BEFORE THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18,

02-04-08A11:01 CF

Complainant,

vs.

07-PELRB-2007
PELRB Case No. 164-06

THE STATE OF NEW MEXICO,

Respondent.

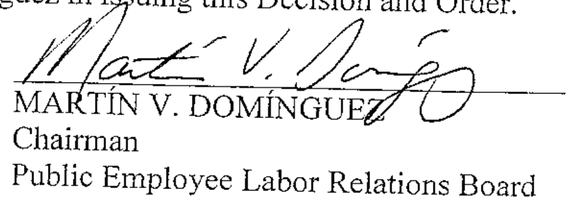
DECISION AND ORDER

THIS MATTER having come before the Public Employee Labor Relations Board (PELRB) by and through the American Federation of State, County and Municipal Employees, Council 18 (AFSCME) appeal of the hearing examiner's decision recommending dismissal of AFSCME's prohibited practices complaint, the PELRB having heard argument of the parties, having reviewed the pleadings and briefs in this matter and being otherwise fully advised;

IT IS HEREBY ORDERED that the prohibited practices complaint filed by AFSCME be and hereby is dismissed. With respect to the challenged provisions of the collective bargaining agreement at issue, the PELRB concludes that the parties to that agreement can, under the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -26, limit the scope of the grievance and arbitration procedures to apply only to disputes concerning the interpretation, application and/or violation of the collective bargaining agreement. Moreover, in the context of the challenged provisions of the collective bargaining agreement at issue, the parties' limiting of the scope of the grievance and arbitration procedures comports with Section 10-7E-3 (PEBA shall not supersede the provisions of the Personnel Act) and with Section 10-7E-17(B) (the obligation to bargain collectively shall not be construed as authorizing a public employer and an

exclusive representative to enter into an agreement that is in conflict with the provisions of any other statute; in the event of conflict between the provisions of any other statute and a collective bargaining agreement, the statute shall prevail). The parties, by limiting the scope of the grievance and arbitration procedures in the manner they have done in their collective bargaining agreement, have avoided conflict with the Personnel Act, NMSA 1978, §§ 10-9-1 to -25.

Member Westbrook joins Chairman Domínguez in issuing this Decision and Order.



MARTÍN V. DOMÍNGUEZ
Chairman
Public Employee Labor Relations Board

Date: 12/13/07

Member Boyd dissents for the following reasons: Although the issue is an abstract one, to the extent that there are rights granted under PEBA or under a collective bargaining agreement that are not subject to the grievance and arbitration procedures of the agreement, the agreement denies complete coverage contrary to Section 10-7E-17 (F) (requiring that a collective bargaining agreement include a grievance and arbitration procedure for the settlement of disputes pertaining to employment terms and conditions and related personnel matters). There cannot be a right granted without a remedy. There must be an arbitration procedure that applies to all rights granted under PEBA itself and under the collective bargaining agreement itself.

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 18,

Complainant,

v. **PELRB Case No. 164-06**

THE STATE OF NEW MEXICO,

Respondent.

HEARING EXAMINER'S DECISION ON AFSCME'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This matter comes before the undersigned on a prohibited practice complaint (PPC) filed with the Public Employee Labor Relations Board (PELRB) on October 12, 2006 by the American Federation of State, County and Municipal Employees, Council 18 (AFSCME or Union), against the State of New Mexico (State). AFSCME's PPC alleges that the collective bargaining agreement (CBA or contract) between it and the State violates §10-7E-17(F) of the Public Employee Bargaining Act (PEBA), NMSA §§ 10-7E-1 *et seq.*, because it submits to the negotiated grievance and arbitration procedures only those disputes related to the application and interpretation of the CBA, not disputes related to discipline or to the violation, misinterpretation or misapplication of State Personnel Board (SPB) rules. The State defends the CBA on grounds that the dispute resolution system, as negotiated, is required under the State Personnel Act and its

implementing regulations, and thus is also required under the conflict provisions of PEBA, §10-7E-3 and §10-7E-17(B).

At the December 1, 2006 Status and Scheduling Conference the parties agreed that the PPC presented pure legal questions that could be resolved without an evidentiary hearing upon stipulation of certain facts, and that the Union would initiate briefing for what would, essentially, be a motion for summary judgment in the Union's favor. The parties filed a joint Stipulation of Fact on December 15, 2006; summary judgment briefing was concluded on February 14, 2006 with the Union's filing of its Reply brief; and the parties presented oral arguments before the undersigned on March 8, 2007.

AFSCME's pleadings and oral argument raised an additional claim that, in implementing the various dispute resolution provisions, the State has been denying or can deny public employees certain substantive and procedural rights negotiated into the CBA and, because there is no adequate remedy for the violation of the additional negotiated rights, the State is violating or may thereby violate public employees' more general due process rights. AFSCME now seeks a hearing on the merits related to this additional claim.

As a remedy, AFSCME seeks either (1) a declaration that the CBA violates PEBA and an accompanying Order directing the parties to renegotiate the CBA consistent with the decision or, in the alternative, (2) a declaration that the State Personnel Office (SPO) and/or its agents—such as the Director and/or SPB Administrative Law Judges (ALJs)—violate PEBA by failing or refusing to consider, in their review of disciplinary action, whether the employing agency has violated any of the employee's additional negotiated rights, and an accompanying Order directing them to do so.

Having reviewed and considered the parties' pleadings, arguments and relevant case law, I conclude that the contract provisions in question do not violate §10-7E-17(F) of PEBA. In the alternative, I conclude that although the SPO and its agents do not, *a priori*, have exclusive jurisdiction over all disputes related to or arising in connection with discipline or the interpretation of SPB rules, the application of the negotiated grievance/arbitration procedure to disputes challenging the adequacy of just cause or progressive discipline would create an impermissible conflict with the State Personnel Act. Finally, I conclude that the dispute resolution system, as allegedly implemented, does not violate public employees' due process rights because adequate remedy lies in the administrative appeal process, and that there is therefore no dispute as to material fact such as to warrant an evidentiary hearing. Accordingly, I hereby recommend that the Union's PPC be **DISMISSED** on summary judgment.

JURISDICTION

The parties have stipulated that the Union is the certified exclusive bargaining representative for certain State employees, and that the Union and the State have entered into a collective bargaining agreement pursuant to §10-7E-17 of PEBA, about which this dispute concerns. Accordingly, the PELRB has jurisdiction to decide this matter pursuant to §10-7E-9(F), §10-7E-22 and §10-7E-19(G) of PEBA.

