whom she had consulted beforehand. Also, because the hearing she attended was short, she had simply used her lunch break for it, again with Pam Acosta's prior approval. Cavis Test., Hearing Day 1, Part 6, at 36:21-39:02. During this same meeting, Ms. Cavis received a "positive coaching" for talking with her co-workers regarding possible COVID-19 exposures at the CARES Campus. According to Ms. Cavis's testimony, her supervisors raised their voices at her, would not let her respond, and angrily told her that "those conversations need to come from management." Id. at 39:03-39:49. She also testified that a "positive coaching" is identified in County policy as a step in the disciplinary process and that they did not tell her that the meeting might lead to discipline (Id. at 39:49-40:48), a violation of a protected employee's representation rights, which was not plead in this case.

In response, the County argues that positive counseling is not discipline and is not maintained in the employee file. Section 600 of the County's Personnel Regulations demonstrates that positive counseling is not discipline. According to Section 600, progressive discipline begins with verbal reprimand.

I agree with the County that Ms. Cavis misunderstands the correction at issue as being discipline. Section 605(A) of the County's Rules concerning the "Range of Discipline" recognizes a distinction between "counselling" and "discipline" by setting forth each separately and calling for consideration of the severity of the infraction, the employee's work record and disciplinary history only when discipline is contemplated:

> "Supervisors are encouraged to use counseling and discipline as methods for assisting an employee in correcting work violations and behavior and to improve job performance. The discipline to be imposed depends on the severity of the infraction and the employee's previous work record and history of disciplinary action. All disciplinary action, constructive criticism, or counseling shall be conducted in private."

The distinction between counselling and discipline is made clearer by reference to Section 605(B) of the County's Rules. That section enumerates the "Range of Discipline" as:

1. Verbal Reprimand.
2. Written Reprimand.
3. Suspension.
4. Demotion.
5. Dismissal.

Counselling is not included within the enumerated range of discipline.

Concerning the corrective counselling itself, the fact that Ms. Cavis asked Pamela Acosta ahead of time how to code her time to attend "a hearing" does not address the issue here. Because Ms. Cavis did not tell Ms. Acosta that the hearing she wished to attend was the card count for recognition of her union rather than one of the hearings routinely attended by employees in her position, Ms. Acosta thought the hearing was a mandatory obligation for Ms. Cavis's employment when she explained how it would be coded. The former are coded differently than the latter so withholding that information resulted in a time code error. Ms. Cavis presented no testimony to the contrary. As Ms. Cavis is a union steward it is highly likely that she will need to request leave in the future to attend to union business, so to

prevent future mistakes, it was important to correct the error as soon as possible after learning of it.

Later, Ms. Cavis decided to use her lunch break rather than use leave to watch the card count, but that decision also required correction. Workers in Ms. Cavis's position are expected to be flexible in their lunch schedules to ensure proper coverage for clients that varies from day to day, but because the hearing was set for a definite time, the expected level of flexibility in scheduling lunch breaks was lost. Essentially, Ms. Cavis rendered herself incapable of being as flexible as her employer and her co-workers had reason to expect on the day in question.

Concerning the "positive coaching" for Ms. Cavis talking with her co-workers regarding COVID-19 exposures at the CARES Campus, Ms. Acosta testified that Ms. Cavis had told other employees there was an "outbreak" at the RRC causing panic and worry. Ms. Cavis was incorrect about what she was telling co-workers about a COVID-19 outbreak. Precisely because spreading such false information is susceptible to causing unnecessary anxiety and confusion, the County is correct that information about positive cases and precautionary measures should be communicated to employees by management, not an individual union steward, at least in the first instance. Optimally, Ms. Cavis's concerns regarding COVID-19 exposures at the CARES Campus would have been brought to the attention of management for confirmation before discussing with co-workers to reduce the risk of spreading disinformation.

Because the October 6th meeting was not discipline and no possibility of discipline was contemplated, any concerns that Ms. Cavis was not informed that the meeting could result in discipline are without merit. Additionally, both instances of "positive counselling" were appropriate under the circumstances and as both instances occurred in the same meeting, I

find Ms. Cavis's testimony about her COVID-19 discussions with co-workers that her supervisors raised their voices at her, would not let her respond and angrily told her that "those conversations need to come from management" not to be credible.

As a result, I conclude the evidence is insufficient to establish a *prima facie* case that the County's actions concerning this claim interfered with, restrained or coerced Ms. Cavis or any other public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or that the County used public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization in violation of Section 19(B).

d. Denying vacation requests when adequate staff was available.