LEGAL STANDARD ON SUMMARY JUDGMENT

"Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Service, Inc.*, 1998 NMSC 46, ¶ 6. In ruling on a motion for summary judgment, undisputed facts and all reasonable inferences therein are construed "in a light most

favorable to the party opposing the motion," *Upton v. Clovis Municipal School District*, 2006 NMSC 40, ¶ 7; *Montgomery v. Lomos Altos, Inc.*, 2007 NMSC 2, ¶ 16 (2006).

Here, it is undisputed that the contract includes a negotiated grievance and arbitration procedure to resolve disputes concerning the alleged "violation, misapplication, or misinterpretation" of the CBA. *See* Article 14, Section 1(A). It is also undisputed that disputes concerning allegations of either (a) "violation, misapplication, or misinterpretation of applicable SPB regulations," (b) dismissal, demotion, or suspension, or (c) reprimands are not addressed through that negotiated grievance/arbitration procedure, and are instead appealed to the SPO Director or the SPB, pursuant to SPB rules where applicable. *See* Article 14, §1(B) and (C); Article 24, §5; and Article 25, §5.

It is, however, disputed whether certain additional negotiated contract rights are being afforded to public employees by the SPO and its agents, and whether public employees have an adequate remedy for any alleged denial of such rights. Although not phrased by either party as such, essentially the State argues that these disputes are not material and a decision can be rendered as a matter of law, while the Union argues that the disputes are material and that an evidentiary hearing is therefore required.

ISSUES PRESENTED

1. Does §10-7E-17(F) of PEBA require that the negotiated grievance/arbitration procedure apply to all disputes concerning employment terms and conditions and related personnel matters, or is it sufficient under PEBA that the grievance/arbitration procedure apply only to disputes concerning the interpretation, application and/or violation of the CBA?

2. Does the SPO and/or its agents have exclusive jurisdiction to finally resolve all disputes related to or arising in connection with discipline or the interpretation of SPB rules, even where the employee right being asserted arises under PEBA and is distinct and separate from rights arising under the State Personnel Act?

3. Would application of the negotiated grievance/arbitration procedure to disputes challenging only the adequacy of just cause or progressive discipline, or the interpretation of SPB rules create an impermissible conflict with State Personnel Act and its implementing rules?

4. Does the current dispute resolution system of the CBA, as allegedly implemented, violate public employees' due process rights?

RELEVANT BACKGROUND LAW

A. PEBA.

Section 10-7E-17(F) of PEBA provides that CBAs between a union and a public employer "shall include a grievance procedure to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters." Section 10-7E-17(F) further provides that "[t]he grievance procedure shall provide for a final and binding determination," which "shall constitute an arbitration award within the meaning of the Uniform Arbitration Act" and "shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act."[1] *Id.*

[1] At the Status and Scheduling Conference, I directed the parties to address in their pleadings whether the language of PEBA had the effect of statutorily deeming that any final and binding determination—such as action by the SPB—"shall constitute an arbitration award within the meaning of the Uniform Arbitration Act." I am persuaded by the State's argument that such a construction would be erroneous, in light of the differing standards of review used for administrative appeals as for appeals of arbitration awards. *See* State's Response at n.3.

Section 10-7E-3 of PEBA provides that PEBA shall generally supersede other previously enacted legislation and regulations, but that it shall not supersede, among certain other statutes, the provisions of the State Personnel Act, NMSA §§ 10-9-1 *et seq*. Additionally, §10-7E-17(B) of PEBA prohibits an employer and union from entering into a CBA that is in conflict with the provisions of any other state statute, and provides that, in the event of a conflict, the statute shall prevail over the CBA.

Although §10-7E-3 and §10-7E-17(B) of PEBA only provide that certain Acts, laws or statutes—not regulations—shall prevail over PEBA or CBAs, administrative regulations generally have the force and effect of law. *See Costain v. State of New Mexico Regulations and Licensing Department*, 128 N.M. 68, 78 (1999). Additionally, the SPB regulations relevant to the instant case—Parts 11 and 12, and Rule 1.7.6.13(D)—simply elaborate on procedures and criteria given in the State Personnel Act. *See, e.g.*, §10-9-12(A), §10-9-13(H), and §10-9-18. Accordingly, for the purposes of this decision, the SPB rules cited herein are treated as having equal weight and force of law as the State Personnel Act.

B. State Personnel Act and its implementing rules.

The purposes of the State Personnel Act and its implementing rules are, respectively, to establish a system of personnel administration based solely on qualification and ability, and to encourage employment with the State. *See* §10-9-1 and §10-9-13.1. Additionally, permanent state employees who have completed a probationary period have a protected property interest in their continued employment. *See Martinez v. N.M. Dep't of Health*, 2006 U.S. Dist. LEXIS 95358, *16 (D.N.M. 2006).

To meet the purposes of the State Personnel Act and protect public employees' due process rights, SPB rules establish procedures and standards governing discipline. These include the principles that discipline shall be progressive unless otherwise warranted and that dismissals, demotions and suspensions shall be based on "just cause;" the procedures to be used in initiating a suspension, demotion or dismissal; procedures to be followed upon appeal to the SPB of a suspension, demotion or dismissal; and procedures for appealing interpretations of SPB rules. *See* Rule 11.8(B), Rule 11.10, Rule 11.13, Rules 12.1-12.15 and Rule 1.7.6.13 (D).

The State Personnel Act grants certain authority to two agents, to carry out SPO functions and enforce the Act and its implementing rules. First, the State Personnel Board was created and vested with broad rule-making authority and the authority to hear appeals governing adverse employment action. *See* §10-9-8 and §10-9-10(A) and (B); *see also Martinez v. New Mexico State Engineer Office*, 2000 NMCA 74, ¶ 22, 129 N.M. 413 (that these are the primary duties of the SPB). Second, the SPO Director is statutorily charged, among other things, with supervising "all administrative and technical personnel activities of the state," acting as secretary to the Board, and recommending necessary or desirable board rules to the SPB. *See* §10-9-12. By regulation, the Director is also charged with issuing a final decision on complaints pertaining to the interpretation of SPB rules. *See* Rule 1.7.6.13.

Neither the State Personnel Act nor its implementing rules expressly provide that the Act or its implementing rules provide the exclusive remedy for employees seeking to appeal disciplinary action. Even §10-9-18, regarding dismissal, demotion or suspension and the only section of the Act to provide for an appeal of any disciplinary action, is

phrased in the permissive. Nonetheless, the Union and the State have expressly "acknowledged" in at least two different sections of the CBA "that Section 10-9-18 NMSA (1980) and implementing SPB regulations provide that an appeal to the SPB is the exclusive remedy available to employees who elect to appeal a demotion, dismissal, or suspension." *See* Article 24, §5; Article 25, §5.

Additionally, the State's position throughout this proceeding, and presumably during contract negotiations, has been that the entire negotiated dispute resolution system—not just that governing dismissals, demotions and suspensions—is required under PEBA conflict provisions to avoid conflict with the State Personnel Act and its implementing rules. Therefore, by implication, the State's basic position is that the SPO has exclusive jurisdiction to resolve all disputes related to or arising in connection with either discipline or the interpretation of SPB rules.[2]

C. The terms of the CBA and related law.

1. Article 14, § 1(A), governing contract disputes.

Article 14, §1(A) of the contract provides that "[a]llegations of violation, misapplication, or misinterpretation of this Agreement," with certain exceptions that are not relevant here, "shall be subject to" the negotiated grievance procedure that is laid out in Section 3 of the contract. *Id.* Section 3 provides for a four-step grievance/arbitration procedure that includes three successive levels of grievance and culminates in final and binding arbitration before a neutral arbitrator from the Federal Mediation and Conciliation Service.

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[2] The State appears to formally link its conflicts argument to dismissals, demotions and suspensions only because § 10-1-18 of the State Personnel Act and the *Barreras* case, *see infra,* most clearly support the State's position as to dismissals, demotions and suspensions.

Pursuant to §10-7E-17(F) of PEBA, the arbitration must meet the requirements of the Uniform Arbitration Act, NMSA §§ 44-7A-1 *et seq.*, and the resulting "award shall be subject to judicial review pursuant to the standard set forth in the Uniform Arbitration Act." *Id.* The rights afforded under the UAA are substantially similar to the rights afforded to public employees appealing a dismissal, demotion or suspension, except that the under §39-3-1.1 less deference is afforded in reviewing an administrative agency's final decision. *Compare* SPB rules 1.7.11.1-13 and 1.7.12.1-25 and NMSA § 39-3-1.1 to §§ 44-7A-12, -16, -17, -20, -22 through -25; *see also Casias v. Dairyland Ins. Co.*, 1999-NMCA-046, 126 NM 772 (regarding the standard of review as to arbitration awards).

One of the few distinct rights afforded under the UAA is the right to a "just and appropriate remedy as authorized under the appropriate legal standards." *See* §44-7A-22(c). However, the parties here have by contract expressly restricted the right and ability of arbitrators to afford an appropriate remedy in certain cases, by declaring that "an arbitrator shall have no authority to set aside, reverse, modify, or otherwise review" dismissals, demotions and suspensions. *See* Article 24, §5 and Article 25, §5. The stated rational for this provision is that under § 10-9-18 and implementing SPB regulations, "the SPB is the exclusive remedy available to employees who elect to appeal a demotion, dismissal, or suspension." *Id.*

2. Article 14, §1(C), governing dismissals, demotions or suspensions.

Article 14, §1(C) provides that "[a]n employee who is dismissed, demoted, or suspended may appeal such action to the SPB in accordance with NMSA 10-9-18 and the rules of the SPB." *Id.* The parties have stipulated that procedures for these appeals are

set forth in SPB Rules 1.7.11.1-13 and 1.7.12.1-25 NMAC. SPB rules provide, generally, for:

- progressive discipline where warranted;
- dismissal, demotion or suspension based only on just cause;
- notice of contemplated action and the opportunity to be heard in response to the contemplated action;
- representation of the employee's choosing; and
- written notice of the final action to be taken, the conduct on which the action is based, an explanation of the evidence, notice of when the action will become effective, and notice of the employee's right to an appeal to the SPB.

See SPB Rules 11.8(B), 11.10, and 11.13.

Additionally, SPB rules provide for the following rights on appeal to the SPB from an employer agency's Notice of Final Action:

- notice and opportunity to be heard before a fair and impartial decision maker;
- the subpoena of witnesses and documents;
- representation of choice, upon his or her filing of an entry of appearance;
- the right to make opening and closing statements, call and examine witnesses under oath, introduce exhibits, cross-examine witnesses, impeach witnesses, and rebut any relevant evidence;
- the right to decisions in writing; and,
- in the case of a hearing by an ALJ, the right to a review of the record by the SPB.

See SPB Rules 12.10, 12.15, 12.17, 12.18, 12.20, 12.22 and 12.24.

Thereafter, §10-9-18(G) of the State Personnel Act authorizes "[a] party aggrieved" by the final decision of the SPB to "appeal the decision to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978." Section 39-3-1.1(D) provides for a whole record review of final agency decision, and "the district court may set aside, reverse or remand the final decision if it determines that: (1) the agency acted fraudulently, arbitrarily or capriciously; (2) the final decision was not supported by substantial evidence; or (3) the agency did not act in accordance with law." Thereafter, further appeal may be had only upon writ of certiorari, first with the court of appeals and then the supreme court. *Id.* at §39-3-1.1(E).

3. Article 14, §1(B), governing disputes concerning SPB rules.

Article 14, §1(B) of the contract provides that "[a]llegations of violations, misapplication, or misinterpretation of applicable SPB regulation may be grieved through Step 3 (Agency Level)," and thereafter appealed "to the State Personnel Director within thirty (30) days of the Step 3 response in accordance with applicable regulations of the SPB." *Id.* The State has represented that SPB Rule 1.7.6.13 governs these appeals. *See* Response Brief at 5. Rule 1.7.6.13(D) provides that a complaint "pertain[ing] to an interpretation of these Rules ... may be appealed to the director within 30 calendar days of the agency's final decision," that "[t]he Director may appoint a hearing officer" to hear the appeal, and that the resultant "decision on the complaint shall be final and binding."