There appears to be three instances in which vacation leave requests were denied at issue:

1) The Union alleges that on November 14, 2020, Pam Acosta denied Ms. Cavis's request for one hour of vacation to attend a doctor's appointment, on the grounds that she had only given two days' notice, not three, and that prior to bringing the Union in, the County had accepted two days' notice for such requests. Cavis Test., Hearing Day 1, Part 6, at 0:47:59-0:48:53;

2) On January 21 and 22, 2021, Ms. Salas requested vacation time. That request was denied, allegedly due to "insufficient staffing." Ex. J-15, at page 3. However, on those days, she worked, and they had "extra" staff, allowing them to have a "floater" employee. Id. at 0:50:45-0:53:15. This is confirmed by the schedules contained in Ex. J-15; and,

3) In that same month, after Ms. Salas was told that bereavement leave was not permitted for cousins, her request for vacation leave was denied, again for "insufficient staffing." Salas Test., Hearing Day 1, Part 2, at 0:53:18-0:55:35.

The County responded that prior to the hearing, the parties settled Ms. Salas's claim that she was denied vacation leave in violation of the PEBA on January 21 and 22, 2021 and following her bereavement leave inquiry. However, since I allowed testimony on this issue, Respondent addressed it as follows:

The Union did not show that others were granted leave on the same day since staffing needs change daily. On this point I incorporate my analysis of the Union's claim for violation of Section 19(A) above, as it pertains to these leave requests. To summarize, it makes a difference that there is no evidence that the grant of leave to others occurred after Ms. Salas's request for leave was denied and a reasonable inference may be drawn that when Ms. Salas requested leave two of her peers had already been granted leave so that when Ms. Salas requested two days of leave, she was not similarly situated with her peers who were previously granted leave. Thus, Petitioner presented no evidence that Ms. Salas was treated disparately than other employees because they were not similarly situated. Although the Union points to no evidence about the union membership of the employees who were granted leave, we know that because they were in the same job classification as Ms. Salas that they were in the same bargaining unit so that two members of the unit were granted their requested leave while one was not. Furthermore, although the request for two days off was denied, Ms. Jaramillo offered to allow leave for part of the day of the funeral. For those reasons, I conclude that, to the extent the claim is not already settled by the parties, the evidence is insufficient to establish a *prima facie* case that the County's denial of vacation leave on January 21 and 22, 2021 and following her bereavement leave inquiry January 28 and 29, 2021, interfered with, restrained or coerced Ms. Salas or any other public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or that the County used public funds to influence the decision of its employees or the employees of

its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization in violation of Section 19(B).

With regard to denial of her request for one hour of vacation leave on November 14, 2020, to attend a doctor's appointment, on the grounds that she had given insufficient notice, I note that Section 1004 of the County's Personnel Rules governing annual leave authorization, explicitly requires "…at least three working days (3) prior to the proposed annual leave, or as directed by the employee's Deputy County Manager, Elected Official or Department Director." A plain reading of the rule informs me that although at least three working days prior notice is required management may shorten that notice period for reasons it may deem to be appropriate. So, while Ms. Cavis's testimony that "prior to bringing the Union in, the County had accepted two days' notice for such requests" is technically correct, that testimony does nothing but confirm the management discretion that appears in the rule. Her testimony does not establish any different standard applied to her or any other union member *because of* a union being recognized. Ms. Cavis did not, and would not be a competent witness to testify to the number of instances both before and after the union organizing effort wherein the three days requirement was shortened, or what circumstances were present in each instance concerning the work requirements and schedule of the department and the length of leave requested for each leave day requested over a sufficient period of time to enable a trier of fact to make a reasonable inference concerning the elements of a claim brought under Section 19(B).

I also note that the County Personnel Rules Section 1007(A), authorizes sick leave:

> "… when an employee is unable to perform normal job duties due to medical considerations including, but not limited to illness, injury, prearranged medical or dental examinations, quarantine, therapy, counseling, and treatment, for the employee, his/her spouse, parents, children, or any person for whom the

employee serves as legal guardian."

After requested vacation leave to attend her cousin's funeral was denied, Ms. Cavis apparently took two days of sick leave January 28 and 29, 2021. If that time was used to attend the funeral for which vacation leave was denied, that does not appear to fit any of the criteria for authorization of such leave under Section 1007(A). The Union then asks for reimbursement of that sick leave in its prayer for relief. If true, such action shows a level of willfulness that is inconsistent with the purpose of the PEBA as expressed in Section 2 "to promote harmonious and cooperative relationships between public employers and public employees and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions" and does damage to Ms. Salas's credibility in this case.

e. Sending Ms. Cavis and Ms. Salas home for dress code violations.