4. Article 24, §5 and Article 25, §5, governing reprimands.

Article 24, §5 and Article 25, §5 provide that "[r]eprimands may be grieved through Step 3 (agency Level) of the negotiated grievance procedure," and thereafter appealed within ten (10) calendar days to the Director of the state Personnel Office or

his/her designee, who "may meet with the agency representative, the employee and his/her representative or conduct a paper review of the agency decision.[3] In any event, the Director or designee shall issue a final and binding decision on the appeal within twenty-one (21) calendar days." *Id.* The State conceded at oral argument that there are no SPB rules governing the appeal of reprimands.

5. Additional negotiated rights that are allegedly being denied.

In addition to asserting that §10-7E-17(F) of PEBA is violated by the failure to provide for final and binding arbitration as to all of the foregoing types of disputes, AFSCME now also asserts that the State, in implementing the various dispute resolution mechanisms, is denying public employees certain additional negotiated rights. AFSCME points to three specific contract Articles that are being or could be violated by the State either in the discipline process or by the application or interpretation of SPB rules.

Article 6, §1 of the contract protects public employees from discrimination "by reason of union membership or non-membership or activities on behalf [of] or in opposition to the Union," and provides that, with certain exceptions not applicable here, "alleged violations of this article may be grieved in accordance with the Grievance Procedure."

Article 24, §2 of the contract provides certain procedural rights in regards to pre-disciplinary investigations and meetings, in addition to those rights established by SPB rules. The additional rights include (a) the right to notice at the outset of the meeting that

[3] The PPC did not on its face challenge these contract sections. However, both parties' pleadings frequently refer generically to all "discipline," "disciplinary action," and/or "personnel action," which would include reprimands as well as dismissal, demotion and suspension. *See* Union Opening Brief at 4, 7; State Response at 5-6, 11-12; and Union Reply at 2, 4-5. Moreover, as noted elsewhere, the State's overall defense is premised on conflict principles that would apply equally to all instances of discipline. Accordingly, I address these sections as well for the purpose of completeness.

the employee is being investigated for possible disciplinary action; (b) the right to union representation and conferral upon request; (c) the right to any verbatim recordings made of the meeting; (d) the right to remain silent until the employee has obtained legal advice or counsel; and the right to maintenance of confidentiality of meetings concerning the employee's performance or conduct. Section 4 of Article 24 also provides that any disciplinary action or notice of contemplated action must be imposed or issued within 45 days of discovery of the basis for discipline, "unless facts and circumstances exist which require a longer period of time." *Id.*

Article 25, §3 of the contract provides certain additional procedural rights in regards to disciplinary action related to unsatisfactory employee performance, including: (1) notice that the employee is not meeting performance expectations; (2) 180 days in which to improve performance; (3) the creation of a written employee development plan to assist the employee in meeting those expectations; (4) protection from overall ratings of less than favorable on the employee's annual performance review unless he or she was advised in writing that he or she is not meeting performance standards; (5) written notice of Contemplated Action if, at the conclusion of the 180 days, the employer elects to initiate discipline; and (6) expungement of the notices described in §3 if the employer decides not to take any action based on unsatisfactory performance.

The Union asserts that when it raises violations of these negotiated rights as part of an appeal of a dismissal, demotion or suspension, the SPB ALJ hearing the matter rules that such claims can only be addressed through the grievance/arbitration procedure. However, as discussed above, the CBA specifies that an arbitrator lacks the authority to set aside, reverse, modify or otherwise review the SPB's decisions as to dismissals,

demotions or suspensions. As also discussed above, a similar contradiction presumably exists concerning final decisions by the SPO Director as to reprimands and the interpretation of SPB rules.

ANALYSIS

A. Whether PEBA requires the grievance/arbitration procedure to apply to all disputes.

As noted above, §10-7E-17(F) of PEBA requires CBAs to include a grievance procedure culminating in final and binding arbitration, "to be used for the settlement of disputes pertaining to employment terms and conditions and related personnel matters," but the CBA at issue here only applies the negotiated procedure to disputes related to the contract itself. *Id.*[4] The Union argues that under §10-7E-17(F), the negotiated grievance/arbitration mechanism must apply to all disputes arising between the parties that concern "employment terms and conditions and related personnel matters," although PEBA itself does not expressly require that.

For support of its position, AFSCME cites *The Toledo Blade Co., Inc.*, 343 NLRB No. 51, 2004 NLRB LEXIS 626, *12-13, in which the NLRB observed that discipline systems and work rules constitute "terms of employment." However, *Toledo Blade* only addressed whether discipline systems and work rules were mandatory subjects of bargaining. It does not speak to whether disputes concerning the discipline system or work rules must be resolved through a negotiated grievance procedure.

[4] At the Status and Scheduling Conference, I directed the party to address in their pleadings whether, assuming §10-7E-17(F) of PEBA did require all disputes be addressed through the grievance procedure, the Union could have waived, or otherwise be estopped from asserting that requirement by entering into the instant contract. I am persuaded by the State's argument that the Union could not have waived any such right because the requirement under §10-7E-17(F) to include a grievance/arbitration provision is mandatory ("shall"), while §10-7E-22 of PEBA provides that only CBAs entered into in accordance with PEBA are valid and enforceable according to their terms. *See* State's Response at n. 2.

In contrast, there is ample support for the State's position that the parties are free to negotiate which matters shall be governed by the grievance/arbitration procedure, and that many if not most CBAs limit application of the grievance/arbitration procedure to disputes concerning the interpretation of the contract. *See* Elkouri and Elkouri, *How Arbitration Works* (6th Ed. 2006) at 201, 207; *compare* Mark E. Zelek, Labor Grievance Arbitration in the United States, 21 U. Miami Inter-Am. L. Rev. 197, 202 (1989) (defining a "grievance" as "an assertion that the collective bargaining agreement has been violated" by one of the parties to the agreement). For instance, review of the case law addressing the application of grievance/arbitration procedures across industries and categories of workers demonstrates that their application, in the vast majority of cases, is limited to disputes concerning the application or interpretation of the CBA. *See, e.g., Office of the Commissioner of Baseball v. World Umpires Ass'n*, 242 F. Supp. 2d 380 (S.D.N.Y. 2003) (CBA defined "grievance" as "any dispute or disagreement involving the interpretation or application of any provision of this agreement"); *Saint Mary Home, Inc. v. Service Employees Int'l Union, Dist. 119*, 116 F.3d 41, 43 (2d Cir. 1997) (CBA defined "grievance" as "a dispute concerning interpretation, application, performance, termination or breach of the agreement"); *Int'l Chemical Workers Union v. Day & Zimmermann, Inc.*, 791 F.2d 366, 368-369 (5th Cir. 1986) (CBA defined "grievance" as "any misunderstanding, controversy or dispute between the company and the union, or between the company and the employees over the interpretation or application of the terms of this agreement"); *In re the Twelve Clubs*, 66 Lab. Arb. (BNA) 101, 109 n. 20 (1975) (CBA defined "grievance" as "a complaint which involves the interpretation of, or compliance with, the provisions of any agreement between the [Baseball Players]