There is no evidence that Ms. Cavis was ever sent home for a dress code violation, so I address the single issue brought to my attention – the Union's allegation that on August 28, 2020, Ms. Salas's supervisor, Cliff [last name unknown], at the direction of Ms. Aragon, sent her home for a dress code violation. According to Ms. Salas she had previously worn the "ripped" jeans she was sent home to change without anyone having an issue with them before. Ms. Salas further claimed on the date she was sent home to change, Ms. Aragon herself was wearing a t-shirt that was in violation of the dress code.

The County's dress code is not in evidence but Ms. Salas does not contest that the jeans she was wearing violated the dress code, only that the code had not been previously enforced and that because Ms. Aragon was also in violation, that the code was being unfairly applied. The County acknowledges that on the date in question Ms. Aragon noticed Ms. Salas's jeans

did not comport with the County's dress code and called this to the attention of her supervisor. Ms. Aragon testified she would not wear a t-shirt to work and denies Ms. Salas's claim that on August 28, 2020, she, too, violated the dress code. As Ms. Aragon also reports to a supervisor who is responsible for enforcing the dress code and would address any violation by Ms. Aragon and because she was never made aware of any dress code violation and the Union presented no evidence to the contrary, I credit Ms. Aragon's version of the events over that of Ms. Salas.

The Employer's enforcement of a dress code that Ms. Salas does not deny violating does not state a claim under 19(B) unless the enforcement is unfairly applied. As I do not credit Ms. Salas's testimony in this regard the evidence is insufficient to substantiate the charge. That Ms. Salas previously wore the jeans without notice is immaterial where Ms. Salas acknowledges the violation and Ms. Aragon testified she had never seen her wear those particular jeans before. The Union produced no evidence that any other supervisors noticed Ms. Salas's jeans previously or that the jeans did not violate the code. Because I conclude the dress code was not unfairly applied there is nothing in Ms. Salas being sent home on August 28, 2020 to rectify a dress code violation, to even approach a *prima facie* case that the County interfered with, restrained or coerced her or any other public employee in the exercise of a right guaranteed pursuant to the Public Employee Bargaining Act or that the County used public funds to influence the decision of its employees or the employees of its subcontractors regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization in violation of Section 19(B).

f. Placing Ms. Cavis and Ms. Salas under investigation.

On December 23, 2020, the County issued notices to Ms. Cavis and Ms. Salas informing them that they were the subjects of an investigation of a harassment complaint filed by Ms. Courtney Thomas on November 26, 2020. That investigation was outsourced on December 11, 2020, to Robert Caswell Investigations. The eventual terminal report, Ex. J-4, issued February 10, 2021, consisted of nine witness interviews, and more than 20 referenced documents and cleared Ms. Cavis and Ms. Salas of all charges. According to Ex. J-4, Robert Caswell Investigations was charged with looking into a complaint filed with DBHS Human Resources Department by Ms. Courtney Thomas that two union representatives, Ms. Deborah Salas and Ms. Alexa Cavis, contacted her in the CARES Campus parking lot on September 24, 2020. Ms. Thomas felt intimidated and pressured to sign a petition to form a union to represent DBHS employees. After that meeting, Ms. Thomas complained that Ms. Salas called her twice on an unlisted number belonging to her father. During the first conversation, Ms. Salas informed Ms. Thomas that the union activity at the facility "was illegal" and not to discuss it with management. In the second conversation, Ms. Salas asked Ms. Thomas about an investigation into a client complaint against her started by Mr. Ralph Chavez. Ms. Salas told Ms. Thomas that she did not have to cooperate with any inquiry. Ms. Thomas signed the union petition and although she told the investigator three months later that she felt intimidated or pressured to sign the petition, there was no indication that was the case at the time.

I perceive the December 11, 2020, investigation as the second investigation the County initiated in this matter. As noted in Ex. J-4 at page 10, Ms. Thomas filed her HR complaint at the behest of Ralph Chavez, the Compliance Officer of DBHS and a management employee, who was conducting a separate investigation into a client complaint against Ms. Salas at that time. According to Ex. J-4, the reason Mr. Chavez suggested that Ms. Thomas

file a HR complaint was that he mistakenly believed that Ms. Salas and Ms. Cavis could not discuss the Union on the DBHS property. Ex. J-4 at page 9. But for Ralph Chavez, the Compliance Officer of DBHS and a management employee, soliciting the Complaint, Ms. Thomas would not have filed one. Clearly, the subject matter being investigated concerned Ms. Cavis's and Ms. Salas's union organizing activities, a matter protected by NMSA 1978 § 10-7E-5 (2020) and the violation of which is prohibited by NMSA 1978 § 10-7E-19(B) (2020).