Association and the Clubs … or any agreement between a Player and a Club …"); *Local 106 Service Employees International Union v. Evergreen Cemetery*, 708 F. Supp. 917, 919 (D. Ill. 1989) (CBA defined a "grievance" as "a claim or dispute concerning rates of pay, hours, or working conditions, or the interpretation or an application of the terms of this agreement"); *compare Borden, Inc. v. American Arbitration Association*, 677 F. Supp. 248, 250 (D. Del. 1988) (CBA established a grievance and arbitration procedure for "all differences, disputes, complaints and grievances of whatever nature that may arise between the Union and the Company").

Accordingly, based on the plain language of PEBA as illustrated by the foregoing persuasive authority, I conclude that §10-7E-17(F) of PEBA does not require all disputes over "employment terms and conditions and related personnel matters" be subject to the negotiated grievance/arbitration procedure. Instead, PEBA permits the parties, by agreement, to limit the scope of the grievance/arbitration procedure to apply only to disputes concerning the interpretation, application and/or violation of the CBA, as was done in this case.

However, because this is a case of first impression I will nonetheless address the State's conflicts arguments, in the event that the PELRB disagrees and concludes that—absent a conflict with the State Personnel Act or its implementing regulations—§10-7E-17(F) does require that a negotiated grievance/arbitration procedure apply to all disputes concerning the terms and conditions of employment and related personnel matters.

B. Whether SPO has exclusive jurisdiction concerning all disputes related to or arising in connection with either discipline or SPB rules.

The State's basic argument, which forms its major premise in the instant case, is that the SPO has sole and exclusive jurisdiction to finally resolve all disputes related to or arising in connection with either discipline or the interpretation or application of SPB rules.

For instance, under the State's reasoning, the PELRB would not even have jurisdiction to remove reprimands from a personnel file or reinstate an employee and award back-pay where the employee was disciplined in discriminatory and/or retaliatory fashion, based on his or her Union affiliation or activity. Although such action would be a clear violation of PEBA, enforcement of which the PELRB is charged through the imposition of appropriate administrative remedies, *see* §10-7E-9(B)(1) and (F), the State submits that the most the PELRB could do in such a case would be to declare that a violation of PEBA had occurred. The aggrieved employee could then, the State argues, seek to introduce that declaration into evidence on appeal of a Notice of Final Action.

As noted above, neither the State Personnel Act nor its implementing rules expressly provide that the SPO has exclusive jurisdiction to review disciplinary action or interpret SPB rules. Moreover, a PPC filed with the PELRB alleging a violation of PEBA rights is distinct and separate from a statutory or regulatory appeal to the SPO of the underlying personnel action. As authority for its proposition that the SPO nonetheless has exclusive jurisdiction to hear all disputes related to or arising in connection with discipline or the interpretation of SPB rules, the State cites *Barreras v. New Mexico Corrections Department*, 2003 NMCA 27, 133 N.M. 313.

In *Barreras*, the New Mexico Court of Appeals stated that, "the comprehensiveness and specificity of the [State Personnel] Act go a long way toward demonstrating that the legislature intended its scheme to be exclusive…" *Id.* at ¶13. However, this general principle cannot be relied upon in the instant case, because the actual holding of *Barreras* is inapplicable under these facts. The *Barreras* holding was specifically limited to a case in which the employee had filed a civil suit for breach of implied employment contract, and where "an employee's contractual claim arises from the State Personnel Act, as well as attendant rules, regulations, and agency personnel policies." *Id.* at ¶2 and ¶¶ 20-21 (emphasis added). In that particular situation only did the Court hold that "the employee's remedies are limited to those set forth in the State Personnel Act." *Id.* at ¶2.

Thus, while it is true that the comprehensiveness and specificity of the Act generally and its implementing rules "go a long way toward demonstrating that the legislature intended its scheme to be exclusive," it does so only "when the employee seeks to vindicate those same rights by another avenue." *Id.* at ¶13 (emphasis added). In contrast, a PPC alleging retaliatory reprimand or discharge based on union affiliation or activity seeks to vindicate rights that rise by virtue of PEBA, not the State Personnel Act.

Other analogous case law also contradicts the State's position, under very similar reasoning. In *Sabella v. Manor Care, Inc.*, 1996 NMSC 14, 121 N.M. 596, the New Mexico Supreme Court held that an employee could pursue claims under both the New Mexico Human Rights Act (NMHRA), NMSA §§ 28-1-1 *et seq.*, and the Worker's Compensation Act (WCA), NMSA §§ 52-1-1 *et seq.*, based on the same underlying fact of sexual harassment at the work place. The Court concluded that even though the WCA

expressly provided that its remedies would be exclusive, *see* §52-1-6(E) and §52-1-9, and even though the claimant could not ultimately obtain a double recovery, the WCA did not provide the exclusive remedy in this case because the "each statute remedies two very different types of injuries that [the claimant] claims to have suffered." *Sabella* at ¶17.

Here, as in *Sabella*, PEBA seeks to protect distinct and very different rights from that protected by the statute purported to provide an exclusive remedy. While the SPO procedures seek to ensure that public employees receive progressive discipline where appropriate, and suffer adverse employment action only for just cause, PEBA seeks to protect public employees' "right to organize and bargain collectively with the employers," by guaranteeing their right to "form, join or assist a labor organization ... without interference, restraint or coercion," and prohibiting retaliation and discrimination based on the exercise of PEBA rights. *See* §10-7E-3, §10-7E-5 and §10-7E-19.

As a final consideration, I note that principles of "economy and efficiency in state government," *see Barreras* at ¶¶ 9-10, do not support the State's position. Specifically, it defies logic that the Legislature would afford certain distinct and separate rights under PEBA and create the PELRB to enforce those rights, yet implicitly removed the ability of the PELRB to afford a prompt and effective remedy for violations of the rights. The procedure that the State advocates would require an injured employee to prosecute two separate administrative actions, one to obtain a PELRB declaration of violation of PEBA, and a second one to obtain an actual, effective remedy from the SPO, which is itself without express or implied authority to adjudicate issues under the PEBA. *Cf. Martinez v. N. M. State Engineer Office*, *supra*, 2000 NMCA 74, ¶27 (that disability claims must,

although related to the issue of just cause for termination, be adjudicated through the New Mexico Human Rights Commission).

Accordingly, based on the foregoing, I conclude that §10-7E-3 of PEBA does not, as the State argues by way of illustration, prohibit the PELRB from directing the removal of a reprimand from a personnel file or awarding reinstatement or back-pay in the event that the PELRB determines that a disciplinary action or a rule interpretation on which the action was based violated rights arising under PEBA rather than the State Personnel Act.

C. Whether application of the grievance/arbitration procedure to all disputes would impermissibly conflict with the State Personnel Act.

However, even after rejecting the State's major premise, an issue is still presented as to whether application of the grievance/arbitration procedure to employment and personnel disputes concerning the adequacy of just cause or progressive discipline or the validity of interpretation of SPB rules, when substantive PEBA rights are not implicated, would create an impermissible conflict with the State Personnel Act and its implementing regulations.

Ordinarily, under a *Barreras*-based analysis, applying the grievance/arbitration procedure to disputes concerning rights arising solely under the State Personnel Act and its implementing rules would create a conflict impermissible conflict with SPB procedural rules, which is prohibited under §10-7E-17(B) of PEBA. This is so because where rights and remedies arise under the State Personnel Act, SPB rules establish what procedures will be utilized to protect or vindicate those rights while the Union seeks to substitute grievance and arbitration for those duly promulgated procedures. Similarly,

under SPB rules, the SPO Director—not labor arbitrators—is charged with interpreting SPB rules. *See* Rule 1.7.6.13.

However, the Union asserts that it is only through the grievance/arbitration procedure that it can adequately protect certain negotiated rights that are in addition to rights afforded by either the State Personnel Act or its implementing rules—such as nondiscrimination, pre-investigation rights, time limits in which to bring disciplinary action, and rights concerning unsatisfactory performance. The question then becomes whether, under *Barreras*, the insertion of additional CBA-derived rights save application of the grievance/arbitration procedure from a conflict bar. I am forced by considerations of practicality and efficiency in governmental administration to conclude that it does not.

By way of analogy, a state law is preempted by federal law when there is a "direct and positive conflict" between the two, meaning "obeying state law would make compliance with federal law impossible or where state law discourages what federal law encourages." *State v. Haddenham*, 110 N.M. 149, 157 (Ct. App. 1990). Here, protecting CBA-derived rights through the grievance/arbitration mechanism—where substantive PEBA rights are not implicated[5] —would undermine the State Personnel Act and its implementing rules, despite the separate and distinct source of the rights. Besides substituting a different procedure than that required under SPB procedural rules, it would put the resolution of questions that concern only such issues as just cause, the adequacy

[5] A third question is also suggested but was not raised by the Union. Is there a conflict bar to applying the grievance/arbitration procedure to a claim of a violation of the CBA where the alleged violation was also a violation of PEBA, such as of Article 6, §1 regarding discrimination based on union membership or non-membership, and the resulting harm was a reprimand, dismissal, demotion or suspension? The Article 6, §1 right does not exist in the State Personnel Act or its implementing rules, but neither is it a CBA-derived right, because it merely echoes rights that derive from PEBA. However, the Union has contracted that dismissals cannot be reviewed by arbitration, so it could be left with an inadequate remedy. The ultimate answer is not immediately clear and is not addressed here because not raised, but the best practice in such a circumstance might be to simply file a PPC with the PELRB.

of progressive discipline and the interpretation of SPB rules into the hands of persons having no special expertise in the matter, which is contrary to the legislative purpose in establishing the SPB.

D. The Union's due process claims.

Finally, I turn to examine whether the Union nevertheless prevails in this matter, based on its argument that a lack of adequate remedy before the SPO for violation of CBA-derived rights, and resulting denial of due process, warrants overturning of the current negotiated dispute resolution system or other action.[6]

1. Due Process, generally.

As noted above, permanent state employees who have completed a probationary period have a protected property interest in their continued employment that cannot be taken away without due process of law. *See Martinez v. N.M. Dep't of Health*, 2006 U.S. Dist. LEXIS 95358, *16 (D.N.M. 2006); *see also* U.S. Const. Amend. XIV, §1 and N.M. Const. Art. II, §18. Due process rights are typically broken down into "procedural" rights and "substantive" rights.[7]

Procedural due process rights address the fairness of the procedures utilized attendant to limiting or restricting property rights. At a minimum, procedural due process

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[6] If due process is violated as a result of the conclusion that §10-7E-3 and/or §10-7E-17(B) prevent application of the grievance/arbitration procedures to disputes concerning disciplinary action and the interpretation of SPB rules, those statutory sections must be void as applied in this instance. Previously, I have declined to address constitutional issues, believing that the first PELRB, in *Santa Fe County and AFSCME*, 1 PELRB 1, had expressed a general disinclination that this Agency decide constitutional questions. *Id.* (specifically holding that the PELRB does not have the authority to pass on the constitutionality of local ordinances, but generally noting that district courts, not the PELRB, are the bodies properly charged with resolving constitutional questions). However, recent Board statements made on the record on appeal have suggested that the present Board does expect hearing examiners to address constitutional issues when the parties raise them. *See In re NEA-Santa Fe v. Santa Fe Public Schools*, PELRB Case No. 123-06, PELRB meeting of Dec.15, 2006.

[7] The Union does not specify whether the alleged denial is of procedural or substantive due process, so both are considered herein.

requires that public employees receive notice of adverse employment action, and be given an opportunity to respond "at a meaningful time and in a meaningful manner," meaning (a) an impartial tribunal and (b) advance notice of the charges. *Id.* at 18; *Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984). Additionally, a court will "examine[] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Daddow v. Carlsbad Municipal School District*, 120 N.M. 97, 114 (1995) (citing *Zinermon v. Burch*, 494 U.S. 113, 126, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990)).