I note that in his interview with Chris Cappon of Robert Caswell Investigations on December 22, 2020, Mr. Chavez said that after interviewing Ms. Thomas about another matter involving a client complaint against Ms. Salas[3], Ms. Thomas shared her concerns about Ms. Salas and Ms. Cavis contacting her in the CARES Campus parking lot as outlined above. Her primary concern however was the two telephone calls on an unlisted number belonging to her father. Mr. Chavez told the investigator that he asked Ms. Thomas for her permission to share the information she had given him with his superiors, Jessica Jaramillo and Margarita Chavez-Sanchez, because he thought some sort of violation occurred that should be brought to their attention and Ms. Thomas granted that permission. Audio record of R. Chavez interview 12-22-20 at 0:11:00 – 0:11:22. After immediately relating the information given him by Ms. Thomas to Ms. Jaramillo, she authorized Mr. Chavez to investigate the identity of others contacted by Cavis and Salas. He interviewed one employee Chris Martinez about their contacting him about the union petition, and also reviewed a security video recording of the CARES Campus parking lot for the date and time in question

[3] That matter, HR Investigation 2020-561, was concluded on October 14, 2020, with dismissal of the complaint as "Unfounded". Ex. J-4, attachments 3 and 4. There is ambiguity about the date of closure, however because subsequent email messages in the attachments to Ex. J-4 continue to refer in the subject lines concerning the instant case to "HR Investigation 2020-561" as late as December 30, 2020, months after that investigation was supposedly closed.

in order to identify other employees contacted by the union organizers. He identified one other, Carol Morgan, but told the investigator that Ms. Jaramillo stopped his investigation at that point before he could call any other employees about the union organizers contacts. Id. at 0:13:50 – 0:15:05; 0:16:05 – 0:17:18.

I do not find Mr. Chavez's statement to the investigator to be credible as it concerns Ms. Jaramillo's instruction to cease his investigation of union organizing activities after speaking with only one employee because attachment 5 to Ex. J-4 includes an email from him to Ms. Jaramillo and to Ms. Chavez-Sanchez dated October 13, 2020, in which he writes:

> "When I spoke to Courtney, she mentioned that she thought a few other staff members were also approached. I spoke to those mentioned and so far, no one is acknowledging having been approached."

The clear implication of that email message is that *all* identified employees having contact with Salas and Cavis were interviewed by Mr. Chavez, including Carol Morgan identified by Mr. Chavez as having been contacted by the two union organizers in the CARES Campus parking lot. Also, Mr. Chavez continued to communicate with the investigator concerning witness interviews in the instant case under the subject heading "HR Investigation 2020-561" at least as late as December 30, 2020, when that case involving Ms. Salas was supposedly concluded on October 14, 2020.

Because it was the County that provided to the Union the phone contact number about which she objected, her complaint about that should have been summarily resolved and dismissed as unfounded as soon Mr. Chavez brought it to management's attention. A quick phone call or email to its own HR/Labor Relations Department or perhaps even a quick question directed to the Union's Representative, Rob Trombley, could have revealed that the contact number was given to the union in response to this Board's direction in the card

check process. Instead, Jessica Jaramillo directed Ms. Thomas to add the two phone call incidents to the contemplated HR Complaint about the parking lot incident.

The County does not pay much attention to this issue in its brief concentrating its fire on allegations that employees complaining about the union were rewarded for doing so rather than on any issues concerning the investigation itself. I do not disagree with the general principle argued by the County that it is obligated to investigate an employee's reported harassment of her fellow employees. However, where, as here, the complaint is solicited by management based on a spurious legal premise and where even a cursory inquiry would have resolved the mystery of the unlisted phone number without the necessity of management suggesting she add it to the original contemplated HR Complaint, the County's "obligation" to investigate takes on a far different dimension. More important than the fact of the investigation, is the scope and breadth of two partially simultaneous and overlapping investigations over a four-month period resulting in the comprehensive outside investigator's report, Ex. J-4, which ultimately concluded that Cavis and Salas had done nothing wrong.

I disagree with the County's argument that the two union organizers' eventual exoneration "is beside the point" because the fact that an independent investigator could not substantiate a single charge not only underscores the weakness of the complaint from the outset but calls into question the good faith of management in the manner and method chosen to conduct the investigation.

Under these circumstances, including the extraordinary amount of time, effort and resources devoted to their investigations, I conclude that the County's investigation of Ms. Cavis and Ms. Salas at issue, coerced them and the other employees called as witnesses in the investigation in the exercise of, and otherwise interfered with, their rights guaranteed by § 5 of the Public Employee Bargaining Act to form, join or assist the employees' chosen labor

organization and thereby met its burden that by its investigations the County violated Section 19(B). The evidence is inconclusive as to whether the County's conduct also constitutes restraint of Ms. Cavis and Ms. Salas from the exercise of those rights inasmuch as the Union was successful in its organizing effort but having concluded that the investigations constituted coercion and interference, whether it also constituted "restraint" is of no import.

g. "General harassment". There is not much a Hearing Officer can do with unspecified generalized claims of "harassment". Unless specified acts by the employer violate one or more of the enumerated provision of Section 19 a general allegation of harassment does not state a claim under the Act. Again, the Union's Brief does not inform me what acts by the County fall within this category of "General Harassment" so that I might review them for stating an actionable claim. However, the Union produced evidence at the Hearing on the Merits of acts that appear to state a claim and in the Stipulated Pre-Hearing Order set forth a claim that on July 13, 2020, Megan Aragon, Clinical Manager for the Respondent, pulled staff into her office on or about July 15, 2020, asking them about the Union being organized and who signed interest cards. On or about the same day, Clinical Manager Aragon also told Tech Leads during their meeting that they cannot have union conversations and to make sure employees do not talk about the Union. That claim, if true, would violate Section 19(B) of the Act, so, as the Union does not argue a specific prohibited practice section violated by these allegation I analyze it under this heading.

I adopt the County's position as stated in its closing brief concerning these allegations. In support of this allegation, Petitioner relies on the testimony of John Chavez, a Tech Lead and bargaining unit member attending the meetings. I give his testimony little weight. Mr. Chavez had limited recollection of the meeting particulars and testified more about how he interpreted what was said at the meeting than he did about what was actually said.

Ultimately, he did not dispute the summary contained in the meeting minutes, relating the union organizing effort:

"Unionizing-staff conversations on County time:

> Whenever you hear any conversations amongst your staff about unionizing while they are on duty please notify staff these conversations need to take place when they are off the clock and should not be doing this during working hours.
>
> Please add this topic to your weekly shift meeting."
>
> (Ex. J-8).

Ms. Aragon denied the Union's version of the meetings occurred. By reason of the foregoing, I conclude that the preponderance of the evidence does not substantiate the Union's claim that the Tech Lead meetings at issue violated Section 19(B) of the Act. None of the other violations of Section 19 are implicated by this allegation.

I decline to address any issues concerning intermittent FMLA leave usage as those are not within the Board's jurisdiction, nor are they preserved in the Stipulated Pre-Hearing Order as an issue for determination.

C. Section 19(D) analysis. Section 19(D) of the Act makes it a prohibited practice for a public employer to "discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization." As best I can tell from the Union's closing brief, it relies on the same factual allegations for both its claims under Sections 19(D) and 19(E):

1. On or about July 20, 2020, Respondent changed the hours and location of work for Alexa Cavis, leading to much less desirable terms and conditions of employment for her given her childcare situation. Moreover, the changed hours are

inconsistent with her job duties. As a result of the changed location, Alexa Cavis is now required to pay around $80 a month in parking that was previously not required.

2. On or about December 23, 2020, Respondent gave Alexa Cavis and Deborah Salas notices of investigation regarding their solicitation of union authorization cards on non-work times and at non-work locations. This is done in retaliation for their rights under PEBA and in order to chill future union activity.

3. Respondent has failed to provide Ms. Salas with information regarding possible COVID-19 exposure and/or provided false information, despite telling other employees correct information.

4. Respondent has claimed that Ms. Cavis's position is a grant-funded position, even though she has never been notified of that fact since accepting her transfer to that position.

5. Respondent refused to grant bereavement leave to Deborah Salas under circumstances where other similarly-situated employees would receive such leave as a matter of course.

6. Respondent has initiated a reduction in force, without bargaining the same with the Union or providing information requested by the Union relating to that reduction in force. The information requested by the Union includes clarification of which positions are grant funded and which are not.