In contrast, substantive due process rights address the underlying law being applied to determine if it is fair and just. The substantive due process analysis typically "inquire[s] whether a statute or government action 'shocks the conscience,'" because it clearly has no rational relationship to a legitimate governmental goal.[8] *See State v. Rotherham*, 1996 NMSC 48, 122 N.M. 246, 259 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987) (internal citations omitted)); *see also* Nowak and Rotunda, *Constitutional Law* (5th Ed.) at §10.6(a).

Concerns about substantive due process can arise in the area of adjudicative administrative law, because the relevant decision maker is making individualized determinations regarding the treatment of individual persons. In such a case, a terminated employee may have been granted an adequate hearing, but there may nonetheless be a challenge to the substance of the decision as being somehow arbitrary or capricious. *See* Nowak and Rotunda at §10.6(b). However, even in these cases the

[8] Substantive due process may also analyze whether the law being applied interferes with fundamental rights, but "fundamental rights" do not include employment rights. Rather, they are limited to the right to engage in interstate travel; the right to vote; the right to privacy; and the right to freedom of choice in marriage. *See* Nowak and Rotunda, Constitutional Law (5th Ed.) at §10.6(a), n. 2.

reviewing body is still not supposed to substitute its judgment for that of the original decision maker.

Substantive due process should be deemed satisfied if "there are some facts that could support" the original decision, such that the affected employee has "not been subjected to arbitrary and capricious decisionmaking." *Id.* at §10.6(b); *see also* §31-3-1.1(D) (requiring an administrative decision be upheld unless it was arbitrary and capricious, not supported by substantial evidence, or not in accordance with the law).

2. The Union's claims as to denial of rights and lack of remedy, and the State's responses.

The Union asserts that the negotiated procedures for resolving disputes concerning discipline or the interpretation of SPB rules, as implemented, result in a denial of due process in several respects.

First, the Union notes several problems related to Article 14, §1(B), governing disputes concerning SPB rules. The Union first notes that Rule 1.7.6.13(D) only addresses complaints "pertain[ing] to the interpretation of [SPB] rules," not misapplication or violation of those rules. I do not find this argument persuasive. Besides the fact that "interpretation" can easily be read to include violation and misapplication as well as misapplication, the State has admitted here that Rule 1.7.6.13(D) governs disputes arising under this Article and it will be bound in the future by that admission. Next and of potential greater concern, the Union notes that Rule 1.17.6.13(D) does not, in any event, provide for a review of the Director's decision.

Second, substantive and procedural rights afforded by the CBA—such as rights against union based discrimination (Article 6, §1); pre-investigation notice and

representation rights and time limits in which to bring disciplinary actions (Article 24, §2 and §4); and rights related to non-punitive performance improvement measures (Article 25, §3)—are not being considered as part of the SPB's review of the Notice of Final Action. Moreover, the Union fears that judicial review pursuant to §10-9-8(G) and §39-3-1.1 will not afford an adequate remedy because there is no relevant case law to guide reviewing district courts as to the weight and import of these contract rights, and the reviewing courts will only look to whether the affected employees are being granted their more general constitutional due process rights.

Finally, although not addressed directly, the Union presumably also views as deficient the procedure for obtaining review of reprimands under Article 24, §5 and Article 25, §5. Like the issue of SPB rule interpretations, the SPB Director performs such reviews without limitation or guidance from any procedural rules or further review by the SPB or a district court. Additionally, as with the Union's other claims, the Union's challenge to the Director's final decision could similarly be founded on a denial of negotiated contract rights.

The State responds as follows. First, any misinterpretation, misapplication or violation of the either SPB rules or the CBA can, if it results in adverse employment action, be addressed as part of the SPB's just cause review in the case of eventual dismissal, demotion or suspension.

Second, the SPB must consider contract rights and due process rights as part of its review of dismissals, demotions and suspensions, and the failure to do so is subject to remedy upon administrative appeal before a district court. The New Mexico Attorney General has already advised representatives of AFSMCE that "a collective bargaining

agreement, once adopted, becomes part of the terms and conditions of employment," and that the SPB and SPB ALJs "will consider the terms of a collective bargaining agreement, along with other terms and conditions of employment, to the extent they are relevant to the particular employment action." *See* State's Response, Exhibit 2 (2004 letter from the A.G. to the Union's chief negotiator). Moreover, the SPB's determination of whether an agency's personnel action is supported by just cause or progressive discipline must look to the employer's conduct in assessing discipline as well as to the conduct of the employee, which necessarily includes the employer's compliance with SPB procedures, the CBA and other due process requirements if raised and relevant. *See, e.g., New Mexico Regulation and Licensing Department v. Lujan*, 127 N.M. 233, 238 (Ct. App. 1999) (that an element to be considered by the SPB in assessing wither or not just cause exists to support disciplinary action is whether or not the State agency "followed appropriate procedures in imposing disciplinary action"); *State v. Silva*, 98 N.M. 549, 552-53 (Ct. App. 1982) (specifically rejecting the argument that the Agency's actions should not be evaluated in determining if there was just cause to support the Agency's action).

Finally, reprimands become a part of an employee's personnel file, as proof of progressive discipline. *See* SPB Rule 1.7.11.8(B). As a consequence, in the event of later dismissal, demotion or suspension, the appropriateness of the reprimand may be indirectly reviewed first by the SPB and then by a district court, upon consideration of whether the employee had been granted appropriate progressive discipline prior to dismissal, demotion or suspension.

3. The *Cahill* decision.

Nonetheless, the Union asserts that in at least one SPB dismissal review, which is currently pending appeal to the district court, the SPB ALJ had declined to consider an alleged violation of the contract as part of its review. *See In re Cahill v. New Mexico HSD*, SPB Case No. 05-098 at p. 40, Conclusion of Law 23 (August 28, 2006). As noted above, however, were the Union to proceed to arbitration after the ALJ entered its decision, the arbitrator would, under Article 24, §5 and Article 25, §5 of the contract, have no authority to set aside, reverse or modify the ALJ's decision even though that decision failed to consider the terms of the contract in determining that the agency had just cause for terminating Mr. Cahill.

To this, the State responds that the ALJ in *Cahill* stated only that the SPB would not make determinations of fact as to whether a CBA had been violated. The State goes on to assert that the proper procedure in such a case, consistent with §10-7E-3 and §10-7E-17(F) of PEBA, is for the Union to either (1) obtain an admission from the State that the CBA was violated, or (2) seek a stay of the SPB proceeding in which to obtain a declaration from an arbitrator that the contract has been violated, then present that arbitrator's declaration to the SPB ALJ for consideration in the matter pending before it.

I discount the likelihood of the State admitting that it violated law as part of an adversarial proceeding, and therefore reject the reasonableness of imposing such a procedure on the Union. Moreover, the Union represents that it has tried to use the second suggested procedure in the past and either the stay was not granted by the SPB ALJ, or no consideration was given to the arbitrator's determination. The Union also

asserts that erroneously terminated public employees are prejudiced in the meantime by having to have recourse to this lengthy, convoluted and unwritten procedure.

Turning to *Cahill* itself, however, it does not appear to stand for the proposition that either party attributes to it. Consistent with the Union's assertion, it is true that the ALJ in *Cahill* stated that, "[a] violation of … the CBA is a violation subject only to the negotiated grievance procedure (as contained in Article 14), and not to an appeal by the SPB." However, reading the entire decision in context, it is clear that the ALJ in Cahill did in fact consider whether or not the employee was entitled to and received the pre-investigation notice and representation rights of Article 24, and did make factual determinations as to whether or not the contract was violated.

However, the ALJ appears to have credited the testimony of the agency witnesses over Mr. Cahill and the other Union witnesses, and to have determined that either there was no such rights because Cahill himself initiated the interview and it was not "investigatory," or that notice was afforded and in any event Cahill admittedly had Union representation at the meeting. *See Cahill* at 3-5, 8-9, 18, 22-23, 25-26, 37-38, and 40. Based on the record evidence related in the decision, the decision is not arbitrary or capricious and it is supported by substantial evidence. As such, it does not stand for the proposition that the Union is being denied procedural or even substantive due process before SPB ALJs.

4. Conclusion regarding due process claim.

Aside from whether *Cahill* was or was not rightly decided, however, I do sympathize with the plight of public employees in regards to this issue. Clearly, a major purpose of any administrative review proceeding is to enhance efficiency, *see Barreras* at

¶¶ 9-10, including the speed with which the violation of rights can be remedied. However, the State's response to every asserted failure of procedure is, essentially, to assure the Union and this tribunal, that in the natural, due—and possibly very lengthy—process, everything will work out and all assertions of right will ultimately be heard by someone, somewhere. Moreover, some of the specific unwritten procedural remedies suggested by the State are positively Byzantine in their convolution, and require almost blind-faith reliance on the reviewing agency whose fairness is being challenged in the first place.

Nonetheless, there is ultimately judicial review available for all of the problems alleged by AFSCME. Any dismissal, demotion or suspension has an automatic right of judicial review under §39-3-1.1, pursuant to §10-9-8(G) of the State Personnel Act, and if raised below the appellant can assert at the District Court review that the SPB failed to consider the employer's violation of contract and/or due process rights as part of its just cause analysis. Any misinterpretation, misapplication or violation of Rule, to the extent such misinterpretation, misapplication or violation forms the basis for an adverse personnel action, will be subject to judicial review, either relatively directly if the adverse action took the form of a dismissal, demotion or suspension, or in due time if it forms a part of the progressive discipline on which subsequent dismissal, demotion or suspension is based. Finally, any imposition of reprimand based in part on a violation of contract rights will eventually be subject to judicial review in the event of subsequent dismissal, demotion or suspension, because it will become part of an employee's record of progressive discipline.

Because judicial review available, there is a legally adequate remedy for violations of negotiated rights that are not properly recognized or credited by the SPO and/or its agents. Accordingly, I do not find the disputes concerning whether or not SPB is considering violations of contract and/or due process rights to be a dispute of material fact. It is certainly regrettable that an employee may wait some months for the conclusion of a district court review, and may even then lose on appeal and need to appeal further and/or be denied certiori to do so, because the law or its arguments were misunderstood. Nonetheless, any administrative appellant is in the same boat—that is the system designed by the Legislature. I do not believe that the delay in vindication or the risk of possible erroneous decisions by appellate authorities authorizes the PELRB to step into the district court's shoes and perform a review of the decisions of SPB agents, to order the parties to renegotiate a contract that does not, as discussed above, violate PEBA, or to order the SPB or its ALJs to take certain action in performing their adjudicative function.

CONCLUSIONS OF LAW

1. The PELRB has jurisdiction to hear this matter.
2. Section 10-7E-17(F) of PEBA does not require that the negotiated grievance/arbitration procedure apply to all disputes concerning employment terms and conditions and related personnel matters. The parties may by agreement limit the scope of the grievance/arbitration procedure to apply only to disputes concerning the interpretation, application and/or violation of the CBA.

3. The SPB does not have exclusive jurisdiction to resolve disputes related to or arising in connection with discipline or the interpretation of SPB rules when the dispute concerns a substantive right arising under the PEBA.
4. Application of the negotiated grievance/arbitration procedure to disputes challenging only the adequacy of just cause or progressive discipline or the interpretation of SPB rules would create direct and positive conflicts with the State Personnel Act and its implementing rules such that it would be void under §17(B) of PEBA.
5. Section 39-3-1.1 provides adequate judicial review of any alleged failure of the SPO and/or its agents to give due consideration to assertions that an employee's CBA and/or due process rights had been violated in imposing the reviewed discipline, or in interpreting or applying SPB rules.
6. There is not, therefore, a material dispute between the parties as to whether or not the SPO and/or its agents are giving due consideration to assertions that an employee's CBA and/or due process rights had been violated in imposing the reviewed discipline, or in interpreting or applying SPB rules.

RECOMMENDATION

Consistent with the foregoing analysis and resulting conclusions of law, the undersigned recommends to the PELRB that AFSCME's PPC be **DISMISSED**.

REQUEST FOR REVIEW

Pursuant to Rule 3.19, within 10 business days after service of this Report any party may file a request for Board review. The request for review shall state the specific portion of the Report to which exception is taken and the factual and legal basis for such

exception. The request may not rely on any arguments not previously [illegible]

undersigned. The request must be served on all other parties. Within [illegible]

after service of a request for review, any other party may file and serve [illegible]

response to the request for review.

Issued in Albuquerque, New Mexico this 4th day of March 2007.

Pilar Vaile
Deputy Director
Public Employee Labor Relations Board