I agree with the union that the County's motivation is an element (but not the only element) of a claim brought under Section 19(D) and that this is a "mixed motive" case in which a *Wright Line* analysis would be appropriate to determine whether the County was motivated by anti-union animus in any of the actions proven to have taken place. Before starting that

analysis however, it is appropriate to address whether the other elements of a *prima facie* case under Subsection D have been met as to each alleged act.

i. Changed hours and location of work for Alexa Cavis.

With regard to the claim that the County changed the hours and location of work for Alexa Cavis on or about July 20, 2020, it cannot be reasonably contested that such a change implicates an employee's "tenure or a term or condition of employment". I conclude that the Union proved the County discriminated with regard to its decision to transfer Ms. Cavis to the RRC in the sense that it chose her for that transfer from among all of the other apparently similarly situated case managers at the CARES Campus.

The evidence is less clear when it comes to proving that the transfer was made "in order to encourage or discourage membership in a labor organization." The Union's closing argument is almost entirely devoted to establishing anti-union animus and does not explain upon what evidence it relies to support the proposition that the transfer was made in order to encourage or discourage membership in a labor organization. But as the Union points out that illegal purpose may be inferred from circumstantial evidence under the *Wright Line* analysis. See *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line*, the required element that protected conduct was a motivating factor in the employer's decision, may be established by showing: (1) union activity, (2) that the employer was aware of that activity, and (3) anti-union animus. Circumstantial evidence in such union-animus cases can be, and often is, used to infer prohibited activity by an employer, as it is very rare for an employer to admit anti-union animus. *Carpenters Health & Welfare Fund*, 327 NLRB 262, 265 (1998); *Vision of Elk River*, 359 NLRB No. 2 (2012) at 3-4. ("An employer's union animus and its unlawful motivation may be inferred from circumstantial evidence, including the suspicious timing of the adverse action or the pretextual nature of the employer's proffered justification for it.").

Pretext is a common way of showing illegal motivation for employment actions. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court explained that proof that an employer's explanation for the employment action is not believable is circumstantial evidence that is probative of intentional discrimination. Id. at 147.

For the reasons sated above I conclude that the Union's witnesses' testimony is not credible as it concerns what Mike Garcia told Ms. Chavez-Sanchez about Ms. Cavis and whether the July 15, 2020, requested meeting concerned the Union.

The union points to a conversation between Ms. Chavez-Sanchez and Ms. Salas on July 7, 2020, in which Ms. Chavez-Sanchez stated that unions only come in when employees are unhappy. As it concerns anti-union animus that statement of opinion is ambiguous. I've heard many pro-union advocates and union organizers express essentially the same or similar opinion. Therefore, I do not consider it, standing alone, to be indicia of anti-union animus. Nor do I find it credible that she said in that meeting that ever since a "certain someone" had recently come in, she has been stirring things up. Neither do I credit the alleged statement by Ms. Chavez-Sanchez describing a career ladder she was working on but would not proceed with if the union came in. Even if the statement were made and assuming (without evidence) that the contemplated career ladder would be a benefit to employees, one possible understanding is that Ms. Chavez-Sanchez threatened to withhold that benefit as a dis-incentive to organizing. A second interpretation however, just as reasonable as the first, is that Ms. Chavez-Sanchez recognized that the career ladder, as a mandatory subject of bargaining could not be implemented unless and until it is bargained and that she could not proceed with developing it because of the obligation to maintain the *status quo* under the PELRB's case precedent. A third similar but distinct interpretation is that the statement is an expression of regret that if a union is recognized her contemplated career ladder cannot be

unilaterally implemented. Based on the foregoing there is insufficient objective evidence on which to infer that the disputed statement gives rise to an inference of anti-union animus.

Finally, the union points to the July 27, 2020, meeting among Ms. Chavez-Sanchez, Ms. Cavis and Ms. Salas, in which Ms. Chavez-Sanchez said she felt "blindsided" and "betrayed" by Ms. Cavis's and Ms. Salas's union activities. I have already commented on the lack of credibility of Ms. Cavis's and Ms. Salas's testimony. One non-credible witness cannot be relied upon to support the non-credible testimony of another. However, even if that statement was made, I conclude that it is too ambiguous to constitute evidence of anti-union animus as contrasted with an expression of a feeling of personal disloyalty.

Based on the foregoing, I conclude that the union established union activity during the times material, that the employer was aware of that activity after July 27, 2021, but not that the changed hours and work locations discriminated in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization as required by Section 19(D) or that Ms. Chavez-Sanchez was motivated by anti-union animus regarding those changes.

Further, even though not required to, the employer proved a legitimate non-discriminatory reason for the transfer. Director Chavez-Sanchez testified that in summer 2020, it became clear that additional case managers were needed at the RRC. Accordingly, Director Chavez-Sanchez, in consultation with other management, determined Ms. Cavis would be sent to the RRC. This move was made based upon the need for more case managers, to move Ms. Cavis into a permanent position from the grant-funded term position she was then filling and was based upon Ms. Cavis's department seniority. Director Chavez-Sanchez provided unrebutted testimony that the budget showing six positions at the RRC identified by Petitioner (Ex. P) was outdated and positions had changed since the budget was developed. The Union's

argument conflates the concepts of a permanent employee and a permanent position by its argument that Ms. Cavis was always a permanent employee and therefore, it was lie that her position at the time of the transfer was grant funded. On this issue Director Chavez-Sanchez explained that Ms. Cavis has always been a permanent employee. However, Ms. Cavis was not originally placed in a permanent position, but in a position that is typically filled by a grant-funded term employee. That placement was done to accommodate Ms. Cavis's requested post assignment and work schedule.

Ms. Cavis's disagreement with the determination of her seniority is based on her lack of knowledge about departmental security and her presumption that application of seniority meant the person holding the least seniority in County employment would be the appropriate person to be transferred. Ms. Cavis testified that all other seniority systems within the County with which she was familiar were based upon a union contract's seniority provisions and that she had no knowledge of seniority in the absence of a CBA. The e-mail Ex. J-11 explicitly states the move was based upon Ms. Cavis's *department* seniority and the Union presented no counter evidence that the County's application of department seniority was inappropriate. Finally, the evidence shows that Director Chavez-Sanchez did not know of Ms. Cavis's role in organizing the Union until seven days after her transfer, on July 27, 2020, so that the preponderance of the evidence supports a conclusion that union activity played no role in Ms. Cavis' transfer.

ii. December 23, 2020, notices of investigation. I incorporate by reference the facts and analysis under Section 19(B) above. Those facts substantiated a claim that the County discriminated against Ms. Cavis and Ms. Salas in regard to a term or condition of employment in order to encourage or discourage membership in a labor organization.

Pretext is a common way of showing illegal motivation for employment actions. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court explained that proof that an employer's explanation for the employment action is not believable is circumstantial evidence that is probative of intentional discrimination. Id. at 147. As a result, presenting evidence of pretext by showing that the employer's articulated reason for taking action against the plaintiff is unbelievable allows a jury to determine that the real reason for the action was unlawful discrimination. As the Court noted, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. Moreover, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. (citation omitted). Indeed, the finding of pretext can allow the factfinder to determine that, not only was the explanation given false, but that the fact of that falsity is sufficient to show that discrimination was the true reason:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt" . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Id. (citations omitted). Such an inference is appropriate here. I conclude that the Complaint by Ms. Thomas for "harassment" was a creation of the employer as a pretext for retaliation against the union's

organizers and constitutes discrimination in regard to a term or condition of their employment in order to discourage membership in the union either as a warning to others, or as a "fishing expedition" to search for incriminating evidence that could be used against them or to identify other pro-union employees in violation of Section 19(D).

iii. Failure to provide accurate COVID-19 information. I incorporate by reference the facts and analysis under Section 19(B) above on this issue. Based on those findings and analysis, I conclude as under the Section 19(B) analysis that surrounding circumstantial evidence does not support an inference in favor of the union. Therefore, the Union did not sustain its ultimate burden of proving the County violated Section 19(D) by failing to provide Ms. Salas with accurate COVID-19 information.

iv. Claiming that Ms. Cavis' position is grant-funded. As this allegation did not state a claim under Section 19(A) or Section 19(B), neither did the Union sustain its ultimate burden of proving the County violated Section 19(D) by claiming Ms. Cavis's position is grant-funded.

v. Discrimination by denial of bereavement leave. I incorporate my factual and legal analysis of this claim from the Section 19(B) above. As the claim has no factual basis the Union did not make a *prima facie* case for a violation of Section 19(D) by the County's refusal to grant bereavement leave.

vi. Layoff without bargaining or providing requested information. Any claim of discrimination requires a comparator from which the trier of fact may conclude that one employee or group of employees were treated differently than another similarly situated employee or group of employees. That comparator is missing here. Therefore, the Union has not made a *prima facie* case of discrimination in regard to hiring, tenure or a term

or condition of employment in order to encourage or discourage membership in a labor organization by the County's failure to bargain in good faith.

D. Section 19(E) analysis. Section 19(E) prohibits discrimination against a public employee because the employee is forming, joining or choosing to be represented by a labor organization. Retaliation by an employer for engaging in such protected activities is generally included within the definition of discrimination prohibited by Section 19(E). As stated in the Section 19(D) analysis above, the Union relies on the same facts for both its Section 19(E) and Section 19(D) claims. I incorporate the same *Wright Line* analysis as was applied in my Section 19(D) analysis. By application of the law to the facts I conclude as follows:

i. Changed hours and work location for Alexa Cavis. I conclude that the Union proved the County discriminated with regard to its decision to transfer Ms. Cavis to the RRC in the sense that it chose her for that transfer from among all of the other apparently similarly situated case managers at the CARES Campus. But under the burden shifting *Wright Line* standard the County has proven a legitimate non-discriminatory reason for the transfer. The Union has not met its ultimate burden of proving discrimination against Ms. Cavis because she formed, joined or chose to be represented by a labor organization.

ii. December 23, 2020, Notices of Investigation. I incorporate by reference the facts and analysis under Section 19(B) above. Based on those findings and analysis, I conclude that the Union has proven a prima facie case of discrimination under Section 19(E) and the County has not met its burden under the *Wright Line* burden shifting standard to demonstrate a legitimate non-discriminatory reason for the investigation. Therefore, The Union's claim of discrimination against a Ms. Cavis and Ms. Salas because of

their forming, joining or choosing to be represented by a labor organization prohibited by Section 19(E) is sustained.

iii. Failure to provide accurate COVID-19 Information. I incorporate by reference the facts and analysis under Section 19(B) above on this issue. Based on those findings and analysis, I conclude as under the Section 19(B) analysis that surrounding circumstantial evidence does not support an inference in favor of the union. Therefore, the Union did not sustain its ultimate burden of proving a violation of Section 19(E) by the County failing to provide Ms. Salas with accurate COVID-19 information.

iv. Claiming that Ms. Cavis's position is grant-funded. As this allegation did not state a claim under Sections 19(A); 19(B) or 19(D), neither did the Union sustain its ultimate burden of proving a violation of Section 19(E) by the County claiming Ms. Cavis's position is grant-funded.

v. Discrimination by denial of bereavement leave. I incorporate my factual and legal analysis of this claim from the Section 19(B) above. As the claim has no factual basis the Union did not make a *prima facie* case for a violation of Section 19(E) by the County's alleged refusal to grant bereavement leave.

vi. Layoff without bargaining or providing requested information. I incorporate my factual and legal analysis from the Section 19(D) analysis above for my analysis of this claim. Based on the foregoing, I conclude that the Union has not met its ultimate burden of proving discrimination against Ms. Cavis because she formed, joined or chose to be represented by a labor organization because of the County's failure to bargain in good faith.

DECISION: For the reasons stated above, I decide that that the Boundary Spanner job actions at issue constituted a layoff of bargaining unit employees, a mandatory subject of

bargaining, and that the County refused to bargain both the layoffs themselves and the effects of those layoffs. Accordingly, the County committed a prohibited labor practice pursuant to NMSA 1978 Section 10-7E-19(F) (2020) by that failure or refusal to bargain. I further decide that the County committed a second violation of Sections 17(A)(1), and Section 19(F) by withholding information relevant to the layoff of Boundary Spanners.

I have also decided that the County violated Sections 19(B), 19(D) and 19(E) of the Act by its investigations of Ms. Cavis and Ms. Salas arising out of the HR Complaint by Ms. Thomas.

All other allegations of violations of Sections 19(A), 19(B), 19(D), 19(E) and 19(F) not sustained above should be **DISMISSED**.

As a remedy for the violations sustained by this report and Recommended Decision the County should be ordered to :

(1) Cease and desist from all violations of the PEBA;

(2) Post and email notice of its violations of PEBA as found herein on a form acceptable to the parties and this Board with assurances that it will comply with the Public Employee Bargaining Act in the future;

(3) Bargain in good faith with the Union regarding the terms under which the laid off Boundary Spanners who have not already been, can be placed in the same or similar position with DBHS; and

(4) Bargain in good faith with the Union to reach agreement on an appropriate back-pay or damages award for the Boundary Spanners who have not already been or cannot now be placed in the same or similar position with DBHS. In the event the parties cannot agree on an appropriate award of damages, the PELRB retains jurisdiction to conduct a hearing on the appropriate amount of damages, if any.

Issued, Tuesday, June 08, 2021.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